[2019] UKFTT 622 (TC)

TC07406

CAPITAL GAINS TAX – exit tax on trustees relocating elsewhere in EU – CJEU judgment to be applied – whether conforming interpretation of UK legislation possible – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2012/10609

BETWEEN

TRUSTEES OF THE P PANAYI ACCUMMULATION AND MAINTENANCE TRUSTS NOS 1-4 **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 9 and 10 April 2019

P Baker QC, instructed by Baldwins, for the Appellant

J Bremner QC and B Elliott, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

THE DISPUTE

Introduction

1. This appeal has a long history. It relates to events which took place in tax years 2004/5 and 2005/6. An enquiry was opened by HMRC in January 2007; the enquiry was closed in September 2010 amending the trustees' 2004/5 SA return. The amendment was unsuccessfully appealed to HMRC and an appeal to this Tribunal was lodged in 2012. The appeal was heard in 2014 and the decision issued in 2015. That decision was to refer a question to the CJEU. The Advocate General gave her Opinion on 21 December 2016 and the CJEU gave its judgment on 14 September 2017 (C-646/15). The parties were unable to agree the disposition of the appeal following that judgment, and so, at a case management hearing in July 2018, I directed that there be a further hearing.

2. The issue between the parties was, as explained in my first decision, about whether the exit charge on trustees, contained in s 80 Taxation of Chargeable Gains Act ("TCGA") on the value of the trust fund if the trustees (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 Treaty on the Functioning of the European Union and its forerunners.

3. The facts were largely agreed. I set them out in my first decision as follows:

> Mr Panayi was born in Cyprus. He moved to the UK as a child in the late 1940s. He lived and worked in the UK after that date until he returned to Cyprus as set out below. His wife is also Cypriot and she moved to the UK on their marriage in 1983. Their three children were born in the UK.
>
> In 1992 Mr Panayi established four settlements for the benefit of his children and others of his family. He was not a beneficiary and, while he lives, his wife cannot be a beneficiary either. He transferred into the trusts some of the shares which he owned in Cambos Enterprises Ltd ("Cambos"). Mr Panayi and a UK trust company (KSL Trustees Ltd) were the original trustees. Later Mrs Panayi was added as a trustee. The four trusts were accumulation and maintenance trusts and were referred to as the Panico Panayi 1992 Accumulation and Maintenance Settlement No 1, No 2, No 3 and No 4, respectively.
>
> Early in 2004 Mr & Mrs Panayi decided they wished to return to live in Cyprus. To that end, amongst other things, on 19 August 2004 Mr and Mrs Panayi resigned as trustees of the four settlements; in their place Mr Panayi, as the trusts' protector with the right of appointment, appointed three individuals resident in Cyprus as trustees. The UK resident trust company remained as a trustee; but the effect was that three out of the four trustees were then non-UK resident. Mr Gregoriades was one of these Cypriot-resident trustees.
>
> The following month, Mrs Panayi moved back to Cyprus with their youngest child. Mr Panayi moved there in early 2005. The two older children also moved out to Cyprus shortly afterwards, on completion of their university education.
>
> It was agreed with HMRC that Mr Panayi had never acquired a UK domicile.

> On 19 December 2005, the trustees of the four settlements sold the shares in Cambos. The proceeds have been invested by the trustees in different ways, and in different countries.
>
> The UK trust company has since resigned as trustee, as has one of the Cypriot trustees. In May 2006, Mr and Mrs Panayi (both now resident in Cyprus) were reappointed as trustees of the settlements. Mr & Mrs Panayi and the two other remaining Cypriot trustees, one of which is Mr Gregoriades, are the four trustees of the settlement at the time of the appeal and they are the appellants in this case.
>
> The value of the Cambos shares held by the trustees at the time the trustees of the four settlements ceased to be resident in the UK has been agreed by the parties (at about £30 million). After indexation and taper relief, it is agreed that the tax in issue amounts to £332,952 plus interest (£83,128 plus interest per trust).
>
> While the facts relating to the change in trustees' residence and the disposal of the shares were given to HMRC in the trusts' self-assessment returns for 2004/5, the returns did not self-assess to a liability under s 80 Taxation of Chargeable Gains Act 1992 ("TCGA"). In January 2007 HMRC opened enquiries into the returns. On 29 September 2010 HMRC issued closure notices to the trustees of the four trusts, re-assessing tax on the basis that there was a charge under s 80 TCGA. The trustees appealed.

4. I should point out that the parties appear to agree that there was an error in this recitation of facts; it was, I am now told, the value of all of the Cambos shares at the relevant time that was about £30million; the value of the Cambos shares held by the trustees was only about £2.1million at the relevant time. This error is not material to the legal principles to be resolved.

The tax charge in issue

5. The tax charge the subject of the appeal was the tax on capital gains ('CGT') as enacted in the Taxation of Chargeable Gains Act 1992 ('TCGA'). S 2 of that Act provided:

> A person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom or during which he is ordinarily resident in the United Kingdom

6. The TCGA contained detailed provisions on what gains were chargeable and how the gain was to be calculated. It was accepted that shares, such as the Cambos shares, were within the scope of the Act and, all other preconditions being met, a gain on them would be chargeable to CGT.

7. So far as the liability of trustees to CGT was concerned, the TCGA provided:

> **69 Trustees of a settlement**
>
> (1) In relation to settled property, the trustees of the settlement shall for the purposes of this Act be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the trustees), and that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom.

8. It was agreed, and one of the findings of fact of my first decision was, that the trustees were only UK resident until 19 August 2004 when the UK-resident trustees resigned and non-UK resident trustees were appointed.

9. The tax charge which was at the heart of the proceedings arose from s 80 TCGA which provided:

> **80 Trustees ceasing to be resident in UK**
>
> (1) This section applies if the trustees of a settlement become at any time ('the relevant time') neither resident nor ordinarily resident in the 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.

10. As I have said, the trustees did not report the tax liability which arose under s 80 in their tax return for 2004/5; they have always taken the position that that there was no such tax liability because the UK provisions imposing the liability were in breach of EU law as they failed to recognise the trustees' EU law rights and in particular their right to freedom of establishment anywhere in the EU.

The Ruling of the CJEU

11. My referral of the EU law dispute in this case was, so I understand, the first case to raise in the CJEU the extent to which trustees of a trust could rely on the freedoms contained in the EU Treaty, and in particular the freedom of establishment. The CJEU ruled that:

> [34] An entity such as a trust which, under national law, possess rights and obligations that enable it to act in its own right, and which actually carries on an economic activity, may rely on freedom of establishment

12. The CJEU also ruled (see [39]) that freedom of establishment could be relied on when there was a tax charge on the trustees becoming non-resident.

13. But it was not the first case to raise the question of whether so-called exit charges, imposed when a person or entity relocated from one member state to another, were an unlawful restriction on the right to freedom of establishment within the EU. Earlier rulings had established that such a charge might be lawful if there was an option to defer payment of the tax. There was no option in UK legislation to defer payment of the s 80 charge. So the reference in this case also asked the CJEU whether an exit charge without an option to defer was unlawful where the asset had been sold before the tax liability was due for payment.

14. The CJEU ruled:

> [59] It is apparent from the documents submitted to the Court that the legislation at issue in the main proceedings provides only for the immediate payment of the tax concerned. It follows that such legislation goes beyond what is necessary to achieve the objective of preserving the allocation of powers of taxation between the Member States and constitutes, therefore, an unjustified restriction on freedom of establishment.
>
> [60] That finding cannot be called into question by the fact that, in the circumstances of the main proceedings, the gains were made after the establishment of the amount of the tax, but before that tax became payable, given that the disproportionality of the legislation at issue in the main

> proceedings is due to the fact that the legislation makes no provision for the taxpayer being able to defer the time when the tax payable is paid.

In brief, the CJEU did not accept that UK law operated lawfully even though the shares had in fact been sold before the due date for payment of the exit charge. The parties were unable to agree on the implications this ruling had for this appeal.

The issue this hearing is called to resolve

15. Unable to agree the disposition of the appeal in the light of the CJEU ruling, the parties came before me in August 2018 to seek directions for a hearing. At that point, they were agreed that there were three issues for this Tribunal to resolve. However, the first question, which related to [34] of the CJEU's judgment (see §11 above) was whether the requirement of 'economic activity' for the purpose of freedom of establishment was satisfied.

16. My directions were for the parties to exchange evidence on this point. I am told the appellant served evidence of the trustee's economic activity on HMRC, who were then satisfied that this precondition was fulfilled by the trustees. Therefore, issue 1 has fallen away.

