Neutral Citation: **[2025] UKUT 00096 (TCC)**

Case Number: UT/2024/61

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

CAPITAL GAINS TAX – entitlement to loss relief under s253 TCGA 1992 following capitalisation of loan – appeal allowed

Heard on: 19 February 2025
Judgment date: 19 March 2025

Before

MRS JUSTICE JOANNA SMITH
JUDGE NICHOLAS ALEKSANDER

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

TIMOTHY BUNTING

Respondent

Representation:

For the Appellants: Quinlan Windle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Thomas Chacko, Counsel, instructed by Evelyn Partners LLP, chartered accountants

DECISION

INTRODUCTION

1. This appeal concerns the interpretation of s253(3) Taxation of Chargeable Gains Act 1992 ("**TCGA 1992**"). In summary, s253(3) provides that a taxpayer who has made a loan to a trader may claim an allowable loss if the outstanding principal of the loan has become irrecoverable, and certain other requirements have been met.

2. The short issue in this appeal is whether a claim can be made under s253(3) in circumstances where a loan was released in consideration for the issue of ordinary shares prior to the claim being made.

3. References in this decision to sections, are to sections in the TCGA 1992, unless stated otherwise.

4. Mr Bunting was represented by Mr Chacko, and HMRC were represented by Mr Windle. Although greatly assisted by their detailed and helpful submissions, both written and oral, we have not found it necessary to refer to each and every argument advanced or all of the authorities cited in reaching our decision.

FIRST-TIER TRIBUNAL'S ("FTT") DECISION

5. The facts in this appeal were not in dispute. The FTT made factual findings with reference to the available evidence in paragraph [7] of its decision ("**the Decision**"), which we summarise by reference to the key facts as follows:

(1) In the early 2000s, Mr Bunting wanted to establish a business dealing in sports history books and memorabilia. It was intended that the business would trade with a view to a profit, and its holding of stock was expected to appreciate in value (paragraph [7(3)]).

(2) On 7 July 2004 Rectory Sports Limited ("**the Company**") was incorporated. Mr Bunting's wife was appointed as the sole shareholder and director. The company was capitalised by one ordinary share of nominal value £1 fully paid (paragraph [7(4)]).

(3) The activities of the business were funded by Mr Bunting who personally invested £3,452,771 by way of a series of unsecured[1], non-interest-bearing loans ("**the Loan**") (paragraph [7(5)]).

(4) The Loan represented money lent to the Company which was used by it wholly for the purposes of its trade in books and memorabilia and was not a debt on security (paragraph [7(6)]).

(5) There was some initial success for the business but by 2012 it had become clear to Mr Bunting (and his wife) that the stock held was depreciating rather than appreciating in value and the targeted market was falling away. The business was becoming unsustainable (paragraph [7(7)]).

(6) On 31 January 2013 Mr Bunting and the Company entered into an agreement for the capitalisation of £2,200,000 of the Loan ("**the Capitalisation Agreement**"). Pursuant

[1] The FTT's decision refers to the loan being "unsecuritised". We consider that this must be a typographical error, and have corrected it to read "unsecured".

to that agreement the Company issued 2,200,000 ordinary £1 shares to Mr Bunting ("**the Consideration Shares**"), and in consideration he agreed to "fully and irrevocably release and discharge the Company from any and all claims or demands [he] [had] or may have against the Company and duties, obligations and liabilities that the Company [had] or may have to [him] under or in respect of [£2,200,000]" (paragraph [7(8)]).

(7) The Capitalisation Agreement does not represent an assignment of the capitalised proportion of the Loan (paragraph [7(9)]).

(8) On 31 January 2013 the Company, and therefore the Consideration Shares, had no value (paragraph [7(10)]).

(9) The capitalisation of £2,200,000 of the Loan was undertaken for the purposes of, and in the belief that, Mr Bunting would, in consequence of the conversion, be entitled to claim income tax losses pursuant to s131 Income Tax Act 2007 on the basis that the shares had become of negligible value (paragraph [7(11)]).

(10) On 18 March 2013, the Company and Mr Bunting entered a further agreement for the release and discharge of £1,325,771 of the Loan in consideration for the transfer to Mr Bunting of identified assets (including the Company's name, fixed and moveable assets and stock) (paragraph [7(12)]).

(11) On 28 March 2013 the Company resolved that it should be liquidated, and liquidators were appointed[2] (paragraph [7(13)]).

(12) Mr Bunting claimed £2,200,000 of income losses in his self-assessment tax return for the tax year ended 5 April 2013 (paragraph [7(14)]).

