UT Neutral citation number: **[2024] UKUT 00168 (TCC)**

UT (Tax & Chancery) Case Number: **UT-2023-000031**

Upper Tribunal
(Tax and Chancery Chamber)

TAX AVOIDANCE – INCOME TAX – loss determination on disposal of gilt strips – paragraph 14A Schedule 13 Finance Act 1996 – grant of option to trustee followed by assignment of option to a third party purchaser – payments made by purchaser to trustee for assignment of option to purchase and to taxpayer for exercise of the option - whether the FTT erred in including the amount paid by the purchaser to the trustee as a person other than the transferor as part of the 'amount payable on the transfer' under para 14A(3)(b) – appeal dismissed

Hearing venue: The Rolls Building
London EC4A 1NL

Heard on: 12-13 March 2024
Judgment on 12 June 2024

Before

JUDGE RUPERT JONES
JUDGE ASHLEY GREENBANK

Between

TIMOTHY WATTS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

<u>Representation</u>:

For the Appellant: Aparna Nathan KC and Colm Kelly, Counsel, instructed by Anthony Collins solicitors

For the Respondent: Jonathan Davey KC and Joshua Carey, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. Mr Watts ('the Appellant') appeals the decision of the First-tier Tribunal ('the FTT') dated 7 November 2022 ('the Decision') released as [2022] UKFTT 408 (TC). References in square brackets [] are to paragraphs in the Decision of the FTT unless the context requires otherwise.

2. While allowing the appeal in small part, the FTT substantially rejected the Appellant's grounds for appealing a closure notice and amendment to his tax return issued by HMRC for the 2003-2004 tax year (the '2004 Return'). In the 2004 Return, the Appellant made a claim for income tax losses sustained in consequence of his purchase and sale of gilt strips. The claim for loss relief was made pursuant to paragraph 14A, Schedule 13 to the Finance Act 1996 ('FA 1996') as was then in force. HMRC denied the claim to a purported loss of £1,349,600 in the closure notice. The FTT upheld HMRC's denial of the Appellant's loss relief claim finding that the scheme did not work. It held that the quantum of loss claimed in the 2004 Return was to be reduced by over 99%, from £1,349,600 to £6,300 ([178]).

3. In summary, the FTT found the scheme involved the following. The Appellant purchased some gilt strips for £1.5 million. He granted an option to purchase the gilt strips to a trust of which he was a life tenant and beneficiary (for which he the trust paid just under £1.34 million) with an exercise price of £150,400. The trustee assigned the option to Investec Bank (UK) Ltd ('Investec') for a price of £1,346,200. Investec exercised the option and paid the Appellant £150,400 (the exercise price) to purchase the gilt strips. The net result of all the composite transactions, the outcome of which was pre-planned and by which the Appellant was repaid around £1.489 million in total, was that the Appellant lost only a few thousand pounds in transferring the option to purchase the gilt strips to the trustee and the exercise of the option to Investec.

4. The key question for the FTT, as it is for us, is whether and to what extent the Appellant had sustained a loss for the purposes of paragraph 14A. This requires calculating the difference between 'the amount paid by [the Appellant]' for the gilt strips of £1.5 million and 'the amount payable on the transfer' of the strips. Is 'the amount payable on the transfer', only the £150,400 Investec paid to the Appellant for the exercise of the option to purchase them or does it also include the £1.347 million Investec paid to the trustee for the assignment of the option? If it includes both payments, as the FTT found, then the loss on which the Appellant can claim tax relief is the loss of a few thousand pounds. The FTT found that it is to be calculated by reference to the £1.5 million the Appellant paid for the gilt strips minus the total of £1.497 million Investec paid to the trustee and Appellant respectively for the assignment and exercise of the option to purchase the strips.

5. In large part therefore, the appeal to the Upper Tribunal turns on the proper construction of the phrase 'the amount payable on the transfer' within paragraph 14A(3)(b). The FTT found the phrase should be construed to include both payments made by Investec to the trustee and to the Appellant which enabled it to acquire the gilt strips. The Appellant submits that the FTT erred and a proper construction only captures Investec's payment of £150,400 to the Appellant for the exercise of the option to purchase the strips because that was the only amount paid or payable for the transfer of an interest in the strips. Therefore, the Appellant submits that the true loss claimable is the sum of £1,349,600.

Grounds of Appeal

6. The Appellant appeals to the Upper Tribunal ('UT') on the following four grounds for which he was granted permission to appeal by the FTT and UT:

   Ground 1 – the FTT erred in concluding (i) that *Campbell v IRC* [2004] STC (SCD) 396 ('*Campbell*') was central to the Appellant's case ([112]), (ii) that *Campbell* was the authority most relied upon by the Appellant ([170]), and (iii) that the dispute between the parties in their construction of the meaning of "loss from the discount on a strip" under sub-paragraph 14A(1) Schedule 13 of the Finance Act 1996 ("FA 1996") exemplified the commercial/legal dichotomy in *Campbell* ([157]).

   Ground 2 – the FTT erred in concluding that it was bound by *Berry v HMRC* [2011] STC 1057 ('*Berry*') ([157]) given that the approach of Lewison J (as he then was) in *Berry* was inconsistent with the correct approach to statutory construction explained in *UBS*.

   Ground 3 – the FTT erred in concluding that "the amount payable on the transfer" as found in paragraph 14A(3) Schedule 13 FA 1996 was a commercial concept ([166] and [171]), with "transfer" to be given a wide practical meaning ([167(1)]).

   Ground 4 – the FTT erred in rejecting the relevance of the extra statutory materials on which the Appellant relied as an aid to statutory construction and, in particular, in seemingly relying on *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1WLR 896 in so doing ([176]).

Factual findings of the FTT

7. We have set out below our summary of the facts as found by the FTT. They are not in dispute.

8. In 2003, the Appellant was introduced to a partner in Grant Thornton who explained to him that the government was having difficulty selling sufficient gilts to cover its expenditure and marketed to the Appellant arrangements which involved the Appellant purchasing gilt strips with borrowed money ([8(4)]). Grant Thornton undertook to advise the Appellant ([19]) and took a fee of £75,000 plus VAT ([20] and [61]).

9. The structure of the scheme was proposed to the Appellant in documents described in the Decision as follows ([22]):

   22. The engagement letter required it to be read with the accompanying document entitled 'Using Gilt Strips', which sets out 'in more detail the use of gilt strips in income tax planning' as having 'been developed by Grant Thornton in conjunction with Counsel'. The content of the document is 'confidential to Grant Thornton', and the outline of the proposal is stated as:

   'In summary, the proposed structure is implemented as follows:
   (i)You will purchase gilt strips in the market to the value of, say, £1,500,000.
   (ii) You settle a sum on a settlement of, say, £150,000.
   (iii) You grant an option to the trustees to acquire the strips at a strike price of, say, £150,000. The premium for which will be its then market value and this will be paid to you.
   (iv) The trustees may then look to sell the, as yet, unexercised option to a third party, e.g. a bank.
   (v) The bank exercise the option requiring you to transfer the strips to it for consideration of £150,000.

   (vi) The strip will mature and the bank will receive the £1,500,000. The difference in value between the amount paid by you for the strip (e.g. £1,500,000) and the consideration received from the bank (e.g. £150,000) will be an income tax loss and will be available to shelter other income arising in the same tax year.'

10. The Appellant was assured by Grant Thornton that this was legitimate tax planning ([24] and [27]).

11. The following transactions then occurred ('the scheme'):

    a. A letter dated 28 October 2003 from SG Hambros and Trust (Jersey) Ltd ('Hambros') offered the Appellant a loan facility of £1.5 million, with a loan period of one month subject to Hambros' right to seek immediate repayment, bearing interest at 5% per annum ('Loan Agreement') ([46-47]).

    b. By deed dated 29 October 2003 ('Trust Deed') the Timothy Watts IIP Settlement ('the Trust') 2003 was created, of which the Appellant was life tenant and a beneficiary and Timothy Watts IIP Settlement Ltd was trustee ('the Trustee') ([48]).

    c. On 29 October 2003 a payment of £150,000 was made to Cobbetts LLP ('Cobbetts'), solicitors who acted for the Appellant, in respect of the Trust ([49]).

    d. On or before 7 November 2003, the Appellant acquired the gilt strips for a purchase price of £1.5 million, drawing on the loan facility. Hambros held the gilt strips as nominee for the Appellant. ([50]). Hambros had a charge over the gilt strips ('Gilt Strips Charge') ([46-47]).

    e. Following a letter dated 7 November 2003 from the Appellant to Hambros, Hambros entered into an undated deed consenting to the Appellant granting an option over the gilt strips to the Trustee, releasing its charge over the gilt strips, and taking a charge over the Appellant's interest in the option over the gilt strips ([51(1)-(2)]). The deed took effect on 19 November 2003 when Hambros consented to the grant of the Option – see h. below.

    f. On 7 November 2003, the Appellant wrote to the Trustee offering to grant an option to purchase the gilt strips, stating as follows ([51(3)]):

        > I should like to grant an option to the trustees to purchase the UK Treasury Principal Gilt Strip 7 December 2003, nominal amount £1,504,212 SEDOL 0219055, which I currently own.
        > I enclose for your consideration a draft option deed and would be grateful if you could [unclear] the deed for me if this is acceptable to you. I propose that the consideration for the grant of the option is £1,346,200 and I also propose an option consideration payable on exercising the option of £150,400.

    g. On or around 19 November 2003, the Appellant and the Trustee entered into an option agreement by way of deed ('Option Contract Deed'), under which the Appellant granted an option to purchase the gilts to the Trustee. The consideration payable for the grant of the option was £1,338,749 and the consideration payable on the exercise of the option was £150,400 ('Option') ([53(1)]).

    h. Hambros consented to the grant of the Option ([53(4)]). Hambros and the Trustee entered into a loan facility dated 19 November 2003 in the sum of £1,350,000 to assist with the purchase of the Option from the Appellant ([53(5)]). As security for its obligations under the loan facility, the Trustee granted Hambros a charge over its rights in the Option ([53(6)]).

    i. On or around 21 November 2003, **Hambros transferred the sum of £1,338,749 to the Trustee and the Trustee transferred the same sum to the Appellant ([54(1)]**).

j. On or around 25 November 2003, the Trustee entered into a deed of assignment with Investec, agreeing to assign the Option to Investec for the sum of £1,347,049 ([54(2)]).

k. On or around 25 November 2003, Investec gave notice to the Appellant that it was exercising the Option ([54(2)]).

l. On or around 26 November 2003 ([54(3)]):

   i. Investec transferred the sum of £1,347,049 to the Trustee.

   ii. The Trustee transferred the sum of £1,338,749 to Hambros.

   iii. **Investec transferred the sum of £150,400 to the Appellant**.[1][2]

m. On 12 January 2004, the Trustee advanced an interest free loan of £128,000 to the Appellant ([66]).