17. That left the last two issues for this Tribunal to resolve, which were pure issues of law and which were:

> (1) Was a conforming interpretation of the UK legislation possible?
>
> (2) And if it was not, and UK legislation had to be disapplied, what was the effect on the trustees' appeal?

The parties' opposing positions

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 – '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.

ISSUE 1: CONFORMING INTERPRETATION?

Introduction

20. As I have said, both parties were agreed that the first question I had to consider was whether it was possible to have a conforming interpretation of the UK legislation. And while the parties had widely diverging views on whether a conforming interpretation was possible, and, if it was, what it should be, they were largely agreed on which were the leading authorities

on conforming interpretations. They were also agreed that the law on when a conforming interpretation was possible was solely a matter for the member state concerned.

21. The obligation to interpret national law in accordance with EU law is a matter of both EU law and UK law. S 2 of the European Communities Act 1972 requires UK legislation to be read in conformity with EU directives (see [74] of *IDT* [2006] EWCA Civ 29) and the CJEU in the well-known case of *Marleasing* (1990) C-106/89 stated:

> [8] In applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the [EU Treaty]

22. However, as I have said, it is also clear that exactly what is a permissible conforming interpretation of national legislation is a matter for the national courts, and not a matter of EU law. I will consider the principles of conforming interpretation below but I agree with counsel for HMRC that the first step in making a conforming interpretation is to identify the defect in the UK legislation as normally interpreted.

The defect in UK legislation

23. At [22] the CJEU recharacterized the questions which I had referred to them as being whether national legislation was lawful under EU law if it

> 'provides for the taxation of unrealised gains in value of assets held in trust when the majority of the trustees transfer their residence to another member state, and fails to permit deferred payment of the tax thus payable.'

24. The CJEU, consistent with its earlier case law, held that, while an exit charge was a restriction on the freedom of establishment, nevertheless if implemented proportionately it was justifiable because without such a tax a member state would be unable to tax gains on assets held by non-residents who had been resident when the gain arose. More specifically, it was proportionate for a member state to determine the amount of the tax charge at the date the entity became non-resident (and therefore not to take account of later falls in value):

> [57] ….the fact that the Member State of origin, for the purpose of safeguarding the exercise of its powers of taxation determines the amount of tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of those capital gains ceases to exist, in this case that the time when the place of management of the trust is transferred to another Member State, is compatible with the principle of proportionality….

25. The CJEU also made this qualification, consistent with its earlier case law:

> [58] Further, in that context, it must be made clear that deferred payment cannot result in the Member State of origin being obliged to take into account losses that occur after the transfer of the place of management of a trust to another Member State.

This was consistent with what the CJEU had said before, such as in *National Grid Indus BV* C-371/10 which the CJEU cited and relied upon in *Panayi*.

26. The element of UK legislation which was said by the CJEU to lack proportionality was the lack of option to defer payment of the tax, and this follows because they said a more proportionate way of imposing an exit tax would be to allow the option of deferral:

> [57]….Further, legislation of a Member State which provides that a trust which transfers its place of management to another Member State may choose

> between immediate payment of the tax due on those capital gains or deferred payment of that tax, together with, if appropriate, interest in accordance with the applicable national legislation, would constitute a measure less harmful to freedom of establishment than the immediate payment of the tax due.
>
> …

27. Having identified the defect in UK law, the next question is what would have been required to make it proportionate?

What would have been proportionate?

28. The parties looked at the details of cases of exit charges to identify what the CJEU would consider to be compliant; there is little help in statements by the CJEU where national law was found to be non-compliant because the national law did not offer a deferral option, as the CJEU was not precise about what kind of option would be needed to make the law compliant. So in *National Grid Indus,* the CJEU talked about 'deferred payment' in [73] without stating precisely until when payment should be deferred. However, there are cases where the national law was upheld, so it is clear from *DMC* C-164/12 that the option of a right to pay an exit tax in 5 annual instalments was proportionate; and in the later case of *Verder Labtec* (2015) C-657/13 the right to pay an exit tax in 10 annual instalments was, not surprisingly, also found to be proportionate.

29. The parties did not agree whether a law which only permitted deferral of payment of the exit tax until disposal of the asset was proportionate. This question was significant in this appeal because the Cambos shares were sold by the trustees before the date for payment of the exit charge under UK law. This fact pattern had not arisen in the previous cases before the CJEU; indeed, in some of the cases in front of the CJEU the reverse was true. For instance, in *Verder LabTec* the taxpayer wanted deferral until realisation rather than payment over ten instalments, presumably precisely because the taxpayer had not sold the asset.

The appellant's position on deferral until realisation

30. Mr Baker's position was that, as the CJEU knew in *Panayi* that the shares had been sold but still held UK law to be non-compliant, the only rational interpretation of its decision that the trustees' EU law rights had been breached was that deferral until sale was not compliant.

31. However, I do not agree that it is correct to make this deduction: it seems to me that the CJEU was clear that EU law was not compliant because it did not offer any <u>option</u> for deferral.

32. Mr Baker also referred me to the case of *Germany* C-591/13. This was an infringement action where German law on roll over on gains on assets transferred between group companies was in issue. German law was found to be incompatible with EU law because it gave roll over relief to intra-German groups but not inter-German groups. The CJEU found it was unlawful to require the tax to be paid on the 'realisation' of the asset, treating realisation as being when it was transferred from the German company to the non-German, EU group company. However, while the CJEU referred to the exit tax cases, as some of the principles were very similar, I agree with Mr Bremner the case is not authority for the proposition, put forward by Mr Baker, that it is not proportionate to defer exit taxes until realisation. The reason in Germany why tax on 'realisation' was unlawful was because there was no tax on the 'realisation' between intra-German transfers. It was the tax on the <u>realisation</u> that was unlawful because it was discriminatory. That is quite different to the exit tax cases where the tax on <u>realisation</u> is lawful as it applies as much to resident trusts as well as non-resident trusts: the question in the exit tax cases is whether the tax on <u>exit</u> is discriminatory and unlawful. And the answer the CJEU gives is that such a tax, while discriminatory, is proportionate if deferred. So deferral until realisation is not discriminatory (as resident entities have to pay tax on

realisation). So *Germany* is not authority for saying deferral of an exit tax until realisation is unlawful.

33. The same comment can be made about the *Denmark* case C-261/11 on which Mr Baker also relied, albeit I had no official translation of it in English.

34. Mr Baker also relied on two recent cases on freedom of movement, both decided after *Panayi* in the CJEU*: Picart* C-581/17 and *Waechtler* C-581/17. While the CJEU again treated the exit tax cases (such as *National Grid Indus)* as relevant, the law at issue was not the same. It does appear to be the case that in *Wachtler*, the CJEU at [68] considered a limited option to pay by instalments to be disproportionate while they considered the right to defer until realisation to be proportionate. While there is no direct read across from these cases to the freedom of establishment exit tax cases, this suggests, if anything, that deferment until realisation is proportionate.

Conclusion on what would be proportionate

35. I think that the CJEU's starting point in the exit tax cases was that deferral until realisation was proportionate. Firstly, it does away with any discrimination because resident trusts have to pay the tax on realisation. Secondly, the CJEU's concerns on proportionality centred on the taxpayer's cash flow position, which clearly might be compromised if the taxpayer was obliged to pay the tax on the gain on an asset before the asset was realised. That is apparent from *National Grid Indus* at [73] and [68] where the court said:

> …recovery of the tax debt at the time of the actual realisation...may avoid the cash-flow problems which could be produced by the immediate recovery of the tax due on unrealised capital gains…

However, the CJEU was not solely concerned with the taxpayer's cashflow position. When the CJEU approved the member state's instalment law in *Verder LabTec GmbH* C-657/13, this was on the basis that the implications for the taxpayer's cash flow had to be weighed against the risk to the member State of non-payment of the tax posed by deferral for a longer period:

> …the court further held that account should be taken of the risk of non-recovery of the tax, which increases with the passage of time, which may be taken into account by the Member State in question, in its national legislation applicable to deferred payment of tax liabilities….
>
> ….a staggered recovery of tax on unrealised capital gains over 10 annual instalments, such as that at issue in the main proceedings, can only therefore be considered….as a proportionate measure to attain that objective.

36. Moreover, as HMRC pointed out, the national legislation at issue in *DMC* included a provision that required immediate payment of the balance of the tax if the asset was sold within the 5 years: see [5]. The CJEU did not refer to that provision again in its decision, presumably because on the facts of that case it was not relevant, the asset not having been sold at all. Nevertheless, their failure to disapprove of it might well suggest they approved it, as their decision upheld the national law.

