[2016] UKUT 165 (TCC)

Appeal number: FTC/25/2015

CAPITAL GAINS TAX – qualifying corporate bonds (QCBs) – whether provisions in bond instruments for redenomination of sterling bonds to euros (or another currency) on adoption by the UK of the euro (or other currency) as its lawful currency prevented the bonds from being QCBs – TCGA 1992, s 117(1)(b) and s 117(2)(b)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Appellants**

- and -

NICHOLAS M F TRIGG (a partner of TONNANT LLP) — **Respondent**

TRIBUNAL: MRS JUSTICE ASPLIN
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 7 and 8 March 2016

Akash Nawbatt, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Malcolm Gammie QC, instructed by Herbert Smith Freehills LLP, for the Respondent

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DECISION

1. This is an appeal by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") from the decision of the First-tier Tribunal (Judge Barbara Mosedale) (the "FTT") released on 20 October 2014 (the "FTT Decision"). The FTT Decision was made pursuant to a joint reference to the FTT under section 28ZA of the Taxes Management Act 1970 by HMRC and Mr Nicholas Trigg, a partner in Tonnant LLP ("Mr Trigg"). A number of references were lodged in the FTT by other partners in Tonnant LLP. Pursuant to Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, Mr Trigg's appeal became the lead appeal before the FTT.

2. The issue with which the joint reference was concerned is a short one. It is whether certain corporate bonds (the "Bonds") purchased by Mr Trigg qualify under an exemption from capital gains tax for "qualifying corporate bonds" ("QCBs"). The terms of the joint reference (the "Reference") were:

> "Does the inclusion in the Bonds (at the time of their issue) of a clause in the form set out in Schedule A or B to this Joint Reference prevent the Bonds from being qualifying corporate bonds by virtue of section 117(1)(b) of the Taxation of Chargeable Gains Act 1992?"

3. The exemption from CGT for QCBs is contained in s 115 of the Taxation of Chargeable Gains Act 1992 ("TCGA"). Although simple debts fall outside the scope of CGT (s 251 TCGA), as a general matter debts on a security, such as the Bonds, are chargeable assets unless the exemption in s 115 applies. That exemption depends upon the securities coming within the definition of a "qualifying corporate bond" in s 117 TCGA which materially provides as follows:

> "**117 Meaning of 'qualifying corporate bond'**
>
> (A1) … for purposes other than those of corporation tax references to a qualifying corporate bond shall be construed in accordance with the following provisions of this section.
>
> (1) For the purposes of this section, a 'corporate bond' is a security, as defined in section 132(3)(b) –
>
> > (a) the debt on which represents and has at all times represented a normal commercial loan; and
> >
> > (b) which is expressed in sterling and in respect of which no provision is made for conversion into, or redemption in, a currency other than sterling,
>
> and in paragraph (a) above 'normal commercial loan' has the meaning which would be given by section 162 CTA 2010 if for paragraphs (a) to (c) of subsection (2) of that section there were substituted the words 'corporate bonds (within the meaning of section 117 of TCGA 1992)'
>
> (2) For the purposes of subsection (1)(b) above –

> (a) a security shall not be regarded as expressed in sterling if the amount of sterling falls to be determined by reference to the value at any time of any other currency or asset; and
>
> (b) a provision for redemption in a currency other than sterling but at the rate of exchange prevailing at redemption shall be disregarded.
>
> …"

4. The Reference raises a question of statutory construction. There was no dispute as to the underlying facts, which were briefly stated by the FTT at [4] – [6] of the FTT Decision. Put very shortly, the Reference concerned six Bonds which had been purchased by Tonnant LLP on the secondary market and later realised in whole or in part. All the Bonds were issued, denominated and redeemable in sterling. Interest was payable in sterling. In the offering circular or prospectus for each of the Bonds, the references to "sterling" were to the lawful currency for the time being of the UK.

5. The offering circular or prospectus for each of the Bonds contained a section setting out extensive risk factors, among which was a factor referring, in varying terms, to the euro becoming the lawful currency of the UK prior to repayment of the Bonds.

6. The dispute before the FTT, and before this tribunal, concerned the effect of two types of clause contained in the conditions on which the Bonds were issued. One type was that set out in Schedule A to the Reference; the other was contained in Schedule B. Each of the Bonds contained one type of clause, but not both. The full terms of the clauses at Schedule A and Schedule B are set out in the Appendix to this decision. For present purposes we gratefully adopt the summary of the two types of clauses which Judge Mosedale provided at paragraphs [8] – [13] of the FTT Decision:

> "*Schedule A*
>
> 8. In summary, Schedule A made no specific reference to the euro (other than in its heading). It became operative:
>
> > "If at any time there is a change in the currency of the United Kingdom such that the Bank of England recognises a different currency or currency unit or more than one currency or currency unit as the lawful currency of the United Kingdom…"
>
> 9. When it became operative, its effect was:
>
> > "… references in, and obligations arising under, the Notes … will be converted into, and/or any amount becoming payable under the Notes … will be paid in, the currency or currency unit of the United Kingdom…"
>
> 10. It provided a rate at which conversion [would] occur:
>
> > "Any such conversion will be made at the official rate of exchange recognised for that purpose by the Bank of England."
>
> 11. Further provisions permitted the terms of the Bonds to be amended by the issuer to put all parties in the same position as if no change in currency had occurred and such changes could be retrospective.

> *Schedule B*
>
> 12. This clause was in different terms. It came into effect 'after the date (if any) on which the United Kingdom becomes a Participating Member State'. A participating member state was defined as any member state of the European Union which has adopted the euro as its lawful currency in accordance with the Treaty establishing the European Union.
>
> 13. Once the UK had adopted the euro as its lawful currency, this enabled the issuer of the bond (on 30 days notice) to designate a 'Redenomination Date' as long as that date fell on a Note payment date. The effect of the issuer giving such notice was that on the specified Redenomination Date, the [N]otes would be deemed to be redenominated in euros at the conversion rate established by the Council of the European Union, and coupons and interest would be re-issued or paid in euros."