12. On 26 June 2004, Ernst & Young submitted the Appellant's tax return for 2003/04. Box 15.8 claimed £1,349,600 for "*Post-cessation expenses, preincorporation losses brought forward and losses on relevant discounted securities*." Box 23.5 contained the following text ([69]):

> On 4 November 2003 I purchased UK Treasury Principal Gilt Strip 7 December 2003, nominal amount £1,504,212 (SEDOL 0219055), for £1,500,000. On 19 November 2003 I granted an option to the Timothy Watts IIP Settlement 2003 Limited in their capacity as trustees of the Timothy Watts IIP Settlement 2003 of which I am settlor and life tenant. I understand that the trustees sold this option to Investec Bank (UK) Ltd who subsequently exercised the option by paying £150,400 to me. As a result of this exercise of the option I have suffered an income tax loss of £1,349,600. It is considered this loss is allowable under para 14A Schedule 13 to the Finance Act 1996 and is reflected at Box 15.8 in the attached tax return.

13. On 27 September 2004, HMRC gave notice of their intention to enquire into the Appellant's tax return for 2003/04 ([70(3)]). On 3 August 2018, HMRC issued a closure notice, amending the Appellant's self-assessment to deny his paragraph 14A, Schedule 13, FA 1996 loss claim ([76]).

The Law

14. Paragraph 4(1), Schedule 13, FA 1996, as was then in force, stated that references to a "*transfer*" are reference to "*any transfer of the security by way of sale, exchange, gift or otherwise*".

15. Paragraph 14A of Schedule 13, FA 1996, as in force at the relevant time, permitted claims to loss relief where a person "*sustain[ed] a loss...from the discount on a strip,*" and read as follows:

> "(1) A person who sustains a loss in any year of assessment from the discount on a strip shall be entitled to relief from income tax on an amount of his income for that year equal to the amount of the loss.
> (2) The relief is due only if the person makes a claim before the end of twelve months from the 31st January following that year.

[1] l(i) and (iii), as underlined, are the two payments made by Investec totalling £1,497,449 in respect of the assignment of the option and exercise of the option to purchase the gilt strips described in steps (j) and (k).

[2] i and l(iii), in bold, are the two payments made to the Appellant, in respect of the grant of the option and exercise of the option to purchase the gilt strips by which he was repaid £1,489,149 in total.

(3) For the purposes of this paragraph a person sustains a loss from the discount on a strip where—

(a) he transfers the strip or becomes entitled, as the person holding it, to any payment on its redemption, and

(b) <u>the amount paid by him for the strip exceeds the amount payable on the transfer or redemption</u> (no account being taken of any costs incurred in connection with the transfer or redemption of the strip or its acquisition).

<u>The loss shall be taken to be equal to the amount of the excess</u>, and to be sustained in the year of assessment in which the transfer or redemption takes place.

(4) In sub-paragraph (3) above the reference to a transfer in paragraph (a) includes a reference to a deemed transfer under paragraph 14(4) above (and paragraph (b) shall be read accordingly).

(5) This paragraph does not apply in the case of—

(a) any transfer of a strip for the time being held under a settlement the trustees of which are not resident in the United Kingdom, or

(b) any redemption of a strip which is so held immediately before its redemption." (emphasis added)

Discussion and Analysis

16. In relation to each ground, we will consider the FTT's Decision, the Appellant's arguments and then our analysis. We do not repeat the submissions on behalf of HMRC because we agree with and adopt much of Mr Davey KC's argument in our analysis below.

17. It is convenient to deal with the grounds of appeal by beginning with Ground 3 because this addresses the key dispute as to the correctness of the FTT's statutory construction and application to the facts of the case.

<u>Ground 3 - the FTT erred in concluding that "the amount payable on the transfer" as found in paragraph 14A(3) Schedule 13 FA 1996 was a commercial concept ([166] and [171]), with "transfer" to be given a wide practical meaning ([167](1))</u>

The FTT Decision

18. The FTT decided at [166] and [167] that 'the amount payable on the transfer' for the purposes of paragraph 14A(3)(b) was to be interpreted as a commercial concept and 'transfer' was to be given a wide practical meaning such that it included both the payments made by Investec to the Trustee to acquire and exercise the option to purchase the gilt strips:

> '166. The relevant question in this appeal is, in my view, not so much whether the meaning of 'loss' in sub-para 14A(1) is a commercial or a legal concept, but whether '*the amount payable on the transfer*' for para 14A(3) purposes is a commercial concept. I conclude that 'the amount payable on the transfer' is a commercial concept for the following reasons:
> (1) The statutory wording directs the focus of construction on '*payable*' (as distinct from 'receivable').
> (2) In a case of actual disposal, 'the amount payable on the transfer' is referable to the amount payable by the transferee to acquire the gilt strips, (*not* the amount receivable by the transferor on the disposal of the gilt strips).
> (3) This is consistent with the concept of using market value as 'the amount payable on the transfer' in a case of deemed transfer (such as for accounting the annual profit or loss on gilt strips, or the transfers between connected parties).
> (4) The amount payable on transfer is a commercial concept by reference to market value or a bona fide amount payable by a third-party purchaser.
> (5) A commercial concept for 'the amount payable on the transfer' is essential to preserving tax symmetry, since the amount payable by the transferee to acquire the gilt strips would be the acquisition cost for the transferee, either for calculating its deemed disposal charge on the

> 5th April in the year of acquisition, or indeed on redemption or eventual disposal, if it were to take place in the same tax year as the acquisition.
>
> 167. I reject therefore the submission put forward for the appellant, that '*the amount payable on the transfer*' was only the £150,400 paid by Investec to Mr Watts, and did not include the amount paid to the Trust of £1,347,049 by Investec. The facts, which fall to be viewed realistically in accordance with case law principles to determine this appeal are as follows:
> (1) The statutory wording requires me to give the term 'transfer' a wide practical meaning as directed in *SPI,* where the short question is whether the Citibank option gave it an entitlement to gilts, and Lord Nicholls observed at [19]:
>
> > '… the language of a taxing statute will often have to be given a wide practical meaning of this sort which allows (and indeed requires) the court to have regard to the whole of a series of transactions which were intended to have a commercial unity. … If the scheme amounted in practice to a single transaction, the court should look at the scheme as a whole. …'
>
> (2) By giving the term 'transfer' in the statutory wording of '*the amount payable on the transfer*' a wide practical meaning: the grant of the Option to the Trust, and the subsequent assignment of the Option by the Trust to Investec are to be viewed as a series of transactions intended to operate as a commercial unity.
> (3) In terms of the legal instruments required to effect the '*transfer*', as Mr Davey submits, the 'transfer' of the Gilt Strips required *both* of the events to have occurred: assignment of the Option to Investec and the exercise of the Option by Investec. It follows therefore that the consideration paid at each event, namely the payment of £1,347,049 by Investec to the Trustee on the assignment of the Option was an essential part of '*the amount payable on the transfer*' for the purposes of para 14A(3)(b).
> (4) In terms of tax symmetry, the acquisition cost of the Gilt Strips for Investec should equate to '*the amount payable on the transfer*' for para 14A(3)(b) purposes. Whether it is for accounting or tax purposes, it is inconceivable that Investec would have only used £150,400 as its acquisition cost (as argued for the appellant). For Investec, the acquisition cost for the Gilt Strips must have been the sum of the two parts: £1,347,049 to the Trustee, *and* £150,400 to Mr Watts. Tax symmetry therefore demands '*the amount payable on the transfer*' to encompass £1,347,049, which was over 91% of the total consideration paid by Investec for Gilt Strips, and not just referable to £150,400.
> (5) In terms of the appellant's 'family silver', Mr Watts considered that he was out of pocket to the tune of £100,000, not in the sum of £1,347,049, because the consideration paid on the assignment of the Option, being money into the trust was, as confirmed to Mr Watts: '*yours by right*'. The Trust borrowed from Hambros on the grant of the Option to repay 90% of Mr Watts' loan from Hambros, and Investec paid the Trust the £1,347,049 on assignment of the Option to enable the Trust's loan with Hambros to be repaid. It was all designed to come out in the wash, and Mr Watts quite correctly understood the family silver he had put on the line amounted to £100,000 (for entering the Scheme) and not £1,347,049, which falls to be viewed as more than 90% of '*the amount payable on the transfer*' of the Gilt Strips to Investec.'

The Appellant's argument

19. Ms Nathan KC, for the Appellant, submitted that the FTT erred in concluding that "*the amount payable on the transfer*" as found in paragraph 14A(3), Schedule 13, FA 1996 was a commercial concept ([166] and [171]), with "*transfer*" to be given a wide practical meaning (FTT [167(1)).

20. She argued that the FTT should have followed the approach of the Special Commissioners in *Campbell*, paying close attention to the statutory language being applied, as well as the overall statutory scheme and its purpose.

21. In *Campbell*, the Special Commissioners considered paragraph 2, Schedule 13, FA 1996 in the form that it stood at the time, which then provided for loss relief on relevant discounted securities and defined the term "*sustains a loss from the discount on a relevant discounted security*" in terms which were materially the same as those in paragraph 14A. Despite noting that one step in the series of transactions entered into by the taxpayer was "*wholly tax motivated*" and "*purely to generate the loss for which the Appellant seeks relief and for no other reason*" (at [67]), the Special Commissioners concluded that the taxpayer had suffered a loss as defined by paragraph 2.

22. The Commissioners stated at [81] and [85]:

> '81. Certainly we can see no conflict between the notion that certain terms may, either expressly, or as a matter of statutory context, have a meaning which is unaffected by the purpose of a taxpayer, whether tax avoidance or otherwise, and the notion that certain other statutory phrases, even those with a settled meaning in certain areas of law (and certain statutes), may, in the context of the application of tax statutes, be given a different meaning in their application to transactions effected purely for tax avoidance purposes. This is no more than a recognition that different statutes are enacted for different purposes and on the basis of different assumptions of the type of transaction and circumstances which the respective draftsmen wish to encompass in their language, and that the assumptions of one statute, which apply to one area of law, do not necessarily hold good in applying another statute in a different area of law:
>
> > "…although a word may have a 'recognised legal meaning', the legislative context may show that it is in fact being used to refer to a broader commercial concept." (Lord Hoffmann in *Westmoreland*, supra, at paragraph 50).
>
> …
>
> 85. We acknowledge, however, as we must, that the commercial/legal dichotomy has given rise to problems. Lord Millett said that:
>
> > "The supposed dichotomy between legal and commercial concepts has caused great difficulty. In *Barclays Mercantile* neither Peter Gibson LJ nor Carnwath LJ could understand it, and counsel were unable to explain it." (*Arrowtown*, para 148).
>
> However we consider that such problems arise due to an attempt to elevate that dichotomy to an exhaustive principle which treats all terms as having either an intrinsic "commercial" or "legal" meaning independent of their statutory context rather accepting that the dichotomy is a useful but particular gloss on the concept of the *Ramsay* doctrine as one of statutory construction.'