(13) On 27 January 2015 HMRC opened an enquiry into the claimed income losses. During the course of that enquiry, on 29 February 2016, Mr Bunting made a protective claim under s253(3) in respect of the amount of the Loan that was released in exchange for the issue of the Consideration Shares. Mr Bunting later accepted that he had no entitlement to claim income tax losses, and by a letter dated 28 September 2016, he invited HMRC to close the enquiry into his 2012/13 tax return. By the same letter, he invited HMRC to formalise the protective capital loss claim and amend the 2012/13 return accordingly (paragraph [7(15)]).

(14) HMRC closed the enquiry on 25 November 2016 refusing the claim for income tax losses. They treated Mr Bunting's letter of 29 February 2016 as a claim for the capital losses made outside a return (the period for amending the return having expired) (paragraph [7(16)]).

(15) On 14 February 2017 HMRC opened an enquiry into the s253(3) claim. That enquiry was closed with the refusal of the claim on 1 September 2022. HMRC refused the claim on the basis that the agreement to capitalise the Loan satisfied £2,200,000 of the debt with the consequence that the conditions prescribed in s253[3] were not met.

[2] There is a typographical error in the FTT's decision, which states (incorrectly) that the liquidators were appointed on 14 April 2013. Nothing turns on this error.
[3] There is a typographical error in the FTT's decision, which refers (incorrectly) to section 235.

HMRC considered, in connection with the capitalised proportion of the Loan, that there was no amount outstanding which had become irrecoverable (paragraph [7(17)]).

(16) The closure notice was appealed to HMRC. It was reviewed and upheld on review and subsequently the appeal was notified to the FTT (paragraph [7(18)]).

6. It was common ground before the FTT that the Loan was a qualifying loan within the terms of s253(1) (paragraph [9]). It was also common ground:

(1) that on and immediately before 31 January 2013 the whole Loan represented an "outstanding amount" and was "irrecoverable" such that as at that date Mr Bunting could have claimed a capital loss (paragraph ([10]);

(2) that had Mr Bunting claimed a capital loss on or before 31 January 2013, and subsequently satisfied £2,200,000 of the Loan pursuant to the terms of the Capitalisation Agreement, the provisions of s253(5) and (9) would not have been met and no gain (reversing the capital loss) would have accrued (paragraph [10]);

(3) that *vis a vis* the proportion of the Loan that was satisfied by way of asset transfer in March 2013, there is no entitlement to claim a capital loss as the Loan was satisfied for valuable consideration (paragraph [11]).

7. At paragraph [41], the FTT correctly identified that it was for Mr Bunting to establish that the conclusion of HMRC's closure notice was wrong, and that he must do so on the balance of probabilities.

8. At paragraph [56], the FTT identified that the issue for determination in the case was whether, as at 29 February 2016 (i.e. the date on which the claim for relief was made), "as regards the capitalised debt, there was an 'outstanding amount […] [which] […] ha[d] become irrecoverable'".

9. In deciding that there was an outstanding amount which had become irrecoverable, the FTT considered, and applied, the decision of the Special Commissioners in *Crosby and others (Trustees) v Broadhurst (Inspector of Taxes)* [2004] STC (SCD) 348 ("***Crosby***"), a case in which a waived loan was held to be outstanding under s253(3). Although *Crosby* was not binding on the FTT, it decided to apply the principle of judicial comity and also expressed the view that *Crosby* was correctly decided (at paragraphs [58] and [59]). The FTT considered that the Special Commissioners in *Crosby* had interpreted the words "outstanding" and "irrecoverable" in s 253(3) in a way which was entirely consistent with their dictionary definitions: "outstanding" means "not paid", while "irrecoverable" means "impossible to get back".

10. The FTT considered this construction to be consistent with the fact that, in its view, "section 253 represents a comprehensive and complete code providing relief for those who have lent money to a trader and who will 'never see that money again'" (paragraph [60]). Thus, the FTT did not consider there to be anything "offensive" in relief being granted where "as a matter of fact, the amount loaned has not been paid, whether or not such non-payment is enforceable at the time the claim is made provided always that it is reasonable to conclude that the amount will never be paid" (paragraph [61]).

11. The FTT then turned to consider whether that conclusion applies where the debt no longer exists because it has been satisfied, albeit by the issue of shares which were accepted to have

nil value (paragraphs [65]-[67]). It was their view that the Loan was not "paid" when it was satisfied by the issue of the Consideration Shares. Those shares were worthless and so did not represent recovery or indeed "payment" against the Loan (paragraphs [69]-[70]). The FTT considered this view to be reinforced by reference to s251 (paragraphs [71]-[78]).