The FTT Decision

7. Before the FTT, HMRC argued that the inclusion of a clause in the form either of Schedule A or that of Schedule B had the effect that the Bonds had a provision for conversion into, or redemption in, a currency other than sterling, so that in consequence of s 117(1)(b) TCGA each of the Bonds would fall outside the definition of a QCB. Mr Trigg's case was that neither Schedule A nor Schedule B comprised such a provision. His primary case in that regard was that, in circumstances in which either Schedule A or B became operative, the euro would not be a "currency other than sterling" on the basis that, purposively construed, "sterling" in s 117(1)(b) should be understood to mean the lawful currency of the United Kingdom. Mr Trigg argued in the alternative that, even if sterling was not to be construed in that way, neither Schedule A nor B provided for conversion into, or redemption in, euros, having regard to the legal process by which the euro would be adopted as the UK's lawful currency.

8. The FTT rejected Mr Trigg's primary case. It held, at [83], that the reference to sterling in s 117(1)(b) was to British pounds sterling, and not to the lawful currency of the UK from time to time. But the FTT went on to hold, first, at [99] to [100], that a purposive construction of s 117(2)(b) would include within the statutory disregard provisions for conversion into, as well as redemption in, the euro where, as the FTT found would follow from the terms on which the euro would be adopted as the UK's lawful currency, the effect of such conversion would be no more than to permit redemption in euros at the sterling:euro rate of exchange prevailing at the redemption date, and secondly (at [103]) that, having regard to that identified purpose of s 117(2)(b), the meaning of "currency other than sterling" in s 117(1)(b) necessarily imports the requirement that sterling continues to exist as a separate currency to that to which the Bonds are to be converted.

9. On that basis, the FTT found that neither Schedule A nor Schedule B was a provision for conversion or redemption into a currency other than sterling within s 117(1)(b), and that in any event the statutory disregard in s 117(2)(b) applied to the whole effect of those clauses. The answer to the question posed by the Reference was

therefore, in relation to both Schedule A and Schedule B, that the inclusion of a clause in either form did not prevent the Bonds from being QCBs.

This appeal

10. HMRC appeal the FTT Decision on two grounds. First, it is submitted that the FTT erred in law in its construction of s 117(2)(b). It is argued that, properly construed, s 117(2)(b) does not apply to disregard conversion clauses. Secondly, HMRC submit that the FTT erred in law in its construction of s 117(1)(b), arguing that there is no warrant for reading into that provision the words "if sterling still exists". Finally, HMRC argue more generally that what they characterise as the FTT's expansive approach to the construction of s 117 was an error of law; s 117, say HMRC, is prescriptive.

11. Mr Trigg supports the conclusions reached by the FTT in his favour, but repeats before this tribunal his primary argument that, in the context of the TCGA as a whole, and therefore for the purposes of s 117(1)(b), "sterling" must mean money in the sense of "the lawful currency of the UK from time to time" (and not pounds sterling), and that the expression "currency other than sterling" must mean currency which is not "money" (in other words, currency that is not lawful currency in the UK).

Purposive construction

12. As has recently been emphasised by the Supreme Court in *UBS AG v Revenue and Customs Commissioners, DB Group Services (UK) Ltd v Revenue and Customs Commissioners* [2016] UKSC 13 (the judgment in which was issued after conclusion of the hearing before us), the former distinction adopted by the courts between tax cases and others, including a literal adoption of tax statutes, was swept away by the House of Lords in *W T Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300. As the House of Lords explained in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, the modern approach to statutory construction is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, to give effect to that purpose.

13. The application of the approach of purposive construction has been observed most often in cases of tax avoidance. But it is a rule of construction of general application, and not therefore confined to such cases.

14. The move away from literal interpretation and to the purposive approach entails regard being had to the context and scheme of the relevant Act as a whole (*Ramsay*, at p 323; *BMBF*, at [29]). It should be assumed that a statutory provision has some purpose, but that purpose must be found in the words of the statute itself. The court must not infer a purpose without a proper foundation for doing so (*Astall v Revenue and Customs Commissioners* [2010] STC 137, at [44]).

15. When determining purpose, it is permissible to have regard to the background and context of the provisions at issue. Thus, in *UBS*, the Supreme Court had regard to

the historical perspective leading to the enactment of the statutory provisions in question which informed the purpose for which those provisions had been enacted.

16. The application of purposive construction does not mean that the literal meaning of the statutory language is to be ignored. It will often be – indeed it must be so in the vast majority of cases – that the purpose of a statutory provision which is discerned from the words of the statute will be the same as the literal meaning of those words. The will of Parliament finds its expression in the statutory language. The courts have identified certain types of statutory provision as less susceptible to a purposive construction that does not accord with the literal meaning. As Lewison J said in this tribunal in *Berry v Revenue and Customs Commissioners* [2011] STC 1057, in summarising the development of the *Ramsay* principle, at [31]:

> "(vi) … the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. (This, I think, is what Arden LJ meant in *Astall v Revenue and Customs Comrs* [2010] STC 137 at [34], 80 TC 22 at [34]. As Lord Hoffmann put it in an article on 'Tax Avoidance' ([2005] BTR 197): 'It is one thing to give the statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there': see *Mayes v Revenue and Customs Comrs* [2009] EWHC 2443 (Ch) at [30], [2010] STC 1 at [30].)"

17. Section 117 has fallen to be construed in a number of previous cases. In *Weston v Garnett* [2005] STC 1134, the question was whether certain loan notes failed to qualify as QCBs because they did not at all times represent a "normal commercial loan". That turned on the ability to exchange the loan notes for new loan notes which carried a right to be converted into ordinary shares of a particular company. The Court of Appeal held that the underlying loan, which the loan note secured, had been made on terms that it could be converted into shares, albeit by a series of steps. The holders of the loan notes had a present right to require conversion of the loan notes into shares. The loan notes were accordingly not QCBs.