23. Ms Nathan KC contended that in reaching the conclusion that the term "*the amount payable on the transfer*" was a commercial concept, the FTT failed to analyse the statute, the overall scheme of Schedule 13 or the statutory purpose. Rather the FTT referred to a number of factors which had no basis in the statute at [166]. Indeed, in reaching the conclusion that the term "*the amount payable on the transfer*" should be regarded as a commercial concept, the FTT did not go on to explain what that commercial meaning might be, save that it must be one which denied the Appellant his claimed loss.

24. Ms Nathan KC also criticised the reasoning of the FTT that "*The statutory wording requires me to give the term 'transfer' a wide practical meaning*" (FTT [167(1)]). She noted that the FTT quoted the following passage from the speech of Lord Nicholls *IRC v Scottish Provident Institution* [2004] UKHL 52, [2004] 1 WLR 3172, at [19] (FTT [167(1)]) in support of this conclusion:

> "… the language of a taxing statute will often have to be given a wide practical meaning of this sort which allows (and indeed requires) the court to have regard to the whole of a series of transactions which were intended to have a commercial unity. … If the scheme

amounted in practice to a single transaction, the court should look at the scheme as a whole.…"

25. Ms Nathan KC submitted, however, that the FTT notably failed to articulate what aspect of the statutory wording required this. Furthermore, the FTT failed to note that the language (i.e. "*will often*") used by Lord Nicholls recognised that he was not laying down a general prescription that the language of taxing statutes must be given a wide practical meaning; the interpretation to be adopted is context specific.
26. Ms Nathan KC submitted that, as recognised in *Campbell*, the proper interpretation requires grappling with closely articulated statutory provisions. The relevant question is then whether the premium paid by Investec to the Trustee for the grant of the Option was an "*amount payable on the transfer*..." On the facts, this cannot be the case:
    a. The Option was granted by the Appellant to the Trustee on 19 November 2003.
    b. The premium for the grant of the Option was paid by the Trustee to the Appellant's account on 21 November 2003.
    c. It was not until 25 November 2003 that the Trustee executed the deed which assigned to Investec, *inter alia*, the benefit of the Option.
    d. On the same date, Investec gave the Appellant notice of its exercise of the Option.
    e. Investec then paid the Appellant the exercise price for the Option on 27 November 2003.
27. Ms Nathan KC relied on paragraph 4(1), Schedule 13, FA 1996 which states that references to a "*transfer*" are a reference to "*any transfer of the security by way of sale, exchange, gift or otherwise*.":
    a. Clause 4.3 of the Option obliged the Appellant to sell the gilt strips <u>to the Trustee</u>. See also clause 6.2(a) to like effect.
    b. Clause 10.1 of the Option contained a power for either party to assign the benefit of the Option.
    c. By an acknowledgment of a notice of assignment, the Appellant acknowledged that the benefit of the Option had been assigned from the Trustee to Hambros. This notice obliged the Appellant, upon the exercise of the Option and payment of the exercise price, to transfer the gilt strips <u>to Hambros</u>.
    d. The transfer of the gilt strips to Investec "*by way of sale, exchange, gift or otherwise*" was only capable of occurring following the execution of the deed which assigned the benefit of the Option from the Trustee to Investec. That deed which came into existence on the 25 November 2003, several days after the premium for the grant of the Option had been paid.
    e. Accordingly, the payment of the premium on 21 November could not have been "*an amount payable on a transfer*" of the gilt strips to Investec on 25 November, which had then not yet occurred and which, when the sum was paid, could not have effected the transfer of the gilt strips to Investec.
28. Ms Nathan KC contended that the only amount payable on the transfer was the amount paid by Investec to the Appellant on the exercise of the Option of £150,400: the amount paid by Investec to the Trustee on the grant of the Option (around £1.35 million) cannot be part of the

amount payable on the transfer of the gilt strips because at the time of the grant of the Option, the Appellant had not acquired the gilt strips.

29. She submitted that had the FTT focused its analysis on the statutory definition of "*transfer*" in paragraph 4 of Schedule 13 comprising three specific transactions followed by "*or otherwise*" it would have concluded that the common feature of the three specified terms – namely sale, exchange, gift – was that they were all means by which an interest in property is transferred. This recognition would have led the FTT to conclude that the term "*or otherwise*" should be construed *ejusdem generis* with the specific terms that preceded it.

30. Ms Nathan KC argued that the FTT, should have concluded that the grant of an option was not a "*transfer*" for the purposes of paragraph 14A, Schedule 13, FA 1996 as the grant of an option does not transfer an interest in the property which is the subject of the option: *George Wimpey & Co Ltd v IRC* [1975] 1 WLR 995 ('*Wimpey*').

31. She contended that the FTT failed to conduct the interpretative exercise set out above and its decision on this aspect represents a failure to engage with the statutory language of "*any transfer of the security by way of sale, exchange, gift or otherwise*" and amounts to an error of law.

32. As a result, the language of paragraph 4, Schedule 13, FA 1996 did not permit the premium paid for the Option (of around £1.35m) to be accounted for as an amount payable on the transfer.

Our Analysis

33. We accept some of Ms Nathan KC's criticisms of the FTT's approach to statutory construction:

    (1) The FTT – despite a section in the Decision headed "Statutory purpose of Sch 13 FA 1996" ([123]-[126]) – did not clearly identify the purpose of paragraph 14A Schedule 13.

    (2) The language used by the FTT in its discussion of the construction of paragraph 14A contains echos of the earlier case law in the line of cases leading up to the decisions of the House of Lords in *Barclays Mercantile Business Finance Limited v Mawson* [2004] UKHL 51 ("*BMBF*") and *UBS AG v HMRC* [2016] UKSC 13 ("*UBS*"). We refer, in particular, to the FTT's repeated references to terms in the legislation being regarded as either a "legal" or a "commercial" concept (see, for example, [164], [165], [166], [170], [171]). That language bears the hallmarks of Lord Hoffmann's judgment in *MacNiven v Westmoreland Investments Ltd* ("*MacNiven*") [2001] UKHL. However, the legal/commercial dichotomy is recognized in later decisions as "not being a substitute for a close analysis of what the statute means" (*BMBF* [38] per Lord Nicholls) but as a "particular gloss" on the approach to statutory construction (*Campbell* [85]).

    (3) At points, the FTT refers to some factors that are taken into account in its analysis that we would not regard as material to the construction of paragraph 14A. For example, in the list of factors which the FTT takes into account in deciding that "the amount payable on the transfer", the FTT refers to the need to preserve tax symmetry ([166(5)], [167(4)]) for which we can find no justification in the legislation.

34. That having been said, even if it could be said that some of the matters on which we might differ in approach to the FTT might be regarded as errors of law, in our view, they did not lead the FTT into material error. Indeed, we agree with the FTT's conclusion.

35. In our view:

(1) For the reasons that we give below in relation to Ground [1], the purpose of paragraph 14A is derived from paragraph 14A(1). It is that a person who sustains a loss from a discount on a strip should be entitled to relief for that loss. The intention is to give relief for "real commercial outcomes" as described by Lewison J in *Berry* (*Berry* [52]) or "real economic outcomes" as described in *Andrew* (*Andrew* [93]).

(2) The term "loss" is clearly defined in paragraph 14(3)(b) as the excess of "the amount paid" by the taxpayer for the strip over "the amount payable on the transfer". We accept Ms Nathan KC's argument that the term "loss" is not capable of purposive interpretation. The statute defines what a "loss" is by the formula in paragraph 14(3)(b).

(3) However, as we describe in relation to Ground [1], that does not mean that the inputs into the formula are not capable of a purposive interpretation. Effect can be given to the purpose in considering the inputs into the formula.

36. Although the FTT's language in referring to the treatment of terms in the legislation as either "legal" or "commercial" concepts is characteristic of the earlier case law (in particular, *MacNiven*), the FTT was clearly aware of the risks of employing that approach:

(1) For example, the FTT was aware of the commercial / legal dichotomy no longer representing a bright line aid to construction in the case law, expressly referring at [162] to "[t]he difficulty posed by the commercial/legal dichotomy as noted by the Special Commissioners in *Campbell* at [85], citing Lord Millet in Arrowtown" (in turn citing *BMBF*).

(2) The FTT explicitly acknowledged at [163] the case law in stating that: "…there is no categorical definition to a statutory word as being either intrinsically 'commercial' or 'legal'; so the meaning of 'loss' in any one provision depends on its particular statutory context."

(3) This wording closely mirrors that of the Supreme Court in *UBS* – "it all depends on the construction of the provision in question" (*UBS* [65]), as well as, more broadly, the FTT's discussion of the case law in general. This assists when understanding the next sentence in the Decision at [163] - "The term 'loss' can be a commercial concept in one context, and a legal concept in another" - and later related passage at [166] - 'I conclude that the amount payable on the transfer is a commercial concept'.

37. We acknowledge that it may have been preferable to express its analysis in another way, but, in our view, the FTT was simply expressing the purposive approach to statutory construction espoused in *BMBF* and *UBS*, to which we will refer in more detail later in this decision, through the "particular gloss" of the distinction between "legal" and "commercial" concepts employed in *MacNiven*. Thus, in relation to the specific complaint of the Appellant that the FTT refers to the phrase "the amount payable on the transfer" as a "commercial concept" (at [166]), we do not accept this raises any material error in its approach. The FTT is simply using that terminology to express a view that applying a purposive view of that phrase to a realistic view of the facts, the phrase was capable of extending to all of the amounts paid by Investec to acquire the rights to gilts. The complaint, that the FTT failed to appreciate that recent case law has retreated from the idea that statutory concepts might be susceptible to categorisation as either commercial concepts or purely legal concepts is not made out.

38. The FTT decided at [166]-[167] that the proper construction of the words "*the amount payable on the transfer*" required taking a wide practical approach to their meaning and viewing the scheme as a composite whole rather than as a set of isolated transactions. That interpretation was consistent with the case law. The approach was also consistent with a realistic view of the facts. This was a pre-planned scheme to effect the transfer of the entire interest in the gilt strips from the Appellant to Investec which required Investec both to accept the assignment of the option and to exercise the option to give effect to the transfer. It is consistent with a purposive interpretation of paragraph 14A - to give effect to real economic outcomes - to treat all the steps as part of the "transfer" for the purposes of paragraph 14(3)(b). It also consistent with a purposive interpretation of paragraph 14A to treat all the amounts paid by Investec as part of "the amount payable on the transfer". It would defeat that purpose if a part of the price which it was necessary for Investec to pay to acquire the entire interest in the gilt strips is not taken into account in determining the amount payable on the transfer.