37. I also note that in *Panayi* itself, the Advocate General's understanding of the law was that it would have been lawful for the UK to permit deferral until realisation (see [58]) and the 2016 Anti-Avoidance Directive permits deferral until realisation.

38. The cases (such as *DMC*) made clear that, although required to permit deferral, member States were acting proportionately if they included in their legislation a requirement for interest (see *DMC* at [61] and *National Grid Indus* at [73]) and, in some cases, for security or guarantees. In *DMC* at [69] this was said only to be proportionate where the guarantee was imposed 'on the basis of actual risk of non-recovery of the tax' so a blanket requirement for

security or guarantee for payment is not lawful. Of course, it follows that the failure of a deferral option to require interest, security or a guarantee would not make it lack proportionality.

39. My conclusion is that the CJEU considers proportionate a range of options for deferral, any one of which the national legislature could select. I find based on the case law that the following options are proportionate:

> (1) Deferral of payment until realisation of the asset, with or without interest, and with or without a requirement for security in cases where there is real risk of non-recovery of tax;
>
> (2) Payment by instalments over at least 5 years with or without liability to interest, and with or without all remaining instalments being precipitated if the asset is realised before the end of the period, and with or without a requirement for security in cases where there is a real risk of non-recovery of tax.

40. Mr Baker suggested that there was another option which was deferral for a set number of years, presumably not less than five, with collection of the tax being waived if at the expiry of the deferral period the asset had still not been realised. I agree it follows from the case law that the CJEU would regard this as proportionate; it is also clear that the CJEU does not require member States to be so generous.

41. But contrary to a suggestion made by Mr Baker, the CJEU has not suggested that there is any requirement for member States to offer taxpayers different deferral options. A member state is only required to offer one, proportionate, option for deferral.

42. In conclusion, the CJEU was clear that UK law (as described to them in the reference) was not compliant because it did not give taxpayers any option to defer payment of the exit tax. A range of different options would have been proportionate but the UK legislation, as described to the CJEU in the refence, offered no options at all. It was in breach of EU law.

Were the appellant's rights breached?

43. While HMRC had originally agreed that this hearing was to determine whether a conforming interpretation of UK was possible, and if not, how UK legislation was to be disapplied, during the hearing they also queried whether any conforming interpretation was necessary at all. What I understood Mr Bremner to be saying was that, while the CJEU had found UK law not to be entirely in line with EU law, to the extent that it was in breach of EU law, that breach had not impinged on the rights of the appellant in this appeal. In other words, HMRC's position (although not articulated in quite this way) was that any conforming interpretation did not have to change the law in so far as it applied to the appellant. The operation of existing UK law had, HMRC implied, respected the appellant's right to freedom of establishment even if the law overall was non-compliant because it lacked an option to defer.

44. At least, that is my understanding of the reason why HMRC kept saying it was relevant that the due date for payment of the exit charge was *after* realisation of the assets on which the tax charge arose; and secondly, that the appellant had deferred payment of the tax to today's date: not a penny of the tax had yet been paid so the tax had already been deferred for a minimum of 13 years.

45. In any event, I dismiss their case on this. While I recognise that it is theoretically possible that a CJEU ruling could identify a defect in the law of the member State which would not require a conforming interpretation of benefit to an appellant because the appellant was not affected by the breach, I do not find that that is the case here and I will explain why.

Tax due after realisation

46. HMRC's preferred option was a 'conforming interpretation' that led to the due date of payment being the 31 January next following the date of realisation.

47. This option can be rejected out of hand because it would not make UK law compliant. On the contrary, it would mean that the trustees remained liable to pay the exit tax on 31 January 2006 (as the shares were sold at the end of 2005). The CJEU was quite clear that obligation breached the trustees' EU law rights:

> [60] That finding cannot be called into question by the fact that, in the circumstances of the main proceedings, the gains were made after the establishment of the amount of the tax, but before that tax became payable, given that the disproportionality of the legislation at issue in the main proceedings is due to the fact that the legislation makes no provision for the taxpayer being able to defer the time when the tax payable is paid.

48. What they meant by this is, I think, apparent from what the Advocate General said:

> [56] Even if it were necessary to take as the point of reference as the UK tax authority does, the fact that the hidden reserves were successfully realised after the assessment to tax but before the due date for payment of the tax debt, which would be more favourable to the taxing State, the exit tax which still be disproportionate. Even then, there would continue to be a difference of treatment by comparison with the domestic context. For, if those reserves had been realised without the exit, the same tax would have fallen due for payment at a later date (as calculated from the time of realisation, exactly one year late in this instance).
>
> [57] Moreover, the assessment of the proportionality of action taken by the State, in this case the determination of the tax owed and the due date for payment of the tax debt, must not depend on the decision of the person affected – the very person whose rights have been encroached upon. Otherwise, only a taxable person who refuses to pay the tax due and does not therefore dispose of the assets incorporating the hidden reserves would be able to complain that his freedom of establishment has been disproportionately restricted. A person affected who complies with the order to pay issued by the State and realises the hidden reserves in order to do so on the other hand, would be denied the opportunity to raise the objection that his fundamental freedoms have been disproportionately restricted.
>
> [58] the tax at issue in the present case therefore remains disproportionate despite the fact that the hidden reserves were realised before the due date for its payment because they were no option to defer payment at the time of the assessment to tax. Such an option to defer does not necessarily have to amount to the five years referred to in the Court's case-law. The UK legislature could instead have linked the option to defer to realisation of the hidden reserves within that five-year period….
>
> [59] The answer…must therefore be that the proportionality of a measure must be assessed by reference to the particular situation obtaining at the time when the exit tax is incurred. This is the case irrespective of whether the assets concerned were sold before the due date for payment and without any fall in value, where the tax debt would have fallen due at a later date if it had not been for the exit and there is no option to defer payment.

What I understand her to be saying was that the unfairness arose to the appellant because, had the trust remained UK resident, the tax on the realisation would have been due to be paid on 31 January *2007*. So properly understood, if the option is to defer the tax until realisation, then

the tax charge should not arise before the date for payment of tax would have arisen on realisation by a UK-resident person (in this case, on 31 January 2007).

49. So a conforming interpretation that UK law which gives an option to defer the payment of exit tax until 31 January next following the date of realisation would not entirely conform with EU law requirements.

Tax deferred for 13 years

50. I'll now deal with HMRC's point that the appellant in fact exercised an option to defer the tax for 13 years, many years after the date of realisation. The reason for this deferral was not, so far as I recollect, articulated in the hearing. I think all parties assumed, as I did, that it was because UK law contained the option for appellants to defer payment of tax where there are grounds for believing that the assessment under appeal is excessive: s 55 TMA(3).

51. The option to defer tax pending resolution of a dispute was not mentioned in the reference to the CJEU and the CJEU therefore made no comment about whether that made UK law compliant with EU law on exit taxes. I am not sure the CJEU were even aware that the tax had not been paid in *Panayi*. So I will consider whether s 55 made UK law compliant with EU law.

52. On one level, it could be said that it was a proportionate option. It was a temporary option such that when it expired, interest would be payable on the tax from the ordinary due date of payment. That was not disproportionate as the CJEU allowed Member States to charge interest on exit taxes from the moment of exit.

53. But it was clearly not compliant for other reasons. Firstly, it was not neither a deferral until realisation nor a deferral for a set period of years. Secondly and even more significantly, it gave rise to a chicken-and-egg position: if s55 made the s 80 exit charge proportionate, then taxpayers would have no genuine dispute with HMRC and could not utilise s 55 to defer payment of the tax; that would mean s 55 did not render the exit charge proportionate.

54. In conclusion, the option to defer under s55 was not an option to defer which made the s 80 exit tax proportionate. Therefore, the fact that the trustees had utilised this option to defer payment of the exit tax in issue was of no relevance to the appeal and HMRC could not rely on the trustees' non-payment of the tax under this option to make out a case that UK law was compliant.

Conclusion on breach of appellant's rights

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; an option to defer payment until 31 January next following the year in which the realisation took place would have been lawful.