18. The argument for the taxpayer that the loan note was not itself capable of being converted into shares was rejected. Lord Justice Chadwick said, at [28]:

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

> condition that it 'represents and has at all times represented a normal commercial loan'."

19. The emphasis in *Weston v Garnett* was thus on the language of s 117, and in particular on the distinction to be drawn between the use of "security" on the one hand and "loan" on the other.

20. In *Harding v Revenue and Customs Commissioners* [2008] STC 1965, the taxpayer exchanged shares in one company for loan notes issued to him by the acquiring company. Those loan notes contained an option for the holder to have the note redeemed in US or Canadian dollars, or German deutschmarks, at a defined exchange rate exercisable during the 10-day period following the giving of a redemption notice. That currency conversion option had the effect that the loan notes were not QCBs, such that the gain on the shares was rolled-over into the loan notes (the base cost of the loan notes being deemed to be that of the shares).

21. The taxpayer did not exercise the option, as a consequence of which it lapsed. He argued that, when they were redeemed, the loan notes were then QCBs, and as such exempt from CGT, because the lapse of the currency conversion option meant that the loan notes were no longer subject to a provision for redemption in a currency other than sterling.

22. On appeal by the taxpayer from the special commissioner, the High Court (Briggs J) dismissed the appeal. Before Briggs J it was common ground that the construction of s 117(1)(b) could be assisted by reference to the history of the relevant provisions, an understanding of their purpose, and a setting of s 117 in its context. In summarising the position, Briggs J referred to the judgment of Buxton LJ in *Weston v Garnett* in the Court of Appeal in which it had been explained, at [41] to [42], that the exemption for corporate bonds had been introduced to stimulate the British bond market; that explained the requirement that the bonds be denominated in sterling and not convertible into any other currency. Mr Justice Briggs then went on to say this (at [15] to [16]):

> "[15] By 1995 the requirement that, to qualify as a QCB, a security had to be listed, or issued by a company with other listed shares or securities, had been removed. It follows that the original purpose, identified by Buxton LJ, of stimulating the British bond market, and limiting the special treatment by way of exception to bonds genuinely traded in that market has been outgrown. None the less, the purpose of excluding loans that give the loan creditor an actual or potential interest in the debtor company or its performance remains, as does the exclusion of participation in anything other than sterling bonds, both denominated and redeemable as such. This follows from the preservation without significant amendment of what is now s 117(1)(a) and (b) from 1984 through to 1995 and beyond.
>
> [16] Mr Southern submitted that the obvious purpose of the exclusion of securities with provision for conversion into, or redemption in, a currency other than sterling was because Parliament consciously wished to ensure that forex gains and losses should remain liable to tax, whereas gains and losses merely incident to the making of normal

> commercial loans should not. To the extent that it matters, I am not inclined to accept this analysis. If the original purpose of what is now s 117(1)(b) was to only exclude from tax investments ordinarily obtainable in the British market so as to promote tax-efficient competition with gilts, then I see no reason why the extension of the same treatment to off-market bonds should, without any corresponding amendment to that sub-sub-section serve any different purpose. None the less, I accept that the practical effect of that sub-sub-section was to exclude securities incorporating forex risks and advantages from immunity from capital gains tax as QCBs."

23. The taxpayer's appeal to the Court of Appeal was also dismissed. In giving the leading judgment, Lawrence Collins LJ, with whom Richards LJ and Rix LJ agreed, first summarised, at [51], the undisputed principles of construction:

> "There was no real dispute on the basic principles of interpretation. The question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found, and the statutory provision should be given a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction answers to the statutory description: *Barclays Mercantile Bank Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51 at [32] and [36], [2005] STC 1 at [32] and [36], [2005] 1 AC 684. In particular, if a literal construction would lead to injustice or absurdity, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted: eg *IRC v Luke* 40 TC 630 at 646–647, [1963] AC 557 at 577; *Mangin v IRC* [1971] 1 All ER 179 at 182, [1971] AC 739 at 746; and *Jenks v Dickinson (Inspector of Taxes)* [1997] STC 853, 69 TC 458. But there may be cases in which the anomaly cannot be avoided by any legitimate process of interpretation: eg *Revenue and Customs Comrs v Bank of Ireland Britain Holdings Ltd* [2008] EWCA Civ 58 at [44], [2008] STC 398 at [44]."

24. It was held that the answer did not depend, as it had done in *Weston v Garnett*, on the distinction between the debt and the security. The answer lay in the plain meaning of the words in s 117(1)(b). The key to the interpretation of s 117(1)(b) was the word "provision". It was equally true at the date of redemption, even though the conversion right had ceased to be exercisable by that time, as it was at the date of issue, when the right was capable of exercise, that provision was made for conversion. As Lawrence Collins LJ put it, at [56]: "In my judgment the word 'provision' is a reference to the terms of the agreement, and not simply to subsisting rights." There was no contrast between a literal construction and the purpose of the legislation, nor any need for a special construction to avoid anomalies.

25. A similar argument arose in *Klincke v Revenue and Customs Commissioners* [2010] STC 2032. The difference was that, whereas in *Harding* the currency conversion right had simply lapsed, in *Klincke* it had been cancelled by an extraordinary resolution modifying the terms of the loan note instrument. In those circumstances, the Upper Tribunal (Newey J and Judge Gammie QC) held, at [25], that there was a critical difference between a note that had been issued on terms that

provided for redemption in foreign currency but where that term had lapsed and one where the terms had been amended to excise the foreign currency redemption option. In the former case it was unlikely that Parliament had intended that the status of a note (and chargeability to or exemption from CGT) would depend on a term being currently or prospectively operative or as having lapsed. On the other hand, in the latter case, the note would, in contrast to *Harding*, no longer contain the relevant provision.

26. That conclusion did not allow the taxpayer in *Klincke* to succeed. The Upper Tribunal went on to hold that, according to the ordinary meaning of "conversion" in s 132 TCGA, which amongst other things included a "change in character, nature, form or function", the excision of the currency conversion provision was such a conversion, with the result that s 116 TCGA applied on that conversion and operated to identify and "freeze" a chargeable gain to be brought into account on disposal of the notes.