39. On the FTT's construction of paragraph 14A(3)(b), the amount payable on the transfer comprised two elements: £150,400 moving from Investec to the Appellant; and £1,347,049 from Investec to the Trustee. The sum payable on the transfer was not solely the £150,400 claimed by the Appellant, which is merely the amount transferred by Investec to the Appellant on the exercise of the Option, but, in addition, the amount paid by Investec for the assignment of the Option: £1,347,049. Thus, £y = £1,497,449 (i.e. £150,400 + £1,347,049). This is because the total consideration paid by Investec to acquire the gilt strips was £1,497,449: £150,400 paid to the Appellant, and £1,347,049 paid to the Trustee.

40. We agree with the FTT's conclusion. Thus, when the transaction is viewed realistically and with regard to its composite whole or commercial unity, the proper conclusion is that the entire sum of £1,497,449 was the sum "payable on the transfer". It is the answer to the question: what amount was payable by Investec in order for the entire interest in the gilt strips to be transferred to it from the Appellant (to acquire or purchase them)? The "transfer" of the gilt strips from the Appellant to Investec as eventual owner, as pre-planned to require assignment of an option from the Trustee, required both of the foregoing events (assignment of the Option to Investec + exercise of the Option by Investec) to have occurred.

41. This interpretation is also consistent with the FTT's then recent determination in the case of *Andrew v HMRC* [2019] UKFTT 177 (TC), [2019] SFTD 714 ('*Andrew*'). *Andrew* was a gilt strips scheme case which was somewhat similar to the present appeal. *Andrew*, like the present appeal involved: (1) a self-confessed composite transaction – "*a pre-planned tax avoidance scheme*" (*Andrew* at [95]) – intended to achieve tax avoidance of £1m+ entered into in the 2003-2004 tax year through the purchase and immediate sale of gilt strips; and (2) Investec as the eventual owner of the gilt strips.

42. Whilst not factually identical in every respect, the scheme in *Andrew* and the scheme in the present case are relevantly similar in that the transaction architecture in both cases was such as to split in two the money transferred by Investec to acquire the gilt strips (present case = assignment price + exercise price; *Andrew* = acquisition price + cash cancellation price).

43. In *Andrew* the FTT held that the right analysis of Mr Andrew's real "*loss*" was one which factored in both elements of the consideration paid by Investec for the gilt strips, as in the present case. It is worth setting out the FTT's analysis in *Andrew* in such regard (*Andrew* at [112]-[118]):

> "112. Mr Davey says that I must view the scheme as a composite whole and adopt a purposive construction of para 14A(3). On doing so, it is clear that both the amount paid by Investec to the NA Trust in order to cash cancel the Call Option and the amount received by Mr Andrew from Investec

on the transfer of the gilt strips should be treated as amounts payable on the transfer of the gilt strips within para 14A(3).

113. On this question, I agree with Mr Davey.

114. This is a pre-planned scheme, which in accordance with the authorities that I have discussed, I should treat as a composite whole.

115. Mr Andrew acquired the gilt strips. Following the implementation of the steps in the scheme, it was always intended that Investec would acquire the entire interest in the gilt strips free of any rights under the Call Option. Under the terms of the scheme, it did so by the means of two steps: the acquisition of the gilt strips subject to the Call Option from Mr Andrew; and the cash cancellation of the Call Option by the NA Trust.

116. The payment of the cash cancellation price was an integral part of the arrangements for the transfer of the gilt strips to Investec. When Investec acquired the gilt strips from Mr Andrew and paid him £30,740, it was always the case that it would also make the cash cancellation payment. That is how parties intended the scheme to operate and that is how it did in fact operate. There was a theoretical possibility that the NA Trust would not elect to cash cancel the Call Option, but it was no more than that.

117. Against that background, I regard the cash cancellation payment as part of the 'amount payable on the transfer' of the gilt strips for the purposes of para 14A(3). Furthermore, in my view, that approach is consistent with a purposive interpretation of para 14A. As I have described, the purpose of the provision is to give effect to real economic outcomes. It would defeat that purpose if, on a transfer of gilt strips, a part of the purchase price which the transferor of gilt strips directs to be paid to a third party is not taken into account in determining the amount of any loss. In my view, there could be little argument that such a payment must be an 'amount payable on the transfer' of the gilt strips. The amount paid by way of cash cancellation in this case was, in reality, much the same. The scheme operated to transfer the entire interest in the gilt strips to Investec. The cash cancellation payment was just a part of the overall price paid by Investec to acquire the gilt strips which, through the design of the Call Option, was diverted to the Trust.

118. For these reasons, in my view, the amount payable on the transfer for the purposes of para 14A(3) is the aggregate of the amount paid by Investec to Mr Andrew (£30,740) and the amount of the cash cancellation payment paid by Investec to the NA Trust (£1,840,442). On that basis, Mr Andrew made a loss of £3,805.94 [rather than £1,844,248 as claimed by Mr Andrew] for the purposes of para 14A(3)."

44. We agree with this analysis.

45. Our conclusions are sufficient to dismiss this ground of appeal, but we should also address some of Ms Nathan KC's specific arguments.

46. Ms Nathan KC contends that "*in reaching the conclusion that the term "The amount payable on the transfer*" *was a commercial concept, the FTT failed to analyse the statute, the overall scheme of Schedule 13 or the statutory purpose*". In so far as this contention simply restates the proposition that the FTT misconstrued the statutory phrase "the amount payable on the transfer", we reject the submission for the reasons given above.

47. Contrary to the Appellant's contention, the FTT was not adopting an *a priori* approach to the exercise of statutory construction with which it was tasked; on the contrary, the FTT was carrying out the exercise of construing the specific statutory wording before it in its own

context having regard to surrounding legislative context and relevant applicable authorities. It was seeking to give a purposive interpretation to paragraph 14A and the overall scheme of Schedule 13 – one that gives effect to real economic outcomes.

48. Our analysis also disposes of the Appellant's argument that paragraph 4 of Schedule 13 defines transfer by reference to a common feature of the three specified terms - 'sale, exchange, gift' - and an 'ejusdem generis' catchall - namely 'or otherwise'. Ms Nathan KC submits that these words are all means by which an interest in property is transferred. Thus, it is submitted that only a transaction which involves a transfer of an interest in property should be included in the definition of 'transfer' and only an amount payable in connection with such a transaction can be an 'amount payable on the transfer' for the purposes of paragraph 14A(3)(b).

49. However, the grant and assignment of the option were simply two steps, necessary although insufficient, in a composite transaction effecting a transfer of the entire interest in the gilts to Investec. The assignment of the option was a part of the transfer of the gilts under the scheme. On a realistic view, the grant and assignment of an option to purchase the gilt strips, and the exercise of the option were all parts of the means by which the gilt strips were transferred from the Appellant (and eventually purchased or acquired by Investec).

50. A purposive interpretation of the payment on the 'transfer' means that the 'transfer' should not be artificially divided or separated so that only the payment in respect of the exercise of the option could be considered the amount payable on the transfer. The payment for the assignment of the option was a necessary step in a composite scheme designed to effect a transfer of the gilt strips for which a series of transactions and payments was required. The payment for the assignment of the option to Investec was properly construed to be part of the amount payable on the transfer of the gilts from the Appellant and to it.

51. Further, the ratio of *Wimpey* in a property law context – that a grant of an option is not a transfer of an interest in property which is the subject of the option – is of no real assistance in the interpretation of 'amount payable on the transfer' in a taxing statute. The fact that the grant or assignment of an option might not constitute a transfer of property in its own right or in isolation does not undermine the interpretation that the payment for the grant or assignment of the option was part of the 'amount payable on the transfer' of the gilts. In this case, the payment for the assignment of the option was part of the payment necessary to effect the transfer and acquisition of the gilt strips.

52. Thus, we consider there was no material error in the FTT's analysis at [172]-[174]:

> 172. Finally, I will address briefly the appellant's contention that the grant of an option over an asset does not pass any property in the asset (*George Wimpey*), and therefore the consideration paid in relation to the grant or assignment of the Option cannot be relevant to the meaning of 'transfer' for the purpose of determining '*the amount payable on the transfer*'.
>
> 173. There are aspects in the Court of Appeal decision in *Astall [Astall v HMRC [2009] EWCA Civ 1010]* which are pertinent to addressing this contention. In *Astall* the taxpayers' arguments were that para 3 Sch 13 FA 1996 is 'immune from purposive interpretation', because (a) the concept of an R[elevant] D[iscounted] S[ecurity] is a legal concept and not a commercial concept; (b) the concept of profit or loss is different from deep gain as concerns what may happen on redemption; and (c) that para 3(1C) contains an express direction that some terms

should not be ignored in determining whether a security constituted an RDS, and the importance to focus on the terms of issue as at the date of issue.

> 174. Arden LJ rejected the argument that para 3 Sch 13 FA 1996 is 'immune from purposive interpretation' for several reasons, including how to view the series of transactions:
>
> > '[42] I see no reason to hold that the new approach to statutory interpretation applies only if there is a composite transaction consisting of several elements destined to lead to a particular result. Mr Prosser [for the taxpayers] urged us to accept that the language of practical certainty is derived from the jurisprudence on pre-ordained transactions for the purposes of [*Ramsay*] jurisprudence. This, he submits, that purposive interpretation should be confined to composite transactions, just as the transaction in *SPI* was a composite transaction. In my judgment, the principle is that set out in the first sentence of [32] of Mawson. This principle is not expressed to be limited to which composite transactions. *It can thus apply to a single multi-faceted transaction which on its face operates in a particular way but which when examined against the facts of the case does not operate as a transaction to which the statute was intended to apply*.' (italics added)

53. The FTT conducted a realistic appraisal of the commercial reality or substance of the arrangements in light of the words of the statute, properly construed: see Whipple LJ in *Good v HMRC* [2023] 1 WLR 2062 at [55]:

> 55. Thirdly, the words "entitled to" do not carry any special meaning, specific to the statute. They are words of ordinary usage and should be given their ordinary meaning. There are many references in the taxing statutes to beneficial entitlement and beneficial ownership, but section 611 does not refer to "beneficial entitlement", which it could have done if that meaning had been intended. I conclude that the words are not intended to import the domestic law concept of beneficial interest or entitlement. I have not found cases such as *Bupa Insurance, Sainsbury v O'Connor and Wood Preservation v Prior* to be of much assistance in construing the legislation, because they concern the meaning of beneficial ownership or beneficial entitlement in the context of facts which are far distant from this case. The words in the statute are not defined and fall to be construed and applied according to their ordinary, non-technical meaning. What is required is a realistic appraisal of the commercial reality or substance of the arrangements in light of the words of the statute, properly construed.

54. This approach also disposes of the timing argument relied on by Ms Nathan KC in her written submissions: the amount paid by Investec to the Trustee on the grant of the Option (around £1.35 million) cannot be part of the amount payable on the transfer of the gilt strips because at the time of the grant of the Option, the Appellant had not acquired the gilt strips. The commercial reality was that the outcome of the transfer and preceding steps were pre-planned and the timing of the steps was part of a commercial unity by which the transfer of the strips from the Appellant to Investec would be effected. There was no doubt as to the transactions and outcomes that would occur at any step in the chain – all the choices as to the steps, parties and timings were circumscribed with the ultimate purpose – the eventual transfer – pre-planned.