12. Thus, the FTT decided that the Loan had not been "paid" when it was released in satisfaction of the issue of the Consideration Shares, holding at paragraph [79] of the Decision that:

> We therefore consider that whilst the facts of the present case differ from that in *Crosby*, on the basis that no value was given in order to satisfy the debt the whole amount remained outstanding and irrecoverable. It is not the act of satisfaction which renders a debt no longer outstanding – it is satisfaction for valuable consideration (i.e. consideration in money or money's worth) in respect of which it is then reasonable to say that the debt or such part of it as is reflected in the value given has been paid. To the extent that the value given in money or money's worth is less than the debt the balance of the debt over the value given will remain outstanding.

13. The FTT therefore allowed Mr Bunting's appeal.

GROUNDS OF APPEAL TO THE UPPER TRIBUNAL

14. With the permission of the FTT, HMRC now appeals against the Decision. HMRC invites the Upper Tribunal to set aside the Decision and to uphold the conclusions contained in the closure notice.

15. HMRC's grounds of appeal are as follows:

(1) the FTT erred in law in holding that the Loan was outstanding in circumstances where the Loan no longer existed. For a loan to be outstanding, there must still be a right to repayment and on these facts, there was not ("**Ground 1**");

(2) the FTT erred in law in holding that the Loan was outstanding and irrecoverable in circumstances where it had been satisfied by an asset (and in particular by an asset that [Mr Bunting] wanted and valued). A loan that has been satisfied by the provision of an asset (including the issuance of shares), is not outstanding (or irrecoverable), regardless of the value of that asset ("**Ground 2**").

THE LAW

16. Section 253 relevantly provides as follows:

> **253 Relief for loans to traders.**
>
> (1) In this section "a qualifying loan" means a loan in the case of which—
>
> (a) the money lent is used by the borrower wholly for the purposes of a trade carried on by him, not being a trade which consists of or includes the lending of money, and
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> (b) the borrower is resident in the United Kingdom, and
>
> (c) the borrower's debt is not a debt on a security as defined in section 132;

and for the purposes of paragraph (a) above money used by the borrower for setting up a trade which is subsequently carried on by him shall be treated as used for the purposes of that trade.

[…]

(3) Where a person who has made a qualifying loan makes a claim and at that time—

(a) any outstanding amount of the principal of the loan has become irrecoverable, and

(b) the claimant has not assigned his right to recover that amount, and

(c) the claimant and the borrower were not each other's spouses or civil partners, or companies in the same group, when the loan was made or at any subsequent time,

then, to the extent that that amount is not an amount which, in the case of the claimant, falls to be brought into account as a debit given for the purposes of Part 5 of CTA 2009 (loan relationships), this Act shall have effect as if an allowable loss equal to that amount had accrued to the claimant at the time of the claim or (subject to subsection (3A) below) any earlier time specified in the claim.

[…]

(4) Where a person who has guaranteed the repayment of a loan which is, or but for subsection (1)(c) above would be, a qualifying loan makes a claim and at that time—

(a) any outstanding amount of, or of interest in respect of, the principal of the loan has become irrecoverable from the borrower, and

(b) the claimant has made a payment under the guarantee (whether to the lender or a co-guarantor) in respect of that amount, and

(c) the claimant has not assigned any right to recover that amount which has accrued to him (whether by operation of law or otherwise) in consequence of his having made the payment, and

(d) the lender and the borrower were not each other's spouses or civil partners, or companies in the same group, when the loan was made or at any subsequent time and the claimant and the borrower were not each other's spouses or civil partners, and the claimant and the lender were not companies in the same group, when the guarantee was given or at any subsequent time,

this Act shall have effect as if an allowable loss had accrued to the claimant when the payment was made; and the loss shall be equal to the payment made by him in respect of the amount mentioned in paragraph (a) above less any contribution payable to him by any co-guarantor in respect of the payment so made.

(4A) A claim under subsection (4) above shall be made—

(a) for the purposes of capital gains tax, not more than 4 years after the end of the year of assessment in which the payment was made;

(b) for the purposes of corporation tax, within 4 years after the end of the accounting period in which the payment was made.