27. We note that, in considering the arguments on the construction of s 117(1)(b), the Upper Tribunal in *Klincke* accepted that there was a difference in language between that provision and s 117(1)(a), which requires that the debt on the relevant security represents *at all times* a normal commercial loan. The absence of those words in s 117(1)(b) was significant, and the tribunal declined to construe that provision as if it had read "no provision is [or ever has been] …". As the tribunal described the position at [24], the debt in question must always have satisfied the relevant condition (that of being a normal commercial loan), but the security for the debt is to be determined for what it is (namely does it include provision for conversion into, or redemption in, a currency other than sterling, to the extent not disregarded by s 117(2)(b)) only at the relevant time. There was a crucial difference in the language employed in the adjacent provisions.

28. A further variation on the same theme was encountered in *Blumenthal v Revenue and Customs Commissioners* [2012] SFTD 1264, in the First-tier Tribunal (Judge Brannan and Ms Redston). There loan notes were issued in exchange for certain shares. The loan notes were structured at the outset so as not to be QCBs. This was achieved by the well-known expedient of providing an option for redemption in a foreign currency which was exercisable by reference to the foreign exchange rate a few days before (but not on) redemption. By that means the statutory disregard in s 117(2)(b) did not apply, and the notes could not therefore be QCBs. The gain on the shares was rolled-over into the loan notes.

29. Subsequently, the terms of the loan notes were varied by deeds of variation. The effect was that, once a relevant event had occurred, the option to redeem the notes in foreign currency (US dollars) was altered so as not to apply at the rate of exchange applicable three days before redemption but at the rate of exchange applicable at the time of redemption. The tribunal, following *Klincke*, found that the foreign currency conversion option where the exchange rate was calculated three days before redemption had been deleted and there had been substituted an exchange rate calculated on redemption. From that time the loan notes owned by relevant holder did not contain a provision for redemption in a currency other than sterling except one that was to be disregarded.

30. That was not the end of the argument on s 117(1)(b). HMRC had also argued that the *Ramsay* principle had the effect that the deeds of variation failed to convert the loan notes from non-QCBs into QCBs.

31. The tribunal rejected that argument so far as it related to the construction of s 117(1)(b) and s 117(2)(b). The tribunal said (at [101]):

> "In our view, the provisions of s 117(1)(b) and (2)(b) are prescriptive and leave little scope for purposive interpretation. They set out in a mechanical fashion the conditions to be satisfied if a debt security is to qualify as a QCB. Furthermore, we do not consider that the purpose of the appellant is relevant to the correct interpretation of this provision. If a security contains a foreign currency conversion option at a rate of exchange prevailing at redemption then the effect of s 117(2)(b) is mandatory: the security will (assuming the other conditions are satisfied) constitute a QCB. As Proudman J observed in *Mayes v Revenue and Customs Comrs* in the High Court [2009] EWHC 2443 (Ch), [2010] STC 1 (at [47]) (in a judgment affirmed by the Court of Appeal [2011] EWCA Civ 407, [2011] STC 1269) some legislation can adopt 'a formulaic and prescriptive approach.' We consider s 117(1)(b) and (2)(b) to be an illustration of that principle."

32. The tribunal thus concluded that the deeds of variation had been effective to convert the loan notes from non-QCBs into QCBs. Although the taxpayer was ultimately unsuccessful, that was on the basis of a purposive construction of ss 116(10) and 272 TCGA as requiring an artificial temporary depression of value to be ignored. The tribunal saw no incongruity in the different conclusions it had reached in respect of neighbouring provisions in the same Act. As it observed at [116], and we respectfully agree, "each statutory provision must be interpreted on its own merits, but in context".

33. We do not consider that it is possible to identify a principle that merely because legislation is closely-articulated, or prescriptive in nature, it is as a general matter somehow less susceptible to a purposive construction. That may be the conclusion that follows from construing a particular provision purposively, but it is not in itself an inhibition on such construction. There may, as Lewison J described in *Berry*, be less room for purposive construction to give a different answer from a literal construction, but that can only be discerned by applying a purposive construction. The principle of purposive construction applies to all legislation, whatever its nature or character. The task for the courts and tribunals, in all cases, is to construe the statutory language of a particular provision in its context and having regard to the scheme of the legislation as a whole in order to ascertain and give effect to its purpose. Even within closely-articulated or prescriptive legislation there may be individual provisions which fall to be construed purposively in a way which would be different from a literal construction. The judgment of the Supreme Court in *UBS* is the most recent example.

34. That is, however, no more than an exercise of construction. Whatever underlying purpose may be identified, it is not the task of the courts to import a different meaning to the provision in question than can properly be attributed to it,

merely because of a perception that such a meaning would better suit the purpose so identified. That, to adopt the words of Lord Hoffmann in his British Tax Review article in 2005, referred to by Lewison J in *Berry*, would be an exercise in rectification and not construction.

5 35. There is also, in our judgment, a distinction between the policy behind, or the reason for, the inclusion of a particular provision in the legislative scheme and the purpose of that provision. Parliament might wish to achieve a particular result as a general matter, and legislate for that reason or in pursuit of that policy. But if the statutory language adopted by Parliament displays a narrower, or more focused, 10 purpose than the more general underlying policy or reason, it is no part of an exercise in purposive construction to give effect to a perceived wider outcome than can properly be borne by the statutory language.

The meaning of "sterling" in s 117(1)(b)

36. With those principles in mind, we turn to the substantive issues in this appeal. 15 We begin, as did the FTT, with Mr Trigg's case that the reference to "sterling" in s 117(1)(b) TCGA is not a reference to pounds sterling, but to money in the sense of the lawful currency of the UK from time to time. That was an argument which, as we have seen, the FTT did not accept.