55. For these reasons, we dismiss Ground 3 – there was no material error in the FTT's construction of 'the amount payable on the transfer' for the purposes of paragraph 14A(3)(b), Schedule 13 FA 1996 and its application to the facts of this case.

Ground 1 – the FTT erred in concluding (i) that *Campbell v IRC* [2004] STC (SCD) 396 was central to the Appellant's case ([112]), (ii) that *Campbell* was the authority most relied upon by the Appellant ([170]), and (iii) that the dispute between the parties in their construction of the meaning of "loss from the discount on a strip" under sub-paragraph 14A(1) Schedule 13 of the Finance Act 1996 "FA 1996" exemplified the commercial/legal dichotomy in *Campbell* ([157])

The FTT's Decision

56. The FTT stated at [112], [157] and [170]-[171] of the Decision:

> 112. Given *Campbell* is so central to the appellant's case, with the corollary assertion that *Berry* is wrongly determined, it is necessary to set out the seemingly conflicting decisions by the Special Commissioners in *Campbell* and the Upper Tribunal in *Berry*.
> …
> 157. The dispute between the parties in their construction of the meaning of 'loss' under subpara 14A(1) of Sch 13 exemplifies the commercial/legal dichotomy noted in *Campbell*….
> …
> 170. The short point I draw from the aforesaid in *Campbell*, which is after all *the* authority most relied on by the appellant, is that although I have accepted that the concept of 'loss' for sub-para 14A(1) purposes is a legal construct, it does not follow, as a matter of statutory construction, that '*the amount payable on the transfer*' for para 14A(3)(b) must also be a legal construct, which I think is the nub of Ms Nathan KC's submissions.
>
> 171. For the avoidance of doubt, even if it is accepted that the concept of 'loss' for para 14A purposes takes on a legal meaning as conferred by the statute, the so-called 'A-B calculation' central to Ms Nathan KC's submissions is not 'invulnerable' to *Ramsay* application. That is to say, the so-called 'A-B calculation' for establishing the 'excess' for para 14A purposes does not take on the formulaic character identical to the relevant provision in *Mayes* for quantifying the Corresponding Deficiency Relief, which 'does not admit of a purposive interpretation' (at [23] of *Mayes HC*). This is because '*the amount payable on the transfer*' (the figure for 'B') is a commercial concept, and although the word 'transfer' may have a 'recognised legal meaning', the legislative context of Sch 13 does '*show that it is in fact being used to refer to a broader commercial concept*': Lord Hoffmann's caution in *MacNiven* at [50].

The Appellant's argument

57. Ms Nathan KC submitted that the FTT erred in concluding:
    (a) that *Campbell* was central to the Appellant's case (FTT [112]);
    (b) that *Campbell* was the authority most relied upon by the Appellant (FTT [170]); and
    (c) that the dispute between the parties in their construction of the meaning of "*loss from the discount on a strip*" under sub-paragraph 14A(1), Schedule 13, FA 1996 exemplified the commercial/legal dichotomy in *Campbell* (FTT [157]).

58. She contended that the FTT misunderstood the Appellant's case. Ms Nathan KC argued that *Campbell* was not the lone rock on which the Appellant built his case. Rather, it was an example of the correct articulation of the leading authorities on statutory construction in the context of legislation expressed in materially the same terms as paragraph 14A.

59. Ms Nathan KC relied upon *Campbell*, where the Special Commissioners considered paragraph 2, Schedule 13, FA 1996, which then provided for loss relief on relevant discounted securities and defined the term "*sustains a loss from the discount on a relevant discounted*

security" i.e. in terms which were materially the same as those in paragraph 14A. Despite noting that one step in the series of transactions entered into by the taxpayer was "*wholly tax motivated*" and "*purely to generate the loss for which the Appellant seeks relief and for no other reason*" (at [67]), the Special Commissioners concluded that the taxpayer had suffered a loss as defined by paragraph 2.

60. Having considered the line of authorities following *Ramsay* (*WT Ramsay Ltd v IRC* [1982] AC 300), and the relevance of a commercial/legal dichotomy, the Special Commissioners reached the following conclusion:

> "79…We take this passage to confirm that the *Ramsay* doctrine is a canon of construction and its application will vary according to the statutory term or phrase under scrutiny and the context of the case before the Court which is invited to apply it….
>
> …
>
> 85. We acknowledge, however, as we must, that the commercial/legal dichotomy has given rise to problems. Lord Millett said that
>
> > "The supposed dichotomy between legal and commercial concepts has caused great difficulty. In *Barclays Mercantile* neither Peter Gibson LJ nor Carnwath LJ could understand it, and counsel were unable to explain it." (*Arrowtown*, para 148).
>
> However we consider that such problems arise due to an attempt to elevate that dichotomy to an exhaustive principle which treats all terms as having either an intrinsic "commercial" or "legal" meaning independent of their statutory context rather accepting that the dichotomy is a useful but particular gloss on the concept of the *Ramsay* doctrine as one of statutory construction."
>
> (emphasis added)

61. Ms Nathan KC submitted that none of the above is to deny that, depending on the context, a term used in a statute should be construed by reference to a commercial or a legal meaning. However, there is no rule of statutory construction which requires an *a priori* categorisation of terms into commercial or legal categories. Whether, in construing the language of the statute, such a construction is appropriate will "*vary according to the statutory term or phrase under scrutiny and the context of the case before the Court*."

62. Applying that approach, the Special Commissioners in *Campbell* went on to analyse the language of paragraph 2 at [86]-[89], concluding as follows at [94]:

> "94. We summarise our conclusions as follows. The circumstances in which a person sustains a loss from the discount on a relevant discounted security and the amount of such loss are specifically articulated in paragraph 2 of Schedule 13, subject to paragraph 8 when the transfer is to a connected person. The Appellant sustained a loss under the express terms of the statute. The concept of sustaining a loss in paragraph 2 is an artificial construct which encompasses situations such as gifts which would not either in ordinary parlance or in a commercial sense be regarded as giving rise to a loss. The decided cases do not support the implication of an additional condition that the transactions resulting in the loss should not have been for the sole purpose of producing a loss or otherwise avoiding tax."
>
> (emphasis added)

63. Ms Nathan KC emphasised that the Appellant put the approach to statutory construction in *UBS* at the forefront of his case to the FTT rather than *Campbell*. *Campbell* was only relied on as an example of the correct application of the *UBS* approach to paragraph 2, Schedule 13, FA 1996 which used materially similar statutory language to paragraph 14A.

64. She contended that the Appellant's submissions before the FTT on the authorities on statutory construction, both in his skeleton argument, and in oral submissions, focused on *UBS* and the preceding leading authorities on statutory construction. As the Appellant stated in paragraph

64 of the skeleton argument for the FTT, the leading statement of the correct approach to statutory interpretation is that of Lord Reed in *UBS*, at [65]-[66]:

> '65. As was noted in *Barclays Mercantile* [2005] 1 AC 684, para 35, there have been a number of cases since *Ramsay* in which it was decided that elements inserted into a transaction without any business or commercial purpose did not prevent the composite transaction from falling within a charge to tax, or bring it within an exemption from tax, as the case might be. ... In each case the court considered the overall effect of the composite transaction, and concluded that, on the true construction of the relevant statute, the elements which had been inserted without any purpose other than tax avoidance were of no significance. But it all depends on the construction of the provision in question. Some enactments, properly construed, confer relief from taxation even where the transaction in question forms part of a wider arrangement undertaken solely for the purpose of obtaining the relief. The point is illustrated by the decisions in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 and *Barclays Mercantile* itself.
>
> 66. The position was summarised by Ribeiro PJ in *Arrowtown Assets* 6 ITLR 454, para 35,in a passage cited in *Barclays Mercantile* [2005] 1 AC 684, para 36: "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."'
> (Emphasis added)

65. Again, Ms Nathan KC relied upon the Appellant's skeleton argument at paragraph 65, citing Lord Reed's caution in *UBS* highlighting the dangers of the use of 'reality' in statutory interpretation which is not rooted in the language of the statute, at [67]-[68]:

> "67. References to "reality" should not, however, be misunderstood. In the first place, the approach described in *Barclays Mercantile* and the earlier cases in this line of authority has nothing to do with the concept of a sham, as explained in *Snook* [1967] 2 QB 786. On the contrary, as Lord Steyn observed in *McGuckian* [1997] 1 WLR 991, 1001, tax avoidance is the spur to executing genuine documents and entering into genuine arrangements.
>
> 68. Secondly, it might be said that transactions must always be viewed realistically, if the alternative is to view them unrealistically. The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven* and *Barclays Mercantile*, then other transactions, although related, are unlikely to have any bearing on its application."
> (emphasis added)

66. She submitted that the Supreme Court has recently re-affirmed the *UBS* approach to statutory construction in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 ('*Rossendale*'), stating the court's task as follows at [16]:

> "16. Both interpretation and application share the need to avoid tunnel vision. The particular charging or exempting provision must be construed in the context of the whole statutory scheme within which it is contained. The identification of its purpose may require an even wider review, extending to the history of the statutory provision or scheme and its political or social objective, to the extent that this can reliably be ascertained from admissible material." (Emphasis added)

67. Ms Nathan KC argued that the FTT misunderstood the place within the Appellant's arguments of *Campbell*. In his speech in *BMBF*, Lord Nicholls analysed the *Ramsay* principle from [26] onwards. Lord Nicholls then went on to state at [38]:

> "*MacNiven* shows the need to focus carefully upon the particular statutory provision and to identify its requirements before one can decide whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute. In the speech of Lord Hoffmann in *MacNiven* it was said that if a statute laid down requirements by reference to some commercial concept such as gain or loss, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in *MacNiven* , the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been. This is not an unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts a priori as either "commercial" or "legal". That would be the very negation of purposive construction: see Ribeiro PJ in *Arrowtown*, at paras 37 and 39 and the perceptive judgment of the special commissioners (Theodore Wallace and Julian Ghosh) in *Campbell v Inland Revenue Comrs* [2004] STC (SCD) 396."
> (emphasis added)

68. According to Ms Nathan KC, what one must take from this is that there is no rule of statutory construction which requires one to categorise *a priori* and interpret a word used in a statute as either commercial or legal. Rather, one has to analyse the words of the statute (and that too purposively) to determine their meaning. That is what the Special Commissioners did in *Campbell*, but what the FTT failed properly to do in this case, when analysing paragraph 14A.