56. The question is whether a conforming interpretation can be given to UK law and the effect on the appellant's appeal.

The suggested conforming interpretations

57. Neither party it seemed to me came to the hearing making any specific suggestion for what a conforming interpretation might look like. Mr Baker did not accept a conforming interpretation was possible; if it was, he considered s 80 should be amended. During the course of hearing, having been challenged by Mr Baker, HMRC put forward three proposals for words that could be implied into existing legislation. They were:

> (1) Option 1 was to insert into s 59B(4) a qualification that in respect of tax arising under s 80 where the taxpayer had the right to freedom of establishment 'HMRC may

not seek payment of the tax before the date those assets are disposed of for valuable consideration under a subsequent disposal';

(2) Option 2 was to insert into s 59B(4) a right for the taxpayer to pay by instalments in respect of tax arising under s 80 where the taxpayer had the right to freedom of establishment;

(3) Option 3 was to add 'section 80' into the list of sections imposing tax charges to which s 281 applied. S 281 conferred a right to pay tax by instalments.

58. Option 1 was the same as their proposal to defer liability to pay the exit tax until the date of realisation (or 31 January next following). I have already rejected this as inconsistent with the CJEU judgment. However, it seems to me that if Option 1 deferred liability to pay the exit tax until the 31 January next following the tax year in which the realisation took place, it would potentially be a possible conforming interpretation. It would have allowed the trust to defer payment until the time they would have been liable had they not become non-resident, in this case 31 January 2007.

59. As suggested by HMRC, Option 3 was very simple requiring the implication of only 4 words: 'section 80' in two places. However, it seems to me that the insertion would require the same restriction as the suggested options 1 and 2 and that is that it would only apply in respect of exit tax arising under s 80 where the taxpayer had the right to freedom of establishment so Option 3 was not as simple as HMRC suggested.

60. In any event, I have come to the conclusion that option 3 should be rejected outright. The problem with it, which no one appears to have identified during the hearing, was the effect of s 281(5) which precipitated payment of the outstanding instalments and interest on realisation. It provided that the tax became 'due and payable immediately' if the asset was sold. So it suffered from precisely the same fault as HMRC's preferred interpretation which I have already rejected. Its application on the facts of this case would appear to give the appellant the option to pay the exit tax on 31 January 2006 (the due date under UK legislation normally interpreted) or the *earlier* date of 19 December 2005 (the date of realisation). It is clear that that is not compliant with the CJEU decision for reasons discussed above.

61. That leaves Option 1 as modified and Option 2. I will also consider the appellant's option, which I shall designate 'Option 4' which was to amend s 80 TCGA. As set out above, s 80 in effect assessed tax at the date of exit; Mr Baker's conforming interpretation was to give the taxpayer an option to have the tax assessed at the date of realisation. The effect of this would mean no alteration to s 59B would be required; such an alteration to s 80 would mean that the tax liability would not arise nor be reportable nor payable until 31 January next following the tax year of realisation.

62. Superficially, this might appear a very similar suggestion to HMRC's first option as amended by me: either of them would mean that the tax charge would (at the option of the taxpayer) be payable 31 January next following the tax year in which the realisation took place. In this appeal, that was 31 January 2007 and that date would appear to comply with the CJEU judgment. But the two options were, so far as the parties were concerned, the difference between winning or losing the appeal. That is because HMRC only enquired into the appellant's 2004/5 tax return; if the effect of any conforming interpretation was that the appellant did not need to return its liability to the exit tax until its 2005/6 tax return (Option 4), HMRC would have enquired into the wrong return and the appeal must be allowed. If, however, Option 1 was chosen as the conforming interpretation, the appellant would very largely lose the appeal: the closure notice amending its 2004/5 return would be upheld and its

only benefit would be a diminution in the amount of interest on that tax than would otherwise be payable (ie interest would run from 31/1/7 rather than 31/1/6.)

63. I will now consider the principles of conforming interpretation to determine whether any of these three remaining options are possible, and if more than one is possible, which is preferred.

Principles of conforming interpretation

64. Having identified the defect in UK legislation, and what UK legislation ought to have been in order to be proportionate, and the suggested conforming interpretations, I move on to consider whether a conforming interpretation is possible.

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 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 did not agree with these last six propositions; I consider whether they are correct where relevant to this appeal.

The nature of a conforming interpretation – the first 7 principles

68. The first 7 principles demonstrate that a conforming interpretation is very different to, and much more extensive than, normal statutory interpretation. This must be the case: a conforming interpretation must go further than the normal rules of interpretation, because if the legislation was compliant with EU law under the normal rules of interpretation, a conforming interpretation would be unnecessary.

69. Therefore, HMRC's propositions (xv) and (xvi) must be right. Proposition (xv) is really a different way of expressing propositions (ii), (v) and (vi) of *Vodafone II;* proposition (xvi) refers to what Henderson J said in *Prudential* [2013] EWHC 3249 (Ch) at [105]:

> It cannot be enough to say that the grant of the proposed credit would breach of prohibition in the legislation, because the question of conforming interpretation only arises where there is prima facie such a breach

But this seems to me to be simply a more succinct expression of the concept I sought to express at [68]: it is inherent in the nature of conforming interpretation that it makes compliant what would otherwise not be compliant. So while I accept the propositions, I do not see that they add anything to those already given in *Vodafone II.*

70. So, almost by definition, a conforming interpretation must go further than the normal rules of interpretation: the question is, how much further. And these seven principles make it clear that a conforming interpretation can include new words being implied into the text of legislation: it is indeed a broad and far-reaching tool of construction and the real question is, therefore, just what are limits? Which words can be implied and which words cannot be?

71. I will consider the restrictions on conforming interpretation which comprise propositions (viii)-(x) of *Vodafone,* but together with them I will consider the further qualifications which Mr Baker suggested limited the ability of this Tribunal to make a conforming interpretation. There were:

(a) The FTT should not mislead the CJEU;

(b) A conforming interpretation was not possible if the CJEU had indicated it was precluded;

(c) The FTT had a discretion whether to make a conforming interpretation and should be slow to do so;

(d) A conforming interpretation could only be made of the offending legislation;

(e) A conforming legislation could not be retrospective where the failure of UK law was to offer a choice, as a choice could not be made retrospectively;

(f) A conforming interpretation was not possible if it involved policy choices;

(g) Where there was more than one possible conforming interpretation, the Tribunal could not choose and so could not choose any of them;

(h) A valid conforming interpretation could not be too detailed and so any breach of EU law which required detailed legislation to correct it could not be the subject of a conforming interpretation.

The CJEU was misled?

72. In its reference to the CJEU, the FTT set out what UK law was: in brief summary, the CJEU was told that the s 80 exit charge arose and was payable on 31 January next following the tax year in which the exit took place. And it was that law which the CJEU said was disproportionate.

73. Mr Baker said that it was therefore impossible to apply a conforming interpretation to UK legislation as that would have meant the FTT had misled the CJEU as to what UK legislation actually was. Put another way, how could the FTT now find that there was, for instance, a right under UK law to pay by instalments, when the FTT had already told the CJEU that there wasn't such a right? Mr Baker referred me to various passages in my original decision where I had made findings on UK law, such as:

> [105] UK law did not give the trustees in this case the option to defer payment until the shares were realised…..

74. While I accept that the CJEU was told that UK law did not permit deferment, I do not accept the premise of Mr Baker's suggested restriction on the power to make a conforming interpretation. If correct, it would mean there was no power to make any conforming interpretation of UK law where the relevant CJEU ruling arose from a reference made in a UK case. Such a restriction is not reflected in case law and is illogical. I think, on the contrary, that it is well-understood that, when a national court refers a question to the CJEU, the reference explains national law to the CJEU as it is understood to be under normal rules of interpretation and without any consideration of what the national law might be once the obligation to make a conforming interpretation was taken into account. The reference has to be made on this basis, because, at that point in time, the national court is uncertain what EU law is, which is why it is making the reference. The referring court cannot know what conforming interpretation might be required. And that was certainly true in the FTT's first decision in *Panayi* when it was not even clear that trusts were able to rely on freedom of establishment.

75. It stands to reason that the CJEU understands the obligation to make a conforming interpretation only arises once the EU law has been elucidated by the CJEU; the CJEU is, after

all, the origin of the obligation to make a conforming interpretation. The CJEU was not misled by only being informed of UK law as it stood without a conforming interpretation.

76. In any event, I note in this case that Advocate General appeared to refer to the FTT's obligation to consider whether a conforming interpretation was possible once the CJEU had given its judgment, although the passage is somewhat obscure and has probably suffered in translation:

> [60] It is for the national court to examine whether the disproportionate nature of the legislation may conceivably arise from an EU-law-based interpretation of a right to defer provided for in the national law of procedure. As the applicant in the main proceedings submitted at the hearing, there would appear to be similar options for a discretionary decision in the United Kingdom too.