37. In support of this argument, Mr Gammie submitted that "sterling" is not an asset 20 for the purposes of the TCGA, but essentially a unit of account. It is the measure by reference to which gains and losses arising on the disposals of assets are computed. A quantity of sterling currency cannot increase or decrease over time so as to give rise to a chargeable gain or allowable loss. It is "money", namely the lawful currency of the UK.

25 38. We can deal with this submission quite shortly, as it was not the subject of any dispute. We accept that sterling as such is not an asset for CGT purposes. That is clear from s 21(1)(b) TCGA, which (subject to express provision to the contrary) excepts sterling from inclusion in the term "currency" as an asset. Prior to amendment by the Finance Act 2006, s 21(1)(b) had referred to "currency other than 30 sterling" as assets for the purposes of TCGA; that had been the case since the inception of CGT in 1965.

39. It is accepted too that sterling is used as the unit of measurement for the purpose of CGT. As Millett LJ explained it in *Goodbrand v Loffland Brothers North Sea Inc* [1988] STC 930, at p 932:

35 > "The legislation does not in terms prescribe that the tax computation must be carried out in sterling, but it has been held that sterling is 'the only permissible unit of account' for capital gains tax purposes (see *Bentley v Pike (Inspector of Taxes)* [1981] STC 360 at 364 and *Capcount Trading v Evans (Inspector of Taxes)* [1993] STC 11 at 24).
40 > For the purposes of capital gains tax, foreign currency is not 'money' but 'money's worth'"

40. As Mr Gammie submitted, for CGT purposes, foreign currency (or currency other than sterling) is an asset the value of which must be computed at the relevant time or times in sterling. Currency other than sterling is, within the TCGA, not money, but money's worth.

5 41. The dispute is not about the place in the scheme of TCGA of sterling and a currency other than sterling, but on the impact of those accepted principles on the construction of both "sterling" and "currency other than sterling" in s 117(1)(b). Mr Gammie submitted that the function and purpose of the exclusion from the definition of a QCB of a normal commercial loan security that is expressed in sterling but where
10 either the amount of sterling is determined by reference to the value of any other currency or asset (s 117(2)(a)) or is convertible or redeemable in a currency other than sterling (s 117(1)(b)) is clear: these are situations in which a gain or loss attributable to the fluctuation of currencies (or other assets) relative to sterling as the unit by reference to which gains and losses are measured can occur. It is not the purpose of
15 Parliament to exempt gains on bonds containing such provisions.

42. We accept that this is so. We also accept, as Mr Gammie submitted, that the disregard in s 117(2)(b) for redemption in currency other than sterling at the rate of exchange prevailing at redemption (which would not give rise to any currency gain or loss) supports this analysis.

20 43. We do not, however, accept that in the TCGA, and in particular in s 117, the word "sterling", whether on its own or as part of the expression "currency other than sterling" can have any meaning other than the existing lawful currency of the UK, that is pounds sterling. Whilst it is correct that Parliament intended that the lawful currency of the UK should not be an asset for CGT purposes, but should be the unit of
25 measurement or account, it legislated to give effect to that intention by referring to what was, and is, that lawful currency, namely sterling, and not by reference to any other currency that might, at some future time, become that lawful currency. Contrary to Mr Gammie's submission, in the context of the TCGA "sterling" does not "connote the UK's lawful currency" or its money; it is simply because sterling is that lawful
30 currency that Parliament has legislated by reference to pounds sterling. If Parliament had wished to refer to any currency other than the pound sterling which might become the lawful currency of the UK it would have done so by the use of language appropriate to that aim. But it did not do so.

44. No amount of purposive construction can result in sterling being given any
35 different meaning in this context. We do not consider that the presumption that Parliament intends the court to apply a construction that continually updates the wording of an Act to allow for changes since the Act was initially framed can have any application to an expression that has a clear present meaning and which does not contemplate a change of lawful currency.

40 45. We accept that as a general principle statutes are to be interpreted as "always speaking statutes". Mr Gammie referred us to the opinion of Lord Steyn in *McCarten Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, at p 296:

> "Unless they reveal a contrary intention all statutes are to be interpreted as "always speaking statutes". This principle was stated and explained in *R v Ireland* [1998] AC 147, 158d-g. There are at least two strands covered by this principle. The first is that courts must interpret and apply a statute to the world as it exists today. That is the basis of the decision in the Ireland case where "bodily harm" in a Victorian statute was held to cover psychiatric injury. Equally important is the second strand, namely that the statute must be interpreted in the light of the legal system as it exists today. In the classic work of Sir Rupert Cross, *Statutory Interpretation*, 3rd ed (1995), pp 51-52, the position is explained as follows:
>
> '… the ordinary legal interpreter of today … expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required.'"

46. Those comments of Lord Steyn were made in the context of an argument whether a press conference was a "public meeting" within the meaning of s 7 of the Defamation Act (Northern Ireland) 1955 and paragraph 9 of the Schedule to that Act. It had been argued that, given the historical genesis of those provisions, press conferences could not be included within the statutory term as the phenomenon of such conferences did not exist at the inception of the legislation. That is very far from the position in this case. We can understand that, if the legislation had referred to "the lawful currency of the UK", it would not have been possible for it to be argued, in circumstances where the UK had adopted a new currency, unknown at the time the legislation was originally enacted, that the expression could not include that newly-adopted currency. But there is no such argument in this case. There is nothing in the principle of the "always speaking statute" that can result in sterling being construed as anything other than pounds sterling.

47. Mr Gammie sought assistance from a number of authorities as demonstrating that "sterling" can have more than one meaning. In *Adelaide Electric Supply Company Ltd v Prudential Assurance Company Ltd* [1934] AC 123, the whole conduct and control of an English company's business was transferred to Australia by special resolution. The resolution also provided for payment of dividends from Australia. The question arose as to whether dividends formerly paid in pounds sterling out of England, should be paid in pounds sterling or in Australian pounds. It was held, as a matter of construction of the contract, that the currency of payment was determined by the lawful currency of the place of payment, namely the Australian pound. *Adelaide Electric Supply* was applied by the Privy Council in *Mayor, Councillors and Citizens of the City of Auckland and another v Alliance Assurance Company Ltd* [1937] AC 587, but to the opposite effect. It was argued in that case that under the New Zealand statute payment on the debentures could be made only in pounds, and that "pounds" there connoted New Zealand pounds. The Privy Council did not accept that argument. It found that the "pound" contemplated by the New Zealand statute meant the common unit of account in Great Britain and the British empire, and that the currency which it connoted was determined by the place of payment. As the place of payment was London, the currency of payment was the English currency.