69. She submitted that it was only after submissions on multiple leading authorities that the Appellant came on to *Campbell*. The relevance of *Campbell* was not that it was central to the Appellant's case, nor that it was the authority most relied upon by the Appellant, nor that it identified a commercial/legal dichotomy applicable to matters of statutory construction. The relevance of *Campbell* was as an illustration of the application of the correct approach to statutory construction, as set out above, in the context of paragraph 2, Schedule 13, FA 1996, which was expressed in materially similar terms to paragraph 14A. In short, *Campbell* was an illustration of the correct approach, applied correctly.

Our Analysis

70. Ground 1 comprises three elements:
    (i) that *Campbell* was central to the Appellant's case ([112]);
    (ii) that *Campbell* was the authority most relied upon by the Appellant ([170]), and
    (iii) that the dispute between the parties in their construction of the meaning of "loss from the discount on a strip" under sub-paragraph 14A(1) Schedule 13 of the FA 1996 exemplified the commercial/legal dichotomy in *Campbell* ([157]).

71. Taking Ground 1 (i) and (ii) together, the Appellant's point seems to be that the FTT erred in viewing the case of *Campbell* as central or key to his case (at [112] and [170]). We do not accept this.

72. First, *Campbell* did feature significantly in the Appellant's argument before the FTT and UT.

Before this Tribunal, four pages of the Appellant's skeleton argument contained direct quotations from *Campbell*. Ms Nathan KC expressly submitted in relation to ground 3 that "*[t]he FTT should have followed the approach of the Special Commissioners in Campbell*" and had failed to pay close attention to the statutory language.

73. Before the FTT, the position was similar. The case of *Campbell* was cited in the Appellant's FTT Skeleton Argument dated 30 August 2021 (at [68(b)]) in a section headed "*Correct Approach to Statutory Construction*"; and *Campbell* played a prominent role in the oral presentation of the Appellant's case before the FTT.

74. On a fair reading of the Appellant's written and oral submissions before the FTT, and the Decision itself, there is nothing in Ground 1 (i)-(ii). *Campbell* was particularly relied on in the articulation of the Appellant's case before the FTT in the present matter. This not a basis to overturn the Decision unless it led to an error in the FTT's statutory construction. For the reasons we have addressed in Ground 3, there was no such error.

75. Second and in any event, we consider that the FTT Decision – a thorough written judgment running to over 60 pages – discloses a careful and nuanced analysis of the case law including *Campbell*. That analysis appears, among other places, in the section of the Decision headed "*The cases of Campbell, Berry, Andrew and Pitt*" (beginning at [111]), as well as in the later section of the Decision headed "*Conclusions*" (beginning at [149]) where the FTT quotes (Decision at [168]) the very passage from *Campbell* ([79]) which the Appellant emphasises.

76. In so doing, the FTT was following the approach of:

    a) Mr Justice Lewison in *Berry* (himself following the approach of the Court of Appeal in *Astall v Revenue and Customs Commissioners* [2009] EWCA Civ 1010 ("*Astall*") at [41]-[42] and [44]-[45] (*Berry* at [36]));
    b) Judge Greenbank in *Andrew*; and
    c) Judge Beare in *Pitt v Revenue and Customs Commissioners* [2022] UKFTT 00222 (TC) ("*Pitt*").

77. Each of these three decisions recognised that Schedule 13 FA 96 is not immune to what was referred to in *Berry* as "*the Ramsay principle*", the *Ramsay* principle being a general principle of statutory construction applicable to any statutory provision.

78. In *Berry* Lewison J summarised the *Ramsay* principle as follows at [31](i)-(ii)]:

    "31. In my judgment:
    (i) The *Ramsay* principle is a general principle of statutory construction (*Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35]*; Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [36], [2005] 1 AC 684 at [36]).
    (ii) The principle is twofold; and it applies to the interpretation of any statutory provision:
    (a) To decide on a purposive construction exactly what transaction will answer to the statutory description; and
    (b) To decide whether the transaction in question does so (*Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [36], [2005] 1 AC 684 at [36]*)."

79. In *Berry* at [43], Lewison J concluded in relation to *Campbell* (approving Malcolm Gammie QC's submissions) that:

> "The ground of the [*Campbell*] decision, as I read it, is that: 'There is no room for the purpose of the holder of the relevant discounted security to inform the construction of the term "loss".' In other words Mr Campbell's motivation did not automatically deny him his tax relief. They were not saying that the fact-finding tribunal should ignore the reality of the transactions that in fact took place. …
>
> … The relevant point about *Campbell* is that the provisions of Schedule 13 [FA 1996] were too closely articulated in relation to the reality of the taxpayer's transactions in that case. It is not that the provisions of Schedule 13 are too closely articulated to exclude the application of the *Ramsay* principle and to prevent one deciding in any other case what is the tax reality of the taxpayer's transactions."

80. In *Andrew* Judge Greenbank expressed the position as follows (at [93]):

> "...a purposive interpretation of paragraph 14A [of Schedule 13 FA 1996] should, as identified by Lewison J in *Berry*, seek to give relief to a person who sustains a loss from a discount on a strip where that loss reflects a real commercial outcome. This will normally involve a taxpayer suffering some real economic detriment. In practical terms, in the context of a transaction (such as in *Campbell*) which is not self-cancelling, the way in which this is achieved is by ensuring that the inputs into the formula in paragraph 14A(3) reflect the reality of the transaction (as described in the extract from Malcom Gammie QC's submissions to which Lewison J refers in *Berry* at [43])."

81. The FTT decision in *Pitt* concerned paragraph 2 of Schedule 13 rather than paragraph 14A of Schedule 13, the former being the statutory predecessor to the latter. In *Pitt* the FTT considered that the two provisions were in material respects identical (*Pitt* at [118]-[119]; see also *Andrew* at [67]). In *Pitt* Judge Beare, in the course of setting out principles derived from *Astall* and *Berry*, stated (at [120]):

> "… (4) the ratio of *Campbell* was that there was no room for the purpose of the taxpayer in entering into the transactions to inform the construction of the term "loss". The ratio was not that, in applying paragraph 2 of Schedule 13, the relevant court or tribunal should ignore the reality of the transactions which had in fact taken place.
> …
> (6) the purpose of paragraph 23 of Schedule 13 [FA 1996] is to provide relief for genuine commercial losses (or "real commercial outcomes" as Lewison J put it). This is not an example of a provision … which operates algebraically without reference to economic reality (see *Berry* at paragraph [52])."

82. In the present case, the FTT was alive to the necessity of ensuring that the "inputs into the formula in paragraph 14A(3) reflect the reality of the transaction" (to use the language of the FTT in *Andrew* (above), itself referring back to the language of the UT in *Berry* (above)). As the FTT concluded at [171]:

> "…even if it is accepted that the concept of 'loss' for para 14A purposes takes on a legal meaning as conferred by the statute, the so-called 'A-B calculation' central to Ms Nathan KC's submissions is not 'invulnerable' to *Ramsay* application."

83. There was no material error of law in the FTT's approach.

84. Overlapping with the above analysis, the argument also involves the almost contradictory contention that the FTT "*missed the significance of Campbell*" (Appellant's Skeleton at [22]), and, accordingly, where legislation "*identifies a loss by prescribing a formula to determine the amount of loss or gain, it is not appropriate to import into the analysis or computation of such a loss or gain a 'real' world concept of gain or loss*" (Appellant's FTT Skeleton at [68], citing *Campbell*).

85. Again, we do not accept this criticism. The short point is that the FTT did not miss the significance of *Campbell*. It addressed the authority at length, for example at [113]-[116] and 119 at [162]-[163] and [168]-[171], concluding with the passage at [170]-[171] set out above.

86. The Appellant's difficulty with the Decision is not so much that the FTT overemphasised or missed the significance of *Campbell*, but, rather, that it reached the view that the particular fact pattern and particular outcome in *Campbell* did not provide the answer to the case before it.

87. Part of the focus of this ground is also the case of *UBS*. Ms Nathan KC submits that the FTT misunderstood the Appellant's case. She argues that the Appellant put the *UBS* approach to statutory construction at the forefront of his case.

88. However, it is clear from the Decision that the FTT well understood that *UBS* was at the forefront of the Appellant's case. Indeed, *UBS* is expressly referred to in the FTT's careful summary of the Appellant's submissions ([77]):

> "77. ..(2) The correct approach to the interpretation of para 14A is as stated in *UBS*, which requires the Tribunal to start with the statutory language to determine to which facts that statute should be applied. ..."

89. The FTT does not simply refer to *UBS* ([77(2)]), without more, but expressly records that the Supreme Court in *UBS* requires that courts and tribunals "start with the statutory language to determine to which facts that statute should be applied". In so articulating the position, the FTT was closely echoing the Appellant's own FTT Skeleton which referred to Lord Reed in *UBS* "*highlight[ing] the dangers of the use of 'reality' in statutory interpretation which is not rooted in the language of the statute*".

90. Having done so, the FTT then went on (Decision at [96]) to quote directly from the very passage of *UBS* at [67]-[68] upon which the Appellant places reliance.

91. In short, the FTT demonstrably understood the Appellant's case, and the role that both *Campbell* and *UBS* played within it. It considered and applied all the relevant authorities without material error.

92. Ms Nathan KC also submits that the FTT erred in concluding that the dispute between the parties in their construction of the meaning of "loss from the discount on a strip" under sub-paragraph 14A(1) of Schedule 13 to FA 1996 exemplified the commercial/legal dichotomy in *Campbell* - see [157] of the Decision.

93. For the reasons we have already set out above in relation to Ground 3, we do not accept there was any material error in the FTT's approach to the 'commercial / legal dichotomy'. Perhaps it would have been preferable not to refer to 'loss' or 'amounts payable on the transfer' as being legal or commercial concepts (it may have been better to refer to having regard to economic / commercial outcomes or economic / commercial reality). Nonetheless, the FTT was entitled to examine the economic reality of the transaction in interpreting what was the 'amount payable on the transfer', in applying this interpretation to its factual findings and in inputting this figure into the formula for the calculation of loss contained in paragraph 14A(3)(b).

94. We dismiss Ground 1. There was no material error of law in the FTT's Decision.

Ground 2 – the FTT erred in concluding that it was bound by *Berry v HMRC* [2011] STC 1057 ([157]) given that the approach of Lewison J (as he then was) in Berry was inconsistent with the correct approach to statutory construction explained in UBS

The FTT Decision

95. At [157] the FTT stated:

> 157. …Notwithstanding the aforesaid, I am bound by the Upper Tribunal in *Berry*, which is concerned directly with para 14A Sch 13 to FA 1996 as relevant to the present case, unlike *Campbell* which was concerned with para 2 of Sch 13, and which had been repealed by the relevant time when the Scheme was implemented. Against the backdrop of *Berry UT*, I now come to the most difficult part of this decision, which is to decide whether the concept of 'loss' in sub-para 14A(1) of Sch 13, nevertheless, has a notional element to it.

The Appellant's argument

96. Ms Nathan KC submitted that the FTT erred in concluding that it was bound by *Berry v HMRC* [2011] STC 1057 given that the approach of Lewison J (as he then was) in *Berry* was inconsistent with the correct approach to statutory construction explained in *UBS*.