(5) Where an allowable loss has been treated under subsection (3) or (4) above as accruing to any person and the whole or any part of the outstanding amount

> mentioned in subsection (3)(a) or, as the case may be, subsection (4)(a) is at any time recovered by him, this Act shall have effect as if there had accrued to him at that time a chargeable gain equal to so much of the allowable loss as corresponds to the amount recovered.
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> (6) Where—
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> (a) an allowable loss has been treated under subsection (4) above as accruing to any person, and
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> (b) the whole or any part of the amount of the payment mentioned in subsection (4)(b) is at any time recovered by him,
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> this Act shall have effect as if there had accrued to him at that time a chargeable gain equal to so much of the allowable loss as corresponds to the amount recovered.
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> […]
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> (9) For the purposes of subsections (5) to (8) above, a person shall be treated as recovering an amount if he (or any other person by his direction) receives any money or money's worth in satisfaction of his right to recover that amount or in consideration of his assignment of the right to recover it; and where a person assigns such a right otherwise than by way of a bargain made at arm's length he shall be treated as receiving money or money's worth equal to the market value of the right at the time of the assignment.
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> […]
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> (12) References in this section to an amount having become irrecoverable do not include references to cases where the amount has become irrecoverable in consequence of the terms of the loan, of any arrangements of which the loan forms part, or of any act or omission by the lender or, in a case within subsection (4) above, the guarantor.
>
> […]

17. Section 253 is to be read in the context of s251(1) to s251(3).

18. Section 251(1) provides that (with exceptions, none of which is relevant to this appeal) neither a chargeable gain nor an allowable loss[4] arises on the disposal of a debt by the original creditor.

19. Section 251(2) provides that the satisfaction of a debt (or part of it) shall be treated as a disposal of the debt, or of that part, by the creditor at the time the debt is satisfied.

20. Section 251(3) addresses the circumstance in which property is acquired by a creditor in satisfaction of his debt (or part of it). It relevantly provides as follows:

> (3) Where property is acquired by a creditor in satisfaction of his debt or part of it, then […] the property shall not be treated as disposed of by the debtor or acquired by the creditor for a consideration greater than its market value at the time of the creditor's acquisition of it; but if under subsection (1) above […] no chargeable gain is to accrue on a disposal of the debt by the creditor (that is the original creditor), and a chargeable gain accrues to him on a disposal by him of the property, the amount of the chargeable gain shall (where necessary) be reduced so as not to exceed the chargeable gain which would have accrued

[4] Although s251 only refers to chargeable gains, the effect of s16 is to extend the provision to apply to allowable losses as well.

> if he had acquired the property for a consideration equal to the amount of the debt or that part of it.

21. It is common ground that legislation is to be applied purposively, and this is perhaps especially true of tax legislation. We were referred to the decision of the Supreme Court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd and others* and *Wigan Council v Property Alliance Group Ltd* [2021] UKSC 16, [2022] AC 690, at [9]-[17]. At [13] the JJSC referred to the well-known statement of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454 at [35] to the effect that:

> the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.

22. Thus, a purposive construction has to be applied to the language of the legislation as approved by Parliament. In this context, we were also referred to the judgement of Lord Hope DPSC in *R (oao O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [29]-[31]:

> 29 The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Ascha›enburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme* p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."
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> 30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory

> statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.
>
> 31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:
>
> > "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House […]. Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

CROSBY V BROADHURST

23. The taxpayers in *Crosby* were the trustees of a settlement which had lent some £250,000 to a company. The shares in the company were owned by members of the settlor's family. The company failed to prosper, and the Revenue accepted that by 1991 the loan to the company was irrecoverable. The shareholders of the company managed to sell it in 1992 but, as a condition of the sale, the trustees executed a deed of waiver which released the loan. The issue that arose was whether the trustees were entitled to make a subsequent claim for a capital loss of £250,000 under s253(3) TCGA in circumstances where the loan had been extinguished by the waiver.

24. Although, at that time, there were some differences in the wording of the statute (most notably in s253(3) which did not include the words "at that time"), s253(3)(a) was in exactly the same form with the issue being whether "any outstanding amount of the principal of the loan has become irrecoverable". The Special Commissioners rejected the argument that there has to be a subsisting irrecoverable debt at the time the claim is made. Their reasons were short, but they focused on a purposive construction, emphasising the title of s253 ('Relief for loans to traders') and observing (at [12]) that "Parliament's intention was to afford relief to those who, having made a loan to a trader, will not see the money, or a part of it, again". Importantly, in our judgment, they went on to observe in the same paragraph that "if Parliament had intended that a loan must be both subsisting and irrecoverable it would have been simple to say so […]" and they concluded that "the accident of waiving a loan" did not disqualify the trustee lenders from claiming relief. As the FTT correctly recorded at [22], the Special Commissioners thus appear to have accepted the trustees' submission that the language of s253 as it then stood merely required that a loan had become irrecoverable and that the word "outstanding" indicated no more than that any claim to relief was limited to the irrecoverable amount.