48. Those cases do not assist Mr Gammie. Although they illustrate that a reference to "pounds", whether in a contract or legislation, may in the particular context of the use of the pound in the UK and other parts of what was the British empire, and depending on the circumstances, be construed as a reference either to the pound sterling of the UK or to the pound that describes the currency of another territory, that can have no relevance to the position in a purely domestic context. It cannot affect the construction of "sterling" in relation to a possible change of currency from the pound sterling to the euro or any other currency, even given that such a change would result in that other currency becoming the lawful currency of the UK.

49. In *De Bueger v J Ballantyne and Company Ltd* [1938] AC 452, the use of the term "sterling" in a contract was held by the Privy Council to be decisive, and to oust the principles established in the *Adelaide Electric Supply* case. There, under a contract made in England, the appellant was employed in New Zealand at an annual salary of "seven hundred pounds sterling". The Privy Council held that "sterling" had a natural meaning of "British sterling" and nothing else. There was a contrast between sterling, in the sense of British currency, and "Dominion or Colonial currency". That narrower meaning tends against Mr Gammie's argument. It cannot be supposed that if "sterling" is used to distinguish currencies that would otherwise be described as "pounds", it would be used in a UK statute to mean anything other than the pound sterling and could not be construed as extending to any other currency, including one that might at some future time become the lawful currency of the UK.

50. On the other hand, in a different context, it was held in *Bonython and others v Commonwealth of Australia* [1951] AC 201 that the use of the term "pounds sterling" in debenture stock issued by the Government of Queensland in 1895 did not refer to the currency of England rather than that of Queensland. The Government of a self-governing country, using the terms appropriate to its own monetary system, had to be presumed to refer to that system whether or not those terms were apt to refer also to another system. Although in that context "sterling" had a different meaning from "British sterling", it nonetheless had a meaning educated by the domestic system under which the debenture was issued. It is of no assistance to an argument that in a UK statute "sterling" should mean anything other than "pounds sterling" as currently constitutes the UK currency.

51. We conclude therefore that "sterling" in s 117(1)(b) TCGA cannot be construed to mean "the lawful currency of the UK from time to time". We agree in that respect with the FTT.

The scope of the s 117(2)(b) disregard

52. We turn next to the FTT's decision as to the scope of the disregard in s 117(2)(b) in respect of "redemption in a currency other than sterling but at the rate of exchange prevailing at redemption". We do so because the FTT sought to answer the question of the meaning of "currency other than sterling" by reference to the application of s 117(2)(b) to the Bonds.

53. Section 117(2)(b) applies for the purposes of s 117(1)(b). Accordingly, in assessing whether, in a security, there is provision for conversion into, or redemption in, a currency other than sterling, it is permitted to disregard a provision for redemption in such a currency, so long as the rate of exchange applied is that ruling at the date of redemption. The purpose of s 117(2)(b) is accordingly to apply a limited exception to the otherwise wider provision of s 117(1)(b).

54. The evident reason for the statutory disregard is that a redemption in foreign currency but at the rate of exchange prevailing at redemption is tantamount to redemption in sterling. We accept that the limitation of the exemption to sterling bonds, and the exclusion of bonds convertible into another currency, is because sterling bonds will not give rise to currency gains and losses. But we do not agree with the FTT that this enables s 117(2)(b) to be purposively construed so as to apply to conversions as well as redemptions.

55. Whether or not there are other circumstances in which currency gains and losses might not arise, the purpose of Parliament in enacting s 117(2)(b) was to enable provisions for conversion or redemption that would otherwise fall within s 117(1)(b) to be disregarded only to the limited extent which Parliament provided for. That was confined to provisions for redemption at the exchange rate at redemption. We accept that if a provision, even one labelled as a conversion, is in substance nothing more than such a provision for redemption at the exchange rate on redemption, the effect of such a redemption being disregarded under s 117(2)(b) would be that the security would be treated as containing no such provision under s 117(1)(b). But s 117(2)(b) does not refer to conversions, and in our judgment it cannot be construed purposively so as to enable provisions for conversions which go beyond mere provisions for redemption of that nature to be disregarded. Parliament cannot have intended s 117(2)(b) to include such conversions; its choice of different language in s 117(1)(b) and s 117(2)(b) cannot be ignored, whatever principle of construction is applied.

56. We accordingly disagree with the conclusion of the FTT, at [100] of the FTT Decision, that s 117(2)(b) includes a provision for conversion if the rate of exchange is identical to the rate of exchange prevailing at redemption. We do not share the view taken by the FTT that other effects of conversion, notably the change in the currency in which interest is payable, are immaterial. Nor do we accept the argument raised by Mr Gammie in oral submission that redemption in s 117(2)(b) could be construed to include redemption of interest coupons. The purpose of the legislation was, first, to exclude from exemption securities which contained provision for conversion or redemption into foreign currency except in so far as such provision was in substance no more than redemption in such currency at the exchange rate on redemption. Any provision for conversion going beyond that was intended to result in the exemption being inapplicable.