97. She contended that the Upper Tribunal was not bound to follow the decision of Lewison J in *Berry*. She argued that we should not do so as Lewison J made two errors of law. First, he looked outside of the statutory language for the meaning of the term "*loss*." Secondly, he failed to give adequate regard to the statutory scheme and did not have before him the extra-statutory materials which establish the purpose of paragraph 14A, Schedule 13, FA 1996.

98. Ms Nathan KC submitted that in *Berry*, Lewison J set out the following accurate summary of the law from [31(i)-(vii)]:

> "In my judgment:
> i) The *Ramsay* principle is a general principle of statutory construction (*Collector of Stamp Revenue v Arrowtown Assets Ltd* (2004) ITLR 454 (§ 35); *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1 (§ 36)).
> ii) The principle is twofold; and it applies to the interpretation of any statutory provision:
> a) To decide on a purposive construction exactly what transaction will answer to the statutory description; and
> b) To decide whether the transaction in question does so (*Barclays Mercantile Business Finance Ltd v Mawson* (§ 36)).
> iii) It does not matter in which order these two steps are taken; and it may be that the whole process is an iterative process (*Barclays Mercantile Business Finance Ltd v Mawson* (§ 32); *Astall v HMRC* [2010] STC 137 (§ 44)).
> iv) Although the interpreter should assume that a statutory provision has some purpose, the 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 HMRC* (§ 44)).
> v) In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole (*WT Ramsay Ltd v Commissioners of Inland Revenue* (1981) 54 TC 101, 184; *Barclays Mercantile Business Finance Ltd v Mawson* (§ 29)).
> vi) However, 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 HMRC* (§ 34). As Lord Hoffmann put it in an article on Tax Avoidance: "It is one thing to give a 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 HMRC* [2010] STC 1 (§ 30)).
vii) In looking at particular words that Parliament uses what the interpreter is looking for is the relevant fiscal concept: (*MacNiven v Westmoreland Investments Ltd* [2001] STC 237 (§§ 48, 49))."

99. Nonetheless, Ms Nathan KC respectfully contended that Lewison J then fell into error when he went on to state as follows at [31(viii)]:

"(viii) Although one cannot classify all concepts a priori as "commercial" or "legal", it is not an unreasonable generalisation to say that if Parliament refers to some commercial concept such as a gain or loss it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction: *WT Ramsay Ltd v Commissioners of Inland Revenue* (1981) 54 TC 101 , 187; *Inland Revenue Commissioners v Burmah Oil Co Ltd* (1981) 54 TC 200 , 221; *Ensign Tankers Ltd v Stokes* [1992] 1 AC 655 , 673, 676, 683; *MacNiven v Westmoreland Investments Ltd* (§§ 5, 32); *Barclays Mercantile Business Finance Ltd v Mawson* (§ 38)." [Emphasis added]

100. She argued that in so stating as underlined, Lewison J erred. There is no general canon of statutory construction to that effect. Lewison J impermissibly attributed a presumed meaning to Parliament without reference to the principal means by which Parliament's intention is discerned: the language of the statute. As the Supreme Court said in *UBS* at [65] "*all depends on the construction of the provision in question*." Lewison J in effect laid down a general rule of interpretation where Parliament has not seen fit to lay down such a rule itself.

101. Ms Nathan KC submitted that this error then infected Lewison J's conclusion at [52], construing paragraph 14A, that it "*is to be expected that Parliament intended to tax (or relieve) real commercial outcomes*." Lewison J arrived at that conclusion by impermissibly referring to a non-statutory presumption rather than by construing the language of the statute. In so doing, Lewison J acted inconsistently with his own articulation of the *Ramsay* principles derived from the authorities and set out at *Berry* [31(iv)] namely:

"(iv) Although the interpreter should assume that a statutory provision has some purpose, the 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 HMRC* (§ 44))."

Our Analysis

102. We reject the Appellant's submissions. First, the FTT was bound to follow *Berry* as it was an inferior tribunal. Further, sitting as coordinate judges of the Upper Tribunal, we would only depart from *Berry* if we considered it to be plainly wrong (see *Gilchrist v. Revenue and Customs Commissioners* [2014] STC 1713 at [94] referring back to *Secretary of State for Justice v B* [2010] UKUT 454 (AAC) at [40]). For the reasons that we give below, we are not convinced *Berry* is plainly wrong, and so we will follow it.

103. At [31(viii)] of *Berry*, Lewison J did not assert or indicate that there is a general canon of statutory construction to the effect that if Parliament refers to some commercial concept such as a gain or loss it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction. The sub-paragraph needs to be read within its own context and that of the other sub-paragraphs in [31]. Lewison J prefaces the observation relied on by the Appellant by stating in terms (emphasis added) that "*one cannot classify all concepts a priori as "commercial" or "legal"*",

before going on to invoke the very language of, and expressly cite the very passage of the House of Lords' decision in *BMBF*, which makes plain that what Lord Hoffmann said in *MacNiven* does not reflect a general canon of construction.

104. In *BMBF* at [38] (cited in *Berry* at [31(viii)]) Lord Nicholls states:

"…In the speech of Lord Hoffmann in *MacNiven* it was said that if a statute laid down requirements by reference to some commercial concept such as gain or loss, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in *MacNiven*, the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been. This is not an unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts a priori as either "commercial" or "legal". That would be the very negation of purposive construction: see Ribeiro PJ in Arrowtown, at paras 37 and 39 and the perceptive judgment of the special commissioners (Theodore Wallace and Julian Ghosh) in *Campbell v Inland Revenue Comrs* [2004] STC (SCD) 396." (emphasis added)

105. As for the UT's interpretation of the statutory provision before it in *Berry*, there is nothing impermissible or remiss in Lewison J's approach; and there is nothing inconsistent between the UT's approach in *Berry* and the House of Lord's position in *BMBF* (there is no "*substitute for a close analysis of what the statute means*" (above)) or the Supreme Court's approach in *UBS* (it "*all depends on the construction of the provision in question*" ([65])).

106. Discussing *Berry*, in *Andrew* Judge Greenbank stated (at [83]):

"83. The principles that I derive from *Berry* are therefore as follows:
(1) First, the *Ramsay* principle must be applied in construing paragraph 14A. This is not in dispute between the parties.
(2) Second, the purpose of paragraph 14A is to be derived from paragraph 14A(1) namely that a person who sustains a loss from a discount on a strip should be entitled to relief from income tax for that loss, but that "loss" in that context should reflect what Lewison J describes as "real commercial outcomes" (*Berry*: [52]). (I will return to the meaning of this phrase below.)
(3) Third, although the motivation of the taxpayer may not be relevant to the application of paragraph 14A(3) once the inputs into the calculation required by that sub-paragraph have been determined, regard must be had to the reality of facts of the particular case in determining those inputs. It is therefore necessary to determine the "amount paid [by the taxpayer] for the strip" and the "amount payable on the transfer" in the context of the facts viewed realistically, bearing in mind that the purpose of the provision is that any loss should reflect the economic outcome. 14 (4) Finally, Lewison J reaches his conclusion (*Berry*: [58]) on an analysis of the effect of the scheme as a composite whole. Lewison J finds that the scheme was a self-cancelling scheme. On that basis, Mr Berry could not have made a loss within paragraph 14A; the purchase price and sale price of the gilt strips were the same."

107. We agree. In *Berry* at [51]-[52] Lewison J carried out the first of the two interpretative stages referred to earlier (*Berry* at [31](ii)(a)). What is required is the ascertainment of the purpose of the key legislative provision: paragraph 14A of Schedule 13.

108. What the UT in *Berry* held is that the purpose of paragraph 14A is to be derived from paragraph 14A(1), namely that a person who sustains a loss from a discount on a strip should be entitled to relief from income tax for that loss, with "*loss*" in this context not being "*notional*" but "*real*" – it should reflect "*real commercial outcomes*" (*Berry* at [52]; *Andrew* at [83(2)-(3)]; *Pitt* at [119(6)]). That the "*loss*" must be "*real*" is not surprising. As observed

by the Supreme Court in *UBS* itself at [64] (citing *Barclays* at [34], in turn citing *Ramsay* at page 326D): "tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, 'in the real world'".

109. Ms Nathan KC also suggested that *Berry* was wrongly decided because Lewison J did not receive argument on the legislative history of the FA 1996 or have sight of the extra statutory material upon which she relied before the FTT and us (which forms part of Ground 4). However, it is notable that despite the number of pages of legislative history and extra-statutory material in the Appellant's presentation before the FTT and us, there is no passage within the material the Appellant relies upon which states or implies that the concept of "*loss*" in paragraph 14A denotes an artificial loss devoid of real world outcome. Had such a proposition been part of Parliament's intent, then this much would have been clear at some point in the legislative process. But it was not. An obvious explanation for such absence is that the Appellant's interpretation was not part of Parliament's intent.

110. In summary, Ground 2 should be dismissed. No sensible criticism of Lewison J's approach in *Berry* is identified by the Appellant. *Berry* is not inconsistent with prior or subsequent case law, and was, we respectfully say, correctly decided. *Berry* is not undermined by the external materials on which Ms Nathan KC seeks to rely.

111. As Mr Davey KC submitted, there is nothing to suggest that Lewison J erred in his approach to construing the legislation in *Berry*, whether by the supposed importation of an illusory canon of statutory construction at [31(viii)] or otherwise. In as much as the Appellant's complaint goes as far as the proposition that Lewison J in *Berry* should have interpreted the legislation before him literally rather than purposively then we have already explained why this should be rejected. It is not what is prescribed in *UBS* or *BMBF* or *Rossendale* or any other authority. We have accepted the purposive interpretation of paragraph 14(3)(b) in rejecting Ground 3.

112. We dismiss Ground 2. The FTT made no error of law.

<u>Ground 4 – the FTT erred in rejecting the relevance of the extra statutory materials on which the Appellant relied as an aid to statutory construction and, in particular, in seemingly relying on *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1WLR 896 in so doing ([176])</u>

The FTT Decision

113. The FTT stated at [176]:

> 176. As a concluding remark, it is not just Lord Hoffmann's speech in *MacNiven* that reverberates in the writing up of this decision, but his speech in *Investors Compensation Scheme* ('*ICS*') as concerns the use of extrinsic material to aid the construction of contractual terms. Suffice it to say that I see parallels in Lord Hoffmann's comments (and criticism) in *ICS* when considering the extent and the relevance of extrinsic material being deployed in aiding statutory construction, of which the appellant has supplied me with in ample quantity.

The Appellant's submissions

114. Ms Nathan KC submitted that the FTT wrongly relied on Lord Hoffman's speech in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1WLR 896

("*ICS*") in rejecting the relevance of the extra statutory materials on which the Appellant relied as an aid to construction.