In any event, whatever the Advocate General meant to be understood by this, it is clear that the obligation to make a conforming interpretation arises after the EU has given judgement and is certainly not precluded by that judgement.

The CJEU precluded a conforming interpretation?

77. In a point very closed linked to the above suggestion, Mr Baker said that the CJEU had made it clear in its judgment that a conforming interpretation of UK legislation was not possible. In fact, the CJEU did not mention a conforming interpretation; I understood Mr Baker's suggestion to arise from the uncompromising nature of the CJEU's statement, and in particular statements such as the 'legislation at issue' 'goes beyond what is necessary' and constitutes 'an unjustified restriction on the freedom of establishment' and that legislation of the type referred was 'preclude[d]'. He also read [60] of the Advocate General's Opinion as a statement that a conforming interpretation was *not* possible. Despite what was said in the last sentence of [60], he was quite sure he had not suggested otherwise in the CJEU hearing.

78. Mr Bremner conceded that the last sentence in [60] was in error: while Mr Bremner might have suggested to the CJEU that UK law might allow for a conforming interpretation, Mr Baker certainly had not. But I agree with Mr Bremner that, however poor the translation of the first sentence in [60], the Advocate General could only have been saying that the UK court must consider whether a conforming interpretation (an 'EU-law-based interpretation') was possible. She could not have meant a conforming interpretation was not possible, because the CJEU itself requires conforming interpretations where possible, and itself has no power to interpret national laws.

79. Mr Bremner cited *Teckal* C-107/98 at [29-33] where the CJEU made it clear that it was for national courts to decide on interpretation of national laws and to decide the facts and dispositions of appeals:

> [33] Next, it must be pointed out that in the context of [the provision of the EU Treaty allowing referrals to the CJEU] the Court has no jurisdiction to rule either on the interpretation of provisions of national laws or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it.

80. In *Vodafone II* something similar was said at [34] of the Court of Appeal judgment in the context of rejecting a submission by counsel that, because CJEU had said the national court could consider a conforming interpretation of the motive test in that particular piece of legislation, that was all the national court could do. The Court of Appeal said:

> [34]…The jurisdiction of the Court of Justice to give preliminary rulings relates to the interpretation of the EU Treaty and the other matters referred to

> in art 234EC. They do not include the interpretation of the legislation of a member state…..

81. Much the same was said by the Court in the earlier case of *IDT* [2006] EWCA CIV 29:

> [81] ..it is for domestic law to determine how far the domestic court can change other provisions of purely domestic law to fulfil this obligation [ie the obligation to make a conforming interpretation].....

82. In conclusion, I reject both of Mr Baker's related restrictions on the power to make a conforming interpretation: I can and must consider whether a conforming interpretation is possible. The FTT would not have misled the CJEU if I come to the conclusion that one is possible, nor did the CJEU preclude the possibility of a conforming interpretation being reached.

Conforming interpretation discretionary?

83. Mr Baker also said the Tribunal should hesitate to make a conforming interpretation because it should recognise that the gain was potentially subject to tax under other UK taxing provisions. Mr Baker's submissions turned on s 86 and 87 TCGA. I set out in my first decision at [147-148] the meaning of these sections. I concluded at [147-151] that s 86 could never apply to tax the gain in this case; and, while s 87 could theoretically apply to tax the gain at issue in this appeal, whether it applied was entirely in the hands of the trustees and beneficiaries. They could ensure s 87 never applied to tax the gain by the expedient (in the case of the beneficiaries) of not residing and becoming domiciled in the UK and (in the case of the trustees) by not making a distribution to a beneficiary so domiciled and resident.

84. The CJEU at [55] rejected the appellant's case that the UK's exit tax was not proportionate because s 86-87 provided a suitable alternative tax of the same gain. The UK's exit tax, as I have said, was found by the CJEU to be proportionate: the problem was with its due date of payment.

85. Mr Baker still relied on s 87 in the second FTT hearing but now put his case somewhat differently. He pointed out that s 87 still had the potential for taxing the gain to the extent it was not taxed under s 80. And while, he said, the CJEU ruled that the potential s 87 charge did not make an exit charge unjustified, the UK's s 80 exit charge was disproportionate because it lacked the option to defer payment. Therefore, says Mr Baker, as the s 80 exit charge was disproportionate, the FTT should consider s 87 when considering the issue of whether a conforming interpretation of s 80 is possible and whether s 80 should be disapplied.

86. Unravelling this, what I understood Mr Baker to be suggesting was that the Tribunal has some sort of discretion over whether to make a conforming interpretation. I think he was suggesting I should be reluctant to find a conforming interpretation because there is the potential for the gain to be taxed one day under another provision.

87. I reject this submission. My understanding of what was said by the CJEU in *Marleasing* and the UK courts in cases such as *Vodafone II* is that this Tribunal has the obligation to construe UK law as consistent with EU law if it is possible to do so. A conforming interpretation is not discretionary. It is not possible for me to decide that there is a conforming interpretation which meets the *Vodafone II* criteria but should not, nevertheless, be adopted.

88. In my view, the existence of the s 86/87 tax charges is quite irrelevant to the question of whether a conforming interpretation can be made of UK law in light of the CJEU's ruling that while the s 80 tax charge was proportionate, the failure to give an option to defer it was not.

Only s 80 could have conforming interpretation?

89. Mr Baker's proposition was that only that part of the UK legislation which was inconsistent with EU legislation could be the subject of a conforming interpretation. This proposition was the complete opposite of HMRC's proposition (xi) set out above, which was based on [34] of *Vodafone II:*

> [34]…the obligation of the national court is to examine the whole of the national law to consider how far it may be applied so as to conform to enforceable Community rights.

90. I think both logic and authority are with HMRC on this. The CJEU is not concerned with how UK legislation is structured but with its effect; a conforming interpretation must ensure its effect is consistent with EU law.

91. I accept that it is likely a conforming interpretation will often be of the particular piece of legislation found, on a normal interpretation, to be in breach of EU law, but it is not necessarily so. For instance, one of HMRC's proposed conforming interpretations in this appeal was to s 281 TCGA. This legislation was not the legislation which made UK law non-compliant with EU law but if a conforming interpretation of it made UK law compliant, it would be no objection to that interpretation that s 281 was not the offending legislation.

Mr Baker's proposition in any event pre-supposed that s 80 was the offending legislation. It was his position that a conforming interpretation could only be made of s 80 and so his suggested conforming interpretation (option 4 above) was the only possible contender. But as I have already indicated, I agree with HMRC that s 80 was not the offending legislation. The failure of UK law was its failure to offer an option to defer payment of the tax so the 'offending' legislation was the obligation to pay tax the tax without an option to defer which was, if any section, s 59B(4) TMA. It does not matter if the CJEU was not specifically referred to this section: the CJEU were well aware of due date of payment (see [16-17]) even if they did not refer to the actual piece of legislation concerned. For instance, at [59] they said:

> It is apparent from the documents submitted to the court that the legislation at issue in the main proceedings provides only for the immediate payment of the tax concerned.

92. In conclusion, I do not agree with Mr Baker on this. The conforming interpretation does not have to be of the offending part of the legislation, but even if it did, s 59B(4) TMA (and not s 80 TCGA) is the offending legislation.

93. I move on to consider the restrictions on a conforming interpretation which were set out in *Vodafone II.*

Go with the grain and not contradict fundamental feature of law?

94. I will consider restrictions (viii) and (ix) together because, while itemised separately, they seem to express similar, perhaps identical, concepts.

95. What is that concept? A conforming interpretation is not, unlike a 'normal' interpretation of legislation, looking for what Parliament's intentions with the specific legislation actually was; a conforming interpretation is recognising Parliament's over-arching intention as expressed in the ECA 1972 to make UK legislation conform with EU law. So a conforming interpretation of an aspect of UK legislation is looking for something which Parliament might have intended, had it appreciated what EU law required, but cannot go so far as to run contrary to the fundamental intentions of the specific legislation Parliament actually made.

96. Mr Baker's approach was that it was quite clear that Parliament intended there to be an exit tax and intended it to be payable immediately on exit: therefore, any interpretation which

resulted in an option to defer liability necessarily went against the grain of the legislation and contradicted a fundamental feature of the law which required the immediate payment of the exit tax.

97. I think, however, the tribunal's approach must be more nuanced when considering what is 'going against the grain' or going against a fundamental or cardinal feature of the legislation. Conforming interpretations are only necessary where UK law interpreted under normal canons of interpretation does not comply with EU law: so it is not enough to prevent a conforming interpretation to say that any particular interpretation was not intended because it was not a part of the legislation normally construed. See the comment from Henderson J cited at §69 above: a conforming interpretation only arises where there is a breach of EU law.