57. The purpose of s 117 TCGA as a whole is to set out what is, and what is not, a "qualifying corporate bond", and for purposes other than corporation tax (to which separate rules apply) to do so by means of a series of what may be described as prescriptive provisions. A "qualifying corporate bond" is a purely statutory construct identifiable entirely by the legislative terms which define it. The plain legislative

intent is to draw a clear, and readily understandable, dividing line between those debt securities which are exempt from CGT and those which are chargeable. That will inevitably lead to some cases where there is a difference in treatment even though a similar economic result may obtain. That is nothing more than a normal incident of the drafting of statutory conditions defining a particular statutory concept that has no independent existence outside the terms set by the legislation. That outcome is, with respect to the FTT which thought otherwise, neither illogical nor absurd. It is not for the tribunal to fill any perceived gap, or to seek to equate cases on one side of the dividing line with similar cases falling on the other side by reason of similarity in effect or economic equivalence. Purposive construction cannot go so far. To construe such legislative conditions in that way would risk undermining rather than applying the distinction determined upon by Parliament according to the plain words of the legislation.

Currency other than sterling

58. The FTT found, at [103], that having regard to the purpose which it had identified in Parliament having enacted s 117(2)(b), the expression "currency other than sterling" in s 117(1)(b) necessarily imported the requirement that sterling continued to exist as a separate currency to that to which the Bonds were converted. The FTT relied once more on the perceived illogicality of securities not subject to provisions such as those in Schedule A or B, but which would necessarily be converted to euros were the UK to adopt the euro as its currency, being accepted as exempt, and HMRC's argument in this case that the Bonds were not exempt.

59. We do not agree with the FTT. We consider that the FTT was wrong to construe the expression "currency other than sterling" as requiring sterling to exist at the relevant time as a separate currency. There is no warrant for such a construction, purposive or otherwise, in the face of the plain words of s 117(1)(b). Once it is accepted, as the FTT did and we too have found, that the reference to "sterling" is to the pound sterling, it necessarily follows that a currency other than sterling is any currency which is not the pound sterling. That does not depend on whether the pound sterling exists at the relevant time or not.

60. The distinction between "sterling" and "currency other than sterling" in s 117(1)(b) cannot be construed, as Mr Gammie argued, as a distinction between money and money's worth or as between something which is not an asset for CGT purposes and something which is. It is the case that sterling is money and is not an asset, and that currency other than sterling is money's worth and is an asset, but that is simply the treatment given to those descriptions of property by the TCGA. It does not define either "sterling" or "currency other than sterling" in such terms, and those terms cannot be construed in s 117(1)(b) as if it did.

Application of s 117 to the Bonds

61. We now turn to the application of s 117 to the Bonds at issue in this case. The questions we have to address are whether Schedule A and Schedule B are provisions

for "conversion", and if so whether they are provisions for conversion into a currency other than sterling.

62. Each of Schedule A and B is a provision. Applying *Harding*, it is immaterial that such a provision is contingent and accordingly incapable at any relevant time of having effect. That follows from *Harding*; it is not necessary that there be any subsisting right under the provision. Although Mr Gammie was disposed to argue, in his skeleton argument if not in his oral submissions, that *Harding* should be distinguished in that it concerned a clause that had been operative but had lapsed but remained one of the terms of the bond, and that the present case was one in which Schedules A and B were inoperative and could become operative only in the specified circumstances, we do not accept that argument. It is the existence of the condition which, if it were to be operative, would be a provision for conversion, which is the essential feature to be identified for the purposes of s 117(1)(b).

63. That does not, however, answer the question whether the provisions are for "conversion". We have alluded earlier to the meaning of conversion for this purpose, as found in *Klincke*, as including any change in the character, nature, form or function of the security. If the conditions under which Schedule A or B were to become operative were such that there could be no such change, the provisions would not be provisions for conversion. Although *Harding* emphasises one must have regard to the terms of the security, that does not displace the requirement that it must be possible to identify a provision which provides for conversion even if that provision has lapsed or is otherwise not operative as a subsisting right.

64. That leads to a consideration of the terms on which Schedules A and B were capable of operating. The question is whether, at the time each provision could become operative, the Bonds would have been converted by operation of law into euro denominated securities (Schedule B) or securities denominated in the then lawful currency of the UK (Schedule A). In that event, if no change of substance would occur under the terms of those Schedules, we would take the view that the provisions would not be provisions *for conversion*.

65. We do not consider that it is possible to reach that conclusion in this case. Although the FTT, at [16] to [22], described the EU law with respect to a Member State joining the currency union, those measures do not, as the FTT observed, apply to the UK. Nor is it certain that, were the UK to give up its derogation in this regard, the EU rules which would apply would be those currently in force. Accordingly, although it is possible to postulate a possible framework under which the euro would be adopted, it is not possible, and has at no time during the term of the Bonds been possible, to be satisfied that, in the circumstances that would obtain at the material time, the effect of the application of Schedule A or B would not be a conversion of the Bonds. Indeed, we share the view of the FTT, at [63], that under the EU Regulations that are currently in force the adoption of the euro would not necessarily lead to immediate redenomination of the Bonds, because there could be a transitional period before such redenomination would take effect under the EU Regulations, and that the application of Schedule A or B in that period would amount to a conversion. Furthermore, in the case of Schedule A, even though the possibility must be regarded

as even more remote than the UK adopting the euro, the conversion mechanics are not confined to the euro, and there is no basis for postulating a framework for adoption of any other currency.

66. Nor does the fact that, in the case of each of the Bonds, references to sterling in the prospectus or offering circular were expressed to be references to the lawful currency for the time being of the UK alter the position. The putative effect of Schedules A and B would nonetheless have been to change the character, nature, form or function of the Bonds, and thus to constitute conversion of the Bonds.

67. We conclude, therefore, that each of Schedule A and Schedule B is a provision for conversion.

68. The next question is whether, given that the Schedules are provisions for conversion, they are provisions for conversion into a currency other than sterling. We have decided that the reference to sterling in s 117(1)(b) is to the pound sterling, and that consequently a currency other than sterling is any currency which is not the pound sterling (whether or not the pound sterling exists at the relevant time). That would include the euro and, in the case of Schedule A, any other currency that might become the lawful currency of the UK. It is only if it could be shown that the only possible conversion would be conversion at a time when the euro (or other currency) was the *same* currency as sterling that the provisions, although provisions for conversion into a currency which is not itself sterling, would not be provisions for conversion into a currency *other than* sterling.