25. As the FTT also pointed out at [45] of the Decision, the Special Commissioners in *Crosby* were thus interpreting the word "outstanding" to mean "not paid" rather than that the lender had an ongoing entitlement to enforce the debt. As the FTT observed, "[q]uite plainly a waived debt is no longer enforceable whereas it is unpaid". The FTT thus started from the proposition

(at [46]) that there was previous, though non-binding, authority "that the section 253 relief may be claimed when a loan no longer exists because it has been waived".

SUBMISSIONS OF THE PARTIES

26. The parties agree that the purpose of s253 is to encourage persons (not being banks) to make (or to guarantee) loans to trading businesses. However, submits Mr Windle, a purposive construction can only take you so far. The starting point for any exercise in statutory interpretation must be the meaning of the words used in the statute, having regard to their particular context. In this case, the words to be construed are "outstanding" and "irrecoverable" – these are not terms that are defined in the legislation, nor do they have a technical meaning in the context of tax law. They must take on their ordinary and natural meaning.

27. Mr Windle submits that, contrary to the views expressed by the Special Commissioners in *Crosby*, the ordinary and natural meaning of "outstanding" in relation to a loan conveys the concept of continuing existence. It encompasses an ongoing legal entitlement to enforce the debt; in other words, it is a subsisting chose in action enforceable by the creditor. We were referred to *Pioneer Freight Futures Co Ltd (in liquidation) v Cosco Bulk Carrier Co Ltd* [2011] EWHC 1692 (Comm), [2011] 2 CLC 184 at [75] where Flaux J (as he then was) considered the meaning of "outstanding":

> […] it seems to me that none of the transactions which had come to an end (i.e. both those where Pioneer was the seller and those where Cosco was the seller) can naturally be described as "outstanding", a word which assumes that some obligation remains to be performed in the future. If the relevant [Forward Freight Agreement] has come to an end through natural expiry, it is difficult to see on what basis it can be said that there is an "outstanding Transaction" consisting of that [Forward Freight Agreement], within the meaning of Section 6(a) of the Master Agreement.[5]

28. Mr Windle submits that this ordinary commercial interpretation is consistent with the operation of the relief in s253(3), and is supported by the use of "outstanding" elsewhere in s253 and in the TCGA more generally. Specifically:

(1) section 253(3)(b) imposes a requirement that the taxpayer must not have "assigned his right to recover" at the time he claims the relief. This must mean, says Mr Windle, that the taxpayer has a right to recover the "outstanding amount" at the time the claim is made, which would not be the case if the taxpayer had waived or released the loan, but had not been paid (whether in full or at all).

(2) the effect of s253(3)(b) is that a creditor who has assigned his right to recover an irrecoverable debt cannot claim relief, even if the assignment was for nominal consideration. However, on the FTT's construction of s253(3)(a), a waiver or release of the loan for nominal consideration would not preclude the making of a claim. Mr Windle contends that there is no sensible basis for this distinction: Parliament has made a clear policy choice in relation to assignment, and it is reasonable to conclude that the language used in s253(3)(a) indicates a similar choice in respect of loans that are satisfied or extinguished without being assigned.

[5] The decision of Flaux J was overturned on appeal, but as the Court of Appeal concluded that the obligations had not been extinguished, it did not need to address the meaning of "outstanding".

(3) section 253(5) addresses the situation in which a taxpayer (who has previously made a claim under s253(3)) recovers the whole or part of "the outstanding amount mentioned in subsection (3)(a)". Section 253(9) provides that a person is treated as recovering an amount if he receives any money or money's worth "in satisfaction of his right to recover that amount or in consideration of his assignment of the right to recover it". Mr Windle submits that both provisions are drafted on the basis that where an amount is "outstanding" for the purposes of s253(3), there remains a "right to recover that amount".

(4) the term "outstanding" is also used in sections 60(2), 115, and 143(3) TCGA in the sense of a subsisting and enforceable right.

(5) the interpretation adopted by the FTT can give rise to double relief (under s251 in addition to the relief claimed under s253(3)) in circumstances where a loan is waived in exchange for an asset (worth less than the amount of the loan) – and that asset subsequently increases in value.

29. Thus, Mr Windle invites this court to determine that *Crosby* was wrongly decided by the Special Commissioners and that, in following and applying the reasoning in *Crosby* to the facts of this case, the FTT erred in law.