98. Case law shows that this is so. For instance, in *Vodafone II,* the tax charge in question had preconditions, but the preconditions were insufficient to comply with EU law. The Court implied a further precondition by a process of conforming interpretation in order to make the law compliant: that additional precondition was clearly not intended to be a part of the law when it was enacted, but inserting it did not go against the grain or contradict a fundamental feature of the law. In *FII,* UK legislation under 'normal' interpretation laws did allow some but not all companies to pay dividends with an ACT credit. The legislation was given a conforming interpretation the effect of which was add a further type of company which was entitled to pay a dividend with an ACT credit, while still leaving certain other types of company unable to pay a dividend with a credit. This did not go against the grain or contradict a fundamental feature of the law because it only shifted the boundaries between which companies could pay a dividend with a credit, rather than entirely nullifying the prohibition on at least some companies being able to pay a dividend with a credit. In *Prudential,* tax relief was specifically excluded for a type of dividend (portfolio dividends). The CJEU ruling was that UK law could only be lawful if relief on dividends was given for no less than the foreign nominal rate of tax. The conforming interpretation was that the tax relief restriction was limited to the excess over the foreign nominal rate of tax: so there was still a restriction on relief for portfolio shares but not as extensive as it had been.

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.

100. So the question arises in this appeal whether the appellant is right to say that it is a fundamental feature of UK law that an exit charge is due for payment on the 'normal' due date and cannot be deferred in any way and that any conforming interpretation which resulted in a different due date for payment would go against the grain of the legislation.

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.

104. So while it may well be said that the effect of s 59B is that most tax is due for payment on 31 January next following the year of assessment, it is not true in all cases. Deferring payment of the s 80 exit charge would therefore do no more than shift the boundary of exactly which taxpayers can defer tax payments. A conforming interpretation which read in a right to defer payment of a s 80 exit charge would not go against the grain of s 59B nor contradict a cardinal feature of the payment of tax law as it would do no more than increase the pool of taxpayers entitled to the tax 'relief' of deferred payment, as most taxpayers would still be liable to pay their taxes on 31 January next following the year of assessment.

A conforming interpretation cannot be retrospective?

105. HMRC's proposition (xii) was that a conforming interpretation was necessarily retrospective. With a conforming interpretation, like any interpretation of legislation, the court is declaring what the meaning of the legislation has always been, so it could be no bar, said HMRC, to a conforming interpretation that it would have a retrospective effect. Mr Bremner cited a few authorities in favour of this proposition, including the Court of Appeal in *Vodafone II:*

> [56] …First, it is inevitable that a conforming interpretation will be retrospective in its operation. Unless and until it is averred that the legislation is inconsistent with some enforceable Community right there is no occasion to consider a conforming interpretation. The fact that the effect of such an interpretation is felt retrospectively is not more an objection in the field of conforming interpretation that it is in the case of domestic statutory construction.

106. Mr Baker did not necessarily disagree with that principle in general but considered it inapplicable where the breach of EU law was the failure to offer a taxpayer a choice. Where the breach of EU law was a taxpayer should have had an option, the inevitably retrospective nature of a conforming interpretation was, he said, therefore prohibited and the breach of EU law was incapable of remedy. A conforming interpretation could not turn back the clock and give the taxpayer an effective choice which the CJEU has said he was entitled to have had at some earlier date. The breach in this case was the failure to give the trustees an option to defer: allowing them to defer now did not give them an effective choice in the past.

107. He relied on the Advocate General's opinion to support this position and in particular [56-59] which I have set out above at §48 and an extract of which is:

> [58] the tax at issue in the present case therefore remains disproportionate despite the fact that the hidden reserves were realised before the due date for

> its payment because they were no option to defer payment at the time of the assessment to tax. ….
>
> [59] The answer…must therefore be that the proportionality of a measure must be assessed by reference to the particular situation obtaining at the time when the exit tax is incurred. ….

108. I do not agree that the Advocate General was saying at [56-59] that the breach was incapable of remedy; indeed her next paragraph [60] which I have already discussed should properly be taken to indicate that she considered it was for the national courts to consider whether a conforming remedy was possible.

109. What she was dealing with in [56-59] was HMRC's submission that, because the trustees sold the shares before the due date for payment of the exit tax, there was no breach of EU law in their particular circumstances. She rejected that submission: she did not go further and say UK law was incapable of a conforming interpretation.

110. Nevertheless, while what she said can therefore not be relied upon to support Mr Baker's proposition, I have to consider whether his proposition is nevertheless correct. Indeed, Mr Baker primarily relied on the House of Lords' decision in *Fleming* [2008] UKHL 2 in support of this proposition and so I consider that next.

The decision in Fleming.

111. The CJEU had, as is well known, ruled in *Marks and Spencer* (2003) C-62/00 that it was unlawful for UK law to introduce a three year cap on reclaims of overpaid tax where no time limit had previously existed, without at the same time introducing a transitional period which allowed taxpayers to submit uncapped claims for a limited time. Purportedly in compliance with this ruling, HMRC then issued a Business Brief announcing a retrospective transitional period. In other words, they allowed claims submitted up to a certain historic date, just as if the three cap had in fact been introduced with a transitional period. The legality of the HMRC's refusal to accept claims made later than that date was successfully challenged in *Fleming*.

112. The Lords did not consider the possibility of a conforming interpretation of the legislation at issue in that case; a conforming construction was only mentioned by one of the five Lords (Lord Walker) and then only to say at [25] that it was common ground between the parties that a conforming interpretation was not possible. The issue in *Fleming* was disapplication: was the three cap to be disapplied entirely because it lacked a transitional period, or was it only to be disapplied for a reasonable period?

113. Each of the five law lords gave somewhat different opinions; Lord Walker dissented as he thought the three cap should only be disapplied in respect of those claims lodged more than a reasonable time after the introduction of it. In other words, he considered the House of Lords should imply a reasonable transitional period into UK legislation. Lord Scott was at the opposite end of the scale and considered at [21-22] that it was not for the courts to make good defects in legislation. He certainly considered the retrospective nature of reading into legislation a reasonable transitional period as a bar to doing it.

114. While the other three judges agreed with Lord Scott on the outcome of the appeal (success for the taxpayers), none of them stated that they agreed with his reasons. Lord Hope said (see [6]-[10]) that in some cases the courts could make good defects in legislation (such as extending an inadequate transitional period) but would not do so in the case of the three year cap as Parliament had chosen to give no transitional period at all: this was not a minor or inadvertent defect. At [11] he referred to taxpayers' entitlement to know the transitional arrangements in advance, but that perhaps should be understood in the context of what he said at [7-8] to be a limited right as he did recognise the possibility of the court making good a defect

retrospectively. Lord Neuberger, however, said that implying a retrospective transitional period 'whose existence would be unknown to any reasonably well-advised person with an accrued right until it has already expired' would be 'little more than hypothetical' and would breach 'the principles of effectiveness and legitimate expectation' [85-86]. The majority considered that the only way to give an effective transitional period was from a future date.

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.

Was the appellant adversely affected by not knowing about the option to defer?

118. I would comment in passing that I do not accept that the appellant would be disadvantaged by the retrospective nature of the suggested conforming interpretations. The option which the appellant should have had to was to defer payment of CGT on accrued gains on exit from the UK. But it can't be said that the appellant was effectively deprived of this option as it *did* defer payment of the tax. It has still not paid it thirteen years later. While it is the case that it must have deferred the tax under s 55 TMA, nevertheless it has deferred payment. Indeed, it deferred its tax under s 55 presumably because it considered its EU law rights were not only to defer the tax, but not to pay it at all.

119. The appellant might say, although this was not really canvassed in the hearing, that it was effectively deprived of the option to defer payment because (if it loses this appeal) s 55 TMA would require it to pay the tax at the conclusion of the appeal with interest from the due date of payment being 31 January 2006. I cannot agree; this option can be effectively retrospectively claimed if the conforming interpretation is one which only obliges the appellant to pay interest on the exit tax at the earliest from the date to which the appellant could have deferred payment (and ignoring the fact that, had UK law been enacted properly in the first place, it could have given an option for deferred payment with concomitant liability to interest from exit).

120. The appellant certainly cannot say that the lack of option to defer may have affected its decision on whether or not to exit the UK. It is clear it chose to exit the UK despite the tax charge. The trustees' lack of knowledge of the option to defer payment of the exit tax did not impact on their actions.