115. She argued as follows. First, *ICS* concerned contractual construction, and the speech of Lord Hoffman is inapplicable to the different exercise of statutory construction. The correct approach to statutory construction is set out in *UBS,* upon which the Appellant relied. Further, Lord Hoffman did not criticise the use of extrinsic materials as an aid to statutory construction (he was not concerned with that in that case) or even contractual construction. In his speech, Lord Hoffman drew on documents extrinsic to the contract to construe the contract (see pp.910D-F and 913H-914A). Lord Hoffman stated, when interpreting a contract, the background against which the contract must be construed "*includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man*" (see p.913A).

116. Secondly, Ms Nathan KC contended that the Appellant was entitled to, and was correct to rely on extra-statutory materials as an aid to construction. Explanatory notes and government reports may be relied on to identify the mischief at which the legislation is aimed its purpose and meaning: *Regina (O) v Secretary of State for the Home Department [2022] UKSC 3* at [30] *('R (O)*'). The FTT accordingly erred in disregarding the extra-statutory material relied upon by the Appellant (at [176]). In so stating, the FTT misunderstood and misapplied binding authority, such as *R (O)*, where Lord Hodge stated at [30] that while extrinsic material cannot displace the clear words of the statute, "*The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute…*"

117. Thirdly, she submitted that the FTT erred in failing to give the Appellant an opportunity to make submissions on the relevance and meaning of *ICS*. It is an error of law for a tribunal to rely on an authority in reaching its decision which it does not give the parties the opportunity to address, where that authority is central to the tribunal's decision (in the sense of not being peripheral): *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449, at [31]; *Lithuanian Beer Ltd v HMRC* [2019] 1 WLR 627, at [33].

Our Analysis

118. We reject the Appellant's submissions.

119. Firstly, the Appellant has sought to undermine the Decision on the basis of the FTT's reference to the case of *ICS*. There is nothing material in the point which assists the Appellant in his present appeal to the UT. The FTT referred to *ICS* once, fleetingly, in a single paragraph, on the penultimate page of the Decision subsequent to the FTT having already, emphatically, decided the substance of the case against the Appellant, it stated (Decision at [175]):

> "I have no difficulty in finding that the absurd result delivered by the multi-faceted transaction as implemented in this case does not operate as a transaction to which paragraph 14A of Schedule 13 was intended to apply."

120. The reference to *ICS* then comes in the next paragraph (Decision at [176]) as part of a "*concluding remark*" in which the FTT refers correctly to the Appellant having provided the FTT with an "*ample quantity*" of "*extrinsic material ... deployed in aiding statutory construction*". This is consistent, with the Supreme Court's recent statement in respect of the process of statutory interpretation including the observation that "*[e]xternal aids to*

interpretation must … play a secondary role" (see *Regina (O) v Secretary of State for the Home Department* [2022] UKSC 3 at [28] and following including at [30]).

121. Secondly, the FTT addressed the Appellant's submissions as to the legislative history of Schedule 13, FA 1996 at [121]-[122] and Annex 3 of the Decision:

> *Amendments to Schedule 13 FA 1996*
> 121. Schedule 13 underwent three key stages of amendments since its introduction in FA 1996, and these are central to Ms Nathan KC's submissions. The details of these amendments as put forward by Ms Nathan KC are set out in **Annex 3**. The gist of the amendments is as follows:
> (1) First: from 27 July 1999, introduction of a targeted anti-avoidance provision into the definition of 'relevant discounted securities' which was not applicable to gilt strips.
> (2) Second: from 10 July 2003, the general scheme for 'relevant discounted securities' other than strips was repealed. The provisions of para 2(2), formerly used to calculate losses for relevant discounted securities, were replicated in the newly introduced para 14A in materially identical terms, without the targeted anti-avoidance provision being introduced into para 14A.
> (3) Third: from 22 July 2004, Sch 13 was significantly amended to introduce general anti-avoidance provisions that denied loss relief in the case of certain schemes or arrangements with an unallowable purpose.
>
> 122. The short points I take from this part of Ms Nathan KC's lengthy submissions are: (1) that the amendments to Sch 13 did not make any changes of substance to the tax treatment of gilt strips, especially in relation to the 'A-B' calculation for losses from a discount on gilt strips, even after para 2 (as concerns *Campbell*) was repealed; and
> (2) the availability of loss relief for losses on gilt strips was maintained without any anti-avoidance provisions into para 14A as was then 'newly' enacted from 10 July 2003.

122. The FTT then addressed the Appellant's arguments as to the relevance of the extra statutory material – the parliamentary material and Explanatory Notes to the Finance Bills - at [123]-[126] and Annex 4:

> *Statutory purpose of Sch 13 FA 1996*
> 123. Ms Nathan KC then took me through parliamentary material behind the amendments to Sch 13 for the submission that the mischief of para 14A as introduced into Sch 13 FA 1996 with effect from 10 July 2003. Section 182 and Schedule 39 to the Finance Act 2003 ('**FA 2003**') was to address tax avoidance by purchasers of relevant discounted securities. The Paymaster General summarised the purpose of Schedule 39 FA 2003 as follows:
>
>> '[Schedule 39] seeks to stop widespread and aggressive exploitation of the relevant discounted securities regime by high net-worth individuals using marketed schemes. The schedule's purpose is to put the taxation of relevant discounted securities on the same footing as the taxation of normal interest bearing securities, and to ensure European Union capability by extending the special treatment of UK gilt strips to strips of overseas Government securities.' (Standing Committee B debate, 17 June 2003 (Col 611))
>
> 124. The Explanatory Notes to the Finance Bill 2003 are brought in to aid statutory construction, and some of the paragraphs in the Explanatory Notes that have been referred to are set out in **Annex 4**. In the appellant's post-hearing submissions on *Pitt*, it is emphasised that the strength of his case is different from that of the taxpayer in *Pitt*, due to the appellant's submissions on (a) the legislative history leading to the introduction of para 14A in Sch 13, and (b) the mischief of para 14A as stated in the Explanatory Notes to the Finance Bill 2003.
>
> 125. The main point from this part of the appellant's submission is that the purpose of para 14A did not contain any anti-avoidance element, and it was a 'special treatment' reserved to the gilt strips to

retain the availability of loss relief as contained in para 14A, and that this is consistent with the contents of the Explanatory Note which relate to clause 181 and Sch 39 to the Finance Bill 2003:

> '1. The clause and schedule remove relief for losses and expense for most relevant discounted securities ("RDS"). RDS are securities issued at a discount of more than ½% a year. RDS held on 26th March 2003 which are listed on a stock exchange are protected. The special treatment of UK gilt strips, apart from expenses, is retained and extended to strips of other overseas government securities.'

126. It is further submitted that the issue of avoidance or deferral of taxation in relation to gilt strips was specifically considered in the context of the newly introduced para 14A, as explained at paragraph 23 of the Explanatory Note to the Finance Bill 2003:

> 'There are special rules in the RDS legislation for "gilt strips". These are created when the interest coupon on a gilt is detached from the principal, and dealt in separately. The right to receive an interest payment in the future has a present value lower than the amount of interest due, so a gilt strip falls to be treated as a RDS. To avoid people deferring tax on gilt interest, which is payable twice a year, by investing in a strip where the profit would only be taxable on redemption or sale, legislation requires a strip to be treated as if it were transferred each year on 5th April for its market value, and the reacquired.'

123. The FTT returned to the topic of the Explanatory Notes at [133]-[135] concluding:

> 135. Relying on the Explanatory Notes to the Finance Bill 2003 cited in her submissions, Ms Nathan KC says that there is no indication that either Sch 13 as originally enacted, or the amendments made in 1999 and 2003, were directed at any mischief which could be remedied by restricting the meaning of '*loss from a discount of a strip*' in para §4A(3)(b) beyond the clearly drawn statutory definition. The statutory context shows that when Parliament took action in 1999 and 2003 to address concerns about avoidance on relevant discounted securities, it left the formula for the calculation of losses for gilt strips unchanged, which can be contrasted with the significant amendments made in 2004 to introduce anti-avoidance provisions.

124. Therefore, on a fair reading of the Decision, it is clear that the FTT did adequately consider the materials cited to it by the Appellant. We agree with the FTT's observation when refusing permission to appeal on this ground:

> "… to an objective observer, the Decision has treated the extrinsic material judiciously, fairly, and as comprehensively as the scope of such consideration can be accommodated proportionality in a dispositive decision that is already lengthy. See for example, the engagement in the Decision with the appellant's submissions in reliance on extrinsic material at §§ 123-126; at §§ 133-135; and at §§ 158-159. Annexes 3 and 4 were specifically set out to provide excerpts of the extrinsic material relied upon by the appellant."

125. Thirdly, the Appellant's representatives were given ample opportunity before the FTT, through both written and oral submissions, to make such points as they wished to make, about such materials as they wished to refer to, in contending for a particular construction of the legislation in question. The FTT read and heard those submissions, and considered those materials, and also read and heard HMRC's submissions, and considered such other materials as were before it, and then produced a long and detailed Decision which engaged expressly with the Appellant's submissions and the materials to which the Appellant had referred. The mere fact that the FTT did not take from the materials what the Appellant would have liked is not a basis for overturning the Decision. Finally, there was no debate before the FTT as to

whether the Appellant should have the opportunity to refer the FTT to such materials as were in the FTT hearing bundle; it was their ultimate relevance and materiality that doubted, as stated at [176] of the Decision ("*the extent and the relevance of extrinsic material being deployed…*"). There was no procedural unfairness.

126. Ms Nathan KC took us at length through the following the same and additional extra statutory materials during the hearing: Inland Revenue Consultative Document, '*The Taxation of Gilts and Bonds*' (May, 1995); Bank of England Consultative Paper, '*Strips and new instruments in the Gilt-Edged Market*' (May, 1995); Annex A, Minutes of Evidence to the Treasury Select Committee, January 2000; Standing Committee B debate, 17 June 2003, Col 611 925; and Explanatory Notes to clause 181, Finance Bill 2003.

127. She relied on the fact that passages from these documents evidence that part of the legislative intent behind Schedule 13, FA 1996 in its various iterations was to encourage a market for gilts and the various provisions were not aimed at anti-avoidance. However, there was nothing contained within what Ms Nathan KC cites which supports her construction of paragraph 14A specifically or Schedule 13 generally: nothing which states or implies that the concept of "*loss*" or 'amount payable on the transfer' involves an artificial loss devoid of commercial or economic reality. The explanation for such absence in the materials is that the Appellant's interpretation was not part of Parliament's intent and the construction of the provisions applied by the FTT was the proper one.

128. We dismiss Ground 4.

Conclusion and disposition

129. We have rejected each of the Appellant's grounds of appeal and the appeal must be dismissed. There was no material error of law made by the FTT in a Decision which was carefully and conscientiously constructed. The FTT Decision is confirmed.

JUDGE RUPERT JONES
JUDGE ASHLEY GREENBANK

RELEASE DATE: 12 June 2024