30. In summary, Mr Windle contends that £2,200,000 of the Loan was released in consideration for the issue and paying-up (in full) of the Consideration Shares, and the balance of the Loan was released in consideration for the transfer of identified assets from the Company to Mr Bunting. Thus, at the time the claim under s253(3) was made, the Loan did not exist, and therefore could not have been "outstanding". If the drafter of s253(3)(a) had meant "not paid", that is what the legislation could have said. In finding that £2,200,000 of the Loan remained "outstanding" owing to the fact that it had not been "paid", the FTT erred in law. Accordingly, HMRC's appeal must succeed.

31. Mr Chacko submits that the FTT was correct to consider the language used in s253(3)(a) as a whole and in context. Mr Chacko accepts that the ordinary and natural meaning of "outstanding" in isolation (and in connection with a debt) may carry with it the implication that a lender has a subsisting legal entitlement to enforce the debt. Indeed, he appeared to accept in his skeleton argument that this was the ordinary English meaning of the word "outstanding". He also accepts that this is the way in which the word "outstanding" is used in (for example) sections 60(2), 115, and 143(3) TCGA.

32. However, in s253(3)(a), where the word "outstanding" is used in conjunction with the word "irrecoverable", and adopting a purposive interpretation, Mr Chacko submits that it carries a different meaning. In this context, he says that (as the FTT held) "outstanding" must mean merely "unpaid".

33. As we understood his submissions, Mr Chacko's reasoning for this is twofold. First, he submits that "unpaid" is a natural and ordinary meaning of "outstanding", even if it is not the only meaning. Mr Chacko referred us to the Shorter Oxford English Dictionary, where "outstanding" is defined as meaning "unresolved, pending; esp. (of a debt) unsettled […]" and "unsettled" means "of a debt, bill, etc: undischarged, unpaid."

34. Second, he contends that this interpretation is borne out by the context. A loan that is still enforceable is not strictly irrecoverable and for s253(3)(a) to bite the loan must be both outstanding **and** irrecoverable. Accordingly, the word "outstanding" cannot have been

intended to imply that the loan is still capable of being enforced. As the FTT put it at [66]: "there will be "an outstanding amount […] [which] has become irrecoverable" where the amount has not been paid and is not expected to be paid. Or to use the language in *Crosby* the lender has not seen and "will not see the money, or a part of it, again." This interpretation, says Mr Chacko, is neither wrong nor unnatural. The FTT interpreted the words of the section in a realistic manner which was consistent with its purpose.

35. Further, Mr Chacko submits that the construction adopted by the FTT avoids a number of otherwise capricious consequences:

> (1) if HMRC are right in their suggested construction, Mr Bunting would have been able to make a claim under s253 on 30 January 2013 (the day before the Capitalisation Agreement), but he could not have made a claim on 1 February 2013 (the day after the Capitalisation Agreement), or on any later date because the right to make the claim would have been lost. This, says Mr Chacko, is a result that cannot have been intended by Parliament.
>
> (2) if a borrower enters into one of various statutory insolvency arrangements, the creditor's right to make a claim would be lost – even though it is clearly the purpose of the legislation to give (non-bank) lenders the ability to recognise an allowable loss in the event that a trading borrower becomes insolvent. Mr Chacko referred us to provisions relating to the bankruptcy of individuals, to company and individual voluntary arrangements, and to the dissolution of companies. In the case of an individual becoming bankrupt, the right to sue on a loan is replaced by a right to prove in the bankruptcy (a different right). In the case of the dissolution of a company (following a liquidation or for some other reason), there will no longer be any ability to sue for recovery of the loan. And in the case of a CVA or IVA, the lender may (against his will) be treated as having waived or released all or part of his loan. Mr Chacko submits that these are all circumstances in which the purpose of the legislation would be defeated as the lender's loan would no longer be "outstanding" by the time he makes his s253(3) claim.
>
> (3) the operation of the relief for guarantors under s253(4) becomes problematical, where payment under the guarantee is only demanded after the borrower becomes the subject of a statutory insolvency process. In these circumstances (for the reasons outlined above), the loan may no longer subsist at the time the guarantee is called.