121. In conclusion, the retrospective nature of any conforming interpretation would not make the appellant's right to an option to defer hypothetical, unreal or ineffective. On the contrary, the appellant can benefit from it by reduced liability to interest on the (proportionately imposed) exit tax which should reflect the benefit it would have had if they had known about the option in advance and chosen to exercise it. But my opinion is that in any event the retrospective nature of a conforming interpretation is no bar to it, despite the fact that some taxpayers may have acted differently had they known what the conforming interpretation was in advance.

Conforming interpretation prohibited if it involves policy choices?

122. The last principle of conforming interpretation from *Vodafone II* is the restriction at (x) that 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.

The parties were not agreed on what this meant.

123. HMRC accept that I would have to make a choice between different possible conforming interpretations were I to decide it was possible to have a conforming interpretation. I have already stated that HMRC suggested three possible options, two which involved words being implied into s 59B and one which involved words being implied into s 281. The appellant suggested a fourth possibility. There might well be other possible conforming interpretations which were not discussed. And the impact of the different conforming interpretations is real in monetary terms: one might allow the taxpayer to defer payment until realisation, while another might allow the taxpayer to pay by instalments irrespective of realisation. One might require interest and another might not. And, as I have said at §62, the appellant's option (Option 4) would result in no enforceable tax liability on the appellant at all.

124. Choosing one rather than another inevitably involves choice by the FTT. Mr Baker's position was that the FTT cannot make that choice. His opinion is that the Tribunal is not equipped to make such a policy choice. So, where there is more than one possible conforming interpretation, Mr Baker's view was that I must reject all of them.

125. The FTT appears to have come to that conclusion in the case of *Gallaher* [2019] UKFTT 207 (TC), the decision in which was released very shortly before this hearing came before me.

Gallaher

126. The facts in that case were that a UK subsidiary company transferred shares to its EU parent company. Had that parent been a UK resident company, the transfer would have benefited from CGT relief allowing the gain to be rolled over and only taxed when the asset was sold out of the group; that relief was not available because the parent was not UK resident.

127. The FTT (Judge Beare) concluded (having referred to various decisions including the CJEU's decision in this appeal) that the tax charge would have been a justifiable restriction on the freedom of establishment if payment of the tax could have been deferred. He considered whether a conforming interpretation of UK law was possible but rejected the possibility because it would have required him to make decisions such as (i) over how many years should the tax be deferred and (ii) should interest be charged on the deferred tax? He said:

> [212] …I consider that it is clear both as a constitutional matter and based on the observations of Lord Nicholls in *Ghaidan* and Lord Scott in *Fleming* that, if there are a number of different ways of applying a conforming interpretation of the existing UK legislation, each of which is proportionate and equally valid as a matter of EU and UK law, I am precluded from applying a conforming interpretation of the existing UK legislation which involves selecting one of

> those options over the other or others. That selection can be made only Parliament and my role must necessarily be confined to disapplying some part of the existing UK legislation which will have the effect of rendering the UK legislation EU law-compliant.

128. Judge Beare had put it earlier even more succinctly:

> [198] …it is beyond the competence of the UK courts to choose between various proportionate options because that would involve legislation and is therefore something which can be done only by Parliament'

129. Mr Baker considered that what Judge Beare said here was right; HMRC considered it wrong. And HMRC have lodged an appeal against Judge Beare's decision although it is yet to be given a date for hearing in the Upper Tribunal. No one suggested that my decision should be delayed pending the outcome of it.

130. I will start by considering what was said in *Ghaidan* [2004] UKHL 30 and *Fleming* on this subject, and then consider what was said in the leading cases on conforming interpretation I have already referred to above.

131. Dealing with *Fleming* first, the passage of Lord Scott's judgment relied upon by Judge Beare was quite lengthy and I will not set it out; in essence Lord Scott was saying that neither HMRC nor judges could set a transitional period, that was for Parliament. However, as Judge Beare recognised, *Fleming* was not a case on conforming interpretation; moreover, none of the other four law lords giving judgement agreed with him on his reasoning albeit three agreed with him on the outcome. I cannot take what he said as representing the view of the majority in *Fleming*.

Ghaidan

132. Lord Nicholls in *Ghaidan* said

> [33] ….Nor can Parliament have intended that s 3 [of the HRA] should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

133. *Ghaidan* is not a case on EU law at all; it concerned the obligation to read UK law as compliant with the European Convention on Human Rights. Nevertheless, it is recognised that the principles of conforming interpretation under the ECHR are the same as under EU law: see [260] in *FII*. And in *Ghaidan,* the Lords were able to give the ostensibly non-compliant UK legislation a conforming interpretation; what Lord Nicholls said at [33] was by way of summary of existing case law on conforming interpretations and was not actually an issue in that case where only one conforming interpretation was considered.

134. But did he actually mean, as Judge Beare thought, that *any* choice prohibited a conforming interpretation? Or properly read, did he mean a conforming interpretation involving choice was only prohibited if it involved choices about issues calling for legislative deliberation? As he used the word 'may' it seems to me he contemplated the possibility that some choices might not involve issues calling for legislative deliberation. Mr Baker's view was that *all* choices by definition would call for legislative deliberation.

135. Such a narrow view would mean that whether or not a conforming interpretation could be made would depend on whether or not more than one conforming interpretation was possible, and that would not only be a somewhat arbitrary rule but one which would depend on the inventiveness of the parties or the panel.

136. Such a narrow view also does not seem consistent with more recent authorities on conforming interpretations. The Courts in *Vodafone II, Prudential* and *FII* (see discussion at [90] of that case) were faced with the possibility of different, acceptable conforming interpretations and nevertheless applied a conforming interpretation. In *Vodafone II* it was said:

> [59] It is the case that there are likely to be other ways of achieving conformity….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 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.

Conclusion on whether the tribunal can made a choice

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 exceeding 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.*

Conforming interpretation would involve too much detail?

140. In a submission linked to the one I have just considered, Mr Baker also said that a conforming interpretation was not possible because too much detail would be required. He referred to s 229 FA 2013 and Sch 3ZB of TMA 1970. I do not set out these provisions as nothing seemed to turn on the precise details of them. The effect of them was to introduce into UK legislation exit charge payments plans for companies subject to exit charges. Mr Baker also relied on s 22 and Sch 7 of FA 2019 which brought into UK law CGT exit charge payments plans which now apply to trustees ceasing to be UK resident. The provisions do not apply to the events at issue in this appeal as they are not retrospective and only apply to events occurring on or after 6 April 2019. It is this legislation which was clearly introduced to make UK legislation comply with the CJEU's decision in *Panayi.*

141. These two pieces of legislation are extremely detailed: Mr Baker said that they demonstrated the detail necessary in order to make an exit charge compliant with EU law: moreover, they were an acknowledgement by the UK Government (were any needed) that its failure to provide for a payment plan on exit charges was a breach of EU law.

142. I agree with Mr Baker's second point but it takes the matter nowhere: the UK government is obliged to comply with EU law and has the choice of how to do so. It has exercised its choice by introducing this prospective legislation, opting for very detailed provisions. That does not take away from the courts their obligation, where possible, to give a conforming interpretation retrospectively to the unamended UK legislation.

143. And I do not agree with his first point. I agree with Mr Bremner that there is no need for an option to defer to be set out in great detail. S 281 contained a deferral option and is quite concise; the German law in *DMC* which gave an option to defer was also concise but still lawful. While it is possible to have complicated provisions on when realisation will trigger the remaining instalments, and how interest should be calculated and when and how security should be given, they are not necessary to comply with the CJEU's ruling.

144. In conclusion, I do not need to consider whether a detailed conforming interpretation is prohibited as I am satisfied that none of the proposed conforming interpretations contain more detail than is permissible. None of them are detailed provisions and they do not need to be in order to make UK law compliant.

Conclusion on conforming interpretation

145. I am persuaded that 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.

Choosing the conforming interpretation

147. The choice can only be between options which would actually make the UK's ostensibly non-compliant law comply with EU law. I have considered what that means at §§35-42. I have listed the options I have to choose from at §§57-62. I have concluded that I can make a choice between them and indeed must do so as there is no discretion: where a conforming interpretation is possible it must be adopted.

148. What are the principles on which the choice must be made? I think there are that:

(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.

149. I will deal with these points in turn and what they mean for the various options proposed.

Conforming interpretation must not go further than necessary?