69. It is not possible to be satisfied that this is the case. Although recital (13) of Council Regulation (EC) No 974/98 provides that the euro unit, which will become the currency of the participating Member State from the date of adoption of the euro, and the national currency unit of the participating Member State are to be "units of the *same* currency", it cannot be said with certainty, and could not at any time during the term of the Bonds be said, that such would be the case, or the case at all material times, were the UK to adopt the euro as its currency. The same is of course true for any other currency that the UK might adopt.

70. The terms of Schedule A and Schedule B apply irrespective of whether sterling will be, or will be treated as, the same currency as the euro (or any other currency the UK might adopt as its lawful currency). Accordingly, each of Schedule A and Schedule B must be regarded as provisions made in respect of the Bonds for conversion into a currency other than sterling. Although redemption in such a currency at the rate of exchange prevailing at redemption is to be ignored under s 117(2)(b), the provisions for conversion into euros (or another currency) in Schedules A and B go further than that and such further provision cannot be disregarded. It follows that the Bonds are not QCBs.

71. The answer therefore to the question on the Reference is that the inclusion in the Bonds (at the time of their issue) of a clause in the form set out in Schedule A or B does prevent the Bonds from being qualifying corporate bonds by virtue of section 117(1)(b) TCGA.

Decision

72. HMRC's appeal is allowed.

5

MRS JUSTICE ASPLIN

UPPER TRIBUNAL JUDGE ROGER BERNER

10

RELEASE DATE: 12 April 2016

APPENDIX

The relevant clauses

Schedule A

Redenomination in Euro

(i) If at any time there is a change in the currency of the United Kingdom such that the Bank of England recognises a different currency or currency unit or more than one currency or currency unit as the lawful currency of the United Kingdom, then references in, and obligations arising under, the Notes outstanding at the time of any such change and which are expressed in sterling will be converted into, and/or any amount becoming payable under the Notes thereafter as specified in these Conditions will be paid in, the currency or currency unit of the United Kingdom, and in the manner designated by the Principal Paying Agent.

Any such conversion will be made at the official rate of exchange recognised for that purpose by the Bank of England.

(ii) Where such a change in currency occurs, the Global Notes in respect of the Notes then outstanding and these Conditions in respect of the Notes will be amended in the manner agreed by the Issuer and the Note Trustee so as to reflect that change and, so far as practicable, to place the Issuer, the Note Trustee and the Noteholders in the same position each would have been in had no change in currency occurred (such amendments to include, without limitation, changes required to reflect any modification to business day or other conventions arising in connection with such change in currency). All amendments made pursuant to this Condition 6(g) will be binding upon holders of such Notes.

(iii) Notification of the amendments made to the Notes pursuant to this Condition 6(g) will be made to the Noteholders in accordance with Condition 14 which will state, among other things, the date on which such amendments are to take or took effect, as the case may be.

Schedule B

[*Definitions*]

"Euro Commencement Date" means the date (if any) on which the United Kingdom becomes a Participating Member State;

"Participating Member State" means at any time any member state of the European Union that has adopted the euro as its lawful currency in accordance with the Treaty;

"Redenomination Date" means the Note Payment Date falling on or after the Euro Commencement Date on which the Issuer intends to redenominate the currency of any of the Notes into euro (if any);

"Treaty" means the Treaty establishing the European Union, as amended by the Treaty on European Union and the Treaty of Amsterdam;

…

Redenomination

(a) *Notice of Redenomination*

The Issuer may, after the date (if any) on which the United Kingdom becomes a Participating Member State, without the consent of the Noteholders, the Couponholders and the Receiptholders on giving at least thirty (30) days prior notice to the Noteholders and the Paying Agents, designate a Note Payment Date as the Redenomination Date.

(b) *Redenomination*

With effect from the Redenomination Date:

(i) the Notes in each class shall be deemed to be redenominated into euro with the Principal Amount Outstanding of each Note in each class being equal to the Principal Amount Outstanding of that Bond in such class in Sterling, converted into euro at the rate for conversion of Sterling into euro established by the Council of the European Union under the Treaty (including compliance with rules relating to rounding in accordance with European Union regulations); and

(ii) notwithstanding Condition 18(b)(i) (*Redenomination*), if the Issuer determines, with the agreement of the Trustee, that the then market practice in respect of the redenomination into euro of internationally offered securities is different from that specified above, such provision shall be deemed to be amended so as to comply with such market practice and the Issuer shall promptly notify the Noteholders, and the Couponholders, the Receiptholders, the Stock Exchange, the Paying Agents and the Agent Bank of such deemed amendments in accordance with Condition 17 (*Notices to Noteholders*).

(c) *Notice of Redenomination Date*

The Issuer will notify the Noteholders, Couponholders and Receiptholders of the intended Redenomination Date in accordance with Condition 17 (*Notices to Noteholders*).

(d) *Effect of Redenomination*

With effect from the Redenomination Date:

(i) all unmatured Coupons and Receipts denominated in Sterling (whether or not attached to the Notes) will become void and no payments will be made in respect of such Coupons and Receipts;

(ii) the payment obligations contained in all Notes denominated in Sterling will become void but all other obligations of the Issue thereunder (including the obligation to exchange such Notes in accordance with this Condition 18 (*Redenomination*)) shall remain in full force and effect;

(iii) new Notes, Coupons and Receipts denominated in euro will be issued in exchange for Notes, Coupons and Receipts denominated in Sterling in such manner as the Principal Paying Agent may specify and as shall be notified to the Noteholders in accordance with Condition 17 (*Notices to Noteholders*); and

(iv) all payments in respect of the Notes (other than, unless the Redenomination Date is on or after such date as Sterling ceases to be a sub-division of the euro, payments of interest in respect of periods commencing before the Redenomination Date) will be made solely in euro by cheque drawn on, or by credit or transfer to a euro account (or any other account to which euro may be credited or transferred) maintained by the payee with a bank in the principal financial centre of any Participating Member State.