36. Against that background, Mr Chacko contends that if "outstanding" means "unpaid", then the issue of the worthless Consideration Shares did not affect the fact that £2,200,000 of the Loan remained unpaid. Although (as Mr Chacko accepts) £2,200,000 of the Loan was extinguished by the Capitalisation Agreement, it remained (he submits) both outstanding and irrecoverable for the purposes of s253(3) in that it had not been paid or satisfied – in the words of the FTT (at [69]), Mr Bunting "exchanged a right to enforce the debt for shares in the Company at a time when the shares were worthless". Thus, says Mr Chacko, Mr Bunting is "in the middle of the target for this relief: the circumstances are exactly those for which Parliament intended to grant capital loss relief".

37. Mr Chacko submits in the alternative that if a debt is released in exchange for part payment, the remaining amount of the debt continues to be "outstanding". In this case, where £2,200,000 of the Loan was satisfied and discharged in consideration of the issue of shares with a nil market value, the entire Loan remained unpaid and thus outstanding. In other words, for the purposes of s251(2), there was no disposal of the Loan or any part of it: the entire Loan

remained outstanding. As the FTT put it in [78] "[i]n the sense envisaged in section 251 the debt owed to [Mr Bunting] was satisfied only in the sense that it was waived in return for worthless property". Mr Windle's response is simply that the Capitalisation Agreement provided for £2,200,000 of the Loan to be released in consideration for the issue of the Consideration Shares, such that Mr Chacko's characterisation of the release as failing to satisfy the Loan is incorrect.

DISCUSSION

38. HMRC's grounds of appeal overlap, and (as the parties did in their oral submissions) we consider them together.

39. It is common ground that the purpose of s253 is to encourage non-banks to lend funds to trading businesses. We agree with the Special Commissioners in their decision in *Crosby* at [12] that the title of the section: "Relief for loans to traders" identifies its purpose. However, where we depart from the approach taken by the Special Commissioners, and adopted by the FTT, is that we cannot ignore the plain words of the statute itself. We focus (in the words of Lord Hope DPSC in *R (oao O) v Secretary of State for the Home Department* at [31]) on the "objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered" – in this case "outstanding" and "irrecoverable".

40. We agree with Mr Windle's submission as to the ordinary and natural meaning of these terms. We find that once a loan has been voluntarily waived or released, it can no longer be "outstanding" on the normal usage of that word. On the facts in this appeal, the Consideration Shares were fully paid up in cash by the release of a liquidated sum (namely £2,200,000 of the Loan) (see s583 Companies Act 2006). On any basis, we consider that £2,200,000 of the Loan had thereby been satisfied and was no longer "outstanding" in the sense that there was no ongoing obligation to pay that part of the Loan or entitlement to pursue it. The fact that the open market value of the Consideration Shares was negligible is irrelevant to the analysis.

41. This is also the answer to Mr Chacko's submission, and to paragraph [78] of the Decision, that for the purposes of s251(2) there was no disposal of the debt as the Consideration Shares were worthless. As the Capitalisation Agreement provided that £2,200,000 of the Loan was released and discharged in consideration for the issue of the Consideration Shares, we find that there was a satisfaction (and thus a disposal) by Mr Bunting of £2,200,000 of the Loan for the purposes of s251(2). For the Consideration Shares to have been issued as fully paid-up, £2,200,000 of the Loan needed to be released pursuant to s583 Companies Act 2006. The fact that the value of the Consideration Shares was less than the face value of the Loan is, again, irrelevant.

42. We consider that care needs to be taken when considering the definition of terms in a dictionary. The FTT was referred to definitions in the Cambridge Dictionary, and we were referred to definitions in the Shorter Oxford Dictionary. The definitions given for "outstanding" in these dictionaries are subtly different. However, Mr Chacko's submissions did not just refer us to the definition of "outstanding" in the Shorter Oxford Dictionary, but to the definition of one of the words ("unsettled") used in the Shorter Oxford Dictionary to define "outstanding". We were not assisted by this. In the case of "outstanding", we find that the meaning is straightforward (as Flaux J also found in *Pioneer Freight*).

43. We do not consider there to be any magic in the use of the word "irrecoverable" together with word "outstanding" and we reject the suggestion that when these two words are used

together, the meaning of the word "outstanding" is changed. We cannot see why Parliament would have intended the word "outstanding" to take on a different meaning in different provisions of the TCGA and we consider that the meaning of that word as it applies elsewhere in TCGA (as accepted by Mr Chacko) is also the meaning that is to be given to it in s253(3)(a). Notwithstanding the presence of the word "irrecoverable", we do not consider there to be any tension or conceptual difficulty caused by reason of according a meaning to "outstanding" which recognises a continuing entitlement to pursue the debt. We consider that a loan may be both outstanding (in the sense that obligations remain to be performed under it which there is an entitlement on the part of the lender to enforce) and also irrecoverable (in the sense of impossible to get back).