150. HMRC's principle (xiii) was that a conforming interpretation must not go further than necessary. They took this from *Routier* [2017] EWCA Civ 1584 where Arden LJ said:

> Where a statute does not fulfil the requirements of EU law, the courts may interpret it so far as possible so that it complies with EU law (and no further: *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, [52]). This is the principle of conforming interpretation. …

151. Moreover, it follows logically: a conforming interpretation goes beyond a natural interpretation of the legislation and the jurisdiction to make such an interpretation only arises because UK law (naturally interpreted) does not fully comply with EU law: so there is no

jurisdiction to 'interpret' legislation in this fashion beyond what is needed to bring it into conformity. There is no jurisdiction to go beyond what is necessary.

152. Option 4, proposed by the appellant, was, as I have said, for a change to s 80 such that the assessment of the tax only took place in the year of realisation. The outcome of such a conforming interpretation for this appeal would be that it should be allowed as there was no enquiry opened nor closure notice issued for the tax year of realisation and it is far too late for a discovery assessment now.

153. HMRC, as might be expected, opposed such a conforming interpretation. Their point was that, in their view, such an interpretation would go further than required because it would mean no exit tax could be assessed in the year of exit. As HMRC pointed out, the CEJU did not consider assessment of the tax in the year of exit to be unlawful. I have already made this point above at §§24-25. The CJEU said:

> [57] ….the fact that the Member State of origin, for the purpose of safeguarding the exercise of its powers of taxation determines the amount of tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of those capital gains ceases to exist, in this case that the time when the place of management of the trust is transferred to another Member State, is compatible with the principle of proportionality….

154. It was also clear that the CJEU allowed tax to be assessed at the point of exit because (a) it does not require changes in value after the date of exit to be taken into account and (b) it allows interest to be charged from exit and (c) in cases of risk, it permits a member State to require, from the date of exit, security for the payment of the tax.

155. In conclusion, I do not agree with Mr Baker that his Option 4 is a conforming interpretation which this Tribunal could adopt. There was, as HMRC say, nothing in s 80 TCGA inconsistent with EU law. The UK was entitled to assess an exit tax in the tax year of exit. There is no jurisdiction to make s 80 conform with EU law as it conforms already. There is no jurisdiction to shift the date of assessment of the tax from the year of exit to the year of realisation because the CJEU found UK law was complaint in assessing the exit tax in the year of exit.

156. The only possible conforming interpretation is one that defers the due date for payment of the tax so assessed.

Go with the grain of existing legislation?

157. At [113] of its decision, the Court of Appeal in ***FII*** approved the approach of Henderson J to conforming interpretation in the first instance decision, where he said:

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

I take this to mean that the option preferred must be the one most consistent with the UK's legislative regime.

158. The remaining options are:

(1) Option 1(as amended by me): Amending s 59B to imply deferral of liability until 31 January next following the tax year of realisation; or

(2) Option 2: Amending s 59B to permit payment by instalments.

Which of these is the most consistent with the UK's legislative regime? On balance, I think Option 2 is most consistent as there are pre-existing rights to pay in instalments in cases where the asset does not generate cash when the tax liability arises (eg on gifts or where the consideration itself is paid in instalments). This reflects the position in the current case where the liability arises before realisation of the asset. Option 1 is deferred payment and while the scheme of UK legislation does recognise a right to defer with s 55 that is in a situation of doubt over liability; a right to defer pending realisation is a different kind of situation.

In conclusion, Option 2 is the one which is most consistent with the grain of the existing UK legislative scheme.

Indications from Parliament and CJEU?

159. It would seem sensible to look to Parliament and/or the CJEU for indications of their choice of conforming interpretation, although I have no authority for this. And if it is legitimate to look at such indications, I would note that Parliament would appear to prefer option 2 (instalments) as the legislation introduced to prospectively comply with *Panayi* and *NGI* is for payment by instalments.

160. I would also agree with Judge Beare in *Gallaher* at [165] that the CJEU appeared to consider instalments a better balance between the right of the taxpayer to defer and the right of the State to tax.

161. So for this reason as well, I would prefer option 2.

Applying Option 2

162. Option 2 itself has a number of choices:

(a) Over how many years are the instalments to be paid?

(b) Should the right to pay by instalments cease as and when the asset is realised?

(c) Should the right to pay by instalments include a liability to pay interest on all outstanding instalments from the moment of exit?

(d) Should the taxpayer be liable to provide security in cases of risk?

163. So far as option (d) is concerned, it would appear irrelevant in this appeal. The tax has been deferred for 13 years without security; it is payable now and should not be deferred further so security in the future is unnecessary. Options (a)-(c) are relevant to this appeal as they would impact on the amount of interest to be paid on the unpaid tax.

164. So far as (a) is concerned, I think principle 1 contains the answer. The law (which recognised no deferral) should be made to comply but no more; so the period of instalments should be the minimum recognised as lawful. That is five years.

165. So far as (b)-(d) are concerned, I think the principle 2 contains the answer. While it would be lawful for the UK to include these restrictions on deferral of exit tax, they complicate it. A conforming interpretation should be as simple as possible. So a conforming interpretation would not imply words which would precipitate the instalments once the asset is realised, nor a liability to pay interest before the due date, nor any liability to provide security.

The conforming interpretation

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.

DETERMINATION OF APPEAL

167. That decision concludes this appeal. A conforming interpretation is possible and should be made to s 59B. The exit charge assessed in tax year 2004/5 under s 80 TCGA was lawful and so the appeal against the closure notice is DISMISSED. However, it is dismissed on the basis of the conforming interpretation and so the appellant's liability to interest on its late payment of tax must be assessed on the basis of that conforming interpretation as set out above. I will leave it to the parties to carry out the calculation of interest, which will only run on each instalment from the date it was due (under the conforming interpretation) to have been paid.

ISSUE 2: DISAPPLICATION

168. Having concluded that a conforming interpretation is possible, and having in fact made that conforming interpretation, the appeal is dismissed and I do not need to consider disapplication of the offending UK legislation. Nevertheless, as it was argued, and as this appeal may go higher, I will briefly set out the submissions and my views on them.

169. Both parties agree that with disapplication, the offending UK law must be disapplied. The appellant's view is that s 80 which imposes the exit charge is the offending provision and must be disapplied. It should be clear from the above that I do not agree that s 80 is the offending provision. There is nothing in EU law which makes assessing an exit charge in the year of exit unlawful. The illegality lies with s 59B TMA and its requirement for the tax to be paid without any option to defer.

170. It is clear from the authorities that disapplication must not go further than necessary to comply with EU law. The Court of Appeal (Sir Andrew Morritt) said in *Vodafone II*

> 'I would need a great deal of persuading that it was appropriate simply to disallow the [taxing legislation in question]…, for that would be to ignore the justification for [the legislation at issue in that appeal] the Court of Justice upheld in the *Cadbury-Schweppes* case and to disallow the [legislation] more extensively than the Court of Justice considered to be necessary to preserve the relevant freedom of establishment'…[66]

171. More succinctly, it was said in *Fleming* that disapplication of UK laws was

> [24]…to the extent that they improperly deprived taxpayers of directly enforceable Community rights but no further.

172. What does that mean? Does it mean that s 59B is entirely disapplied, so the tax is assessable but never due for payment? Or does it mean S 59B is only disapplied for time, with the tax becoming due at a later date? If so, that would be very similar, if not identical, to a conforming interpretation (in particular Option 1 (as amended) above.

173. HMRC point out that such an outcome is not unsurprising. Henderson J in *Prudential* said:

> [106] Even if I had been persuaded that a conforming interpretation was impossible, I would not have held that the Case V charge had to be disapplied in its entirety. It would only be necessary for the charge to be disapplied to the extent that it was unlawful under EU law. This would, in practice, produce the same result as a conforming interpretation of s 790, and would fulfil the same basic objective of removing the incompatibility with EU law which has been identified by the CJEU.

174. It seems to me that the better view is that disapplication is only to the extent required by the CJEU; the CJEU considered exit taxes justifiable and did not require the UK to forego the exit tax charged. S 59B should only be disapplied such that the tax should not become payable until a date which respects the taxpayer's EU law right to defer; in this case it is clear that that would be no earlier than 31 January 2007.

OUTCOME

175. The effect of my decision is that the trustees' appeal against the closure notice is formally DISMISSED. It is dismissed on the basis a conforming interpretation of s 59B TMA has been made which means that the tax so assessed fell due in 5 equal annual instalments, the first of which was payable on 31 January 2006. Interest is only chargeable on the tax to the extent that the instalment was unpaid after it fell due: in other words, no interest was chargeable on an instalment until it fell due.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

176. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2019