44. Furthermore, we agree with Mr Windle that the wording of s253(3)(b) strongly supports his interpretation. The words "that amount" in s253(3)(b) plainly refer back to the "outstanding amount of the principal of the loan" referred to in s253(3)(a). Furthermore, s253(3)(b) expressly refers to the "right to recover" that amount. We consider that it is impossible to read the words of s253(3)(b) as meaning anything other than that there is a right to recover the "outstanding amount" in s253(3)(a) which is capable of being assigned. An assignment would of course extinguish that "right to recover", just as a waiver or a release does. Sections 253(5) and s253(9) appear to us to be entirely consistent with this interpretation.

45. In so far as the Special Commissioners held in *Crosby* that for the purposes of s253 a loan need not be both subsisting *and* irrecoverable, we consider they were wrong to do so. In large part, this appears to be the underlying reason for the decision that the loan which (as was accepted in that case) had been extinguished by the waiver was capable of falling within s253: it was enough that it was irrecoverable and that at least some part of it was unpaid. This is not, however, our interpretation of the section and it does not recognise the natural and ordinary meaning of the word "outstanding".

46. Accordingly, we consider that the FTT made an error of law in following *Crosby* and in forming the view that it was correctly decided. Although the Special Commissioners in *Crosby* were right to focus on the importance of a purposive interpretation, they failed to attach appropriate weight to the natural and ordinary meaning of the words that had in fact been used in s253 by Parliament. Had they done so, we consider that the outcome of *Crosby* would have been different because the effect of the waiver in that case was that the loan ceased to exist and could not therefore be "outstanding".

47. Similarly, on the facts of this appeal, the effect of the release of £2,200,000 of the Loan was to extinguish that part of it, and we find that it was therefore no longer "outstanding" when the claim for relief was made. The FTT was wrong to focus on the question of whether the Loan had been "paid" rather than considering whether it remained "outstanding" – the word that was in fact used by Parliament in s253. We do not consider the FTT's discussion of s251 at [71]-[80] to take matters further.

48. We acknowledge, of course, that the practical effect of this decision is that (subject to s253(3A)) a claim which could have been validly made on 30 January 2013 could not be made at any time after 31 January 2013, but, standing back, we cannot see that this should affect our approach to interpretation where the natural and ordinary meaning of the words used is clear.

49. We were referred both to *Atherley v HMRC* [2018] UKFTT 408 (TC) and to *HMRC* v *Drown* [2017] UKUT 111 (TCC). We agree with the FTT (at [84]) that neither of these decisions is relevant to the issues in this appeal. We agree with the FTT that in the case of

Drown there was no question before the Tribunal as to whether the debt owed to Mr Leadley had been waived or satisfied when he died. As regards *Atherley,* we also agree that a decision to write-off a loan for accounting purposes cannot be equated with a waiver or satisfaction of a debt. In any event, the FTT in *Atherley* was not concerned with arguments over whether or not the loan remained "outstanding".

50. As regards Mr Chacko's submissions in relation to the various statutory insolvency procedures, these were not fully argued before us. We consider that the impact of a statutory insolvency process on the availability of relief under s253 would be better addressed in the context of an appeal in which these procedures were engaged and the issues were fully argued. However, (without making any findings in this regard) it occurs to us that the ordinary and natural meaning of "outstanding" may well be sufficiently broad to encompass a right to prove in the insolvency of a borrower (who is the subject of a statutory insolvency process) in respect of an outstanding and irrecoverable loan. We note also that s253(3A) permits an "earlier time" to be specified in a s253(3) claim, and in many circumstances the specification of an earlier time may address the concerns raised by Mr Chacko.

51. As regards the entitlement of a guarantor to make a claim under s253(4), and the timing of a claim under this provision - as against the point at which the underlying loan may be extinguished under an insolvency process - we find that there is nothing in the various submissions made to us which persuades us to adopt the meaning of "outstanding" as held by the FTT. We observe for the sake of completeness that neither party agrees with the FTT's analysis at [63].

DISPOSITION

52. We find that a qualifying loan cannot be "outstanding" for the purposes of s253 following its voluntary release by the lender in consideration for shares. For these reasons we allow the appeal in respect of both Ground 1 and Ground 2. We set aside the decision of the FTT and remake it to dismiss Mr Bunting's appeal against HMRC's closure notice of 1 September 2022.

MRS JUSTICE JOANNA SMITH

JUDGE NICHOLAS ALEKSANDER

Release date: 19 March 2025