Neutral Citation Number: [2026] EWCA Civ 461

Case No: CA-2024-001809

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
[2024] UKUT 00152 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 20 April 2026

Before :

LORD JUSTICE SNOWDEN
LADY JUSTICE FALK
and
LORD JUSTICE ZACAROLI

- -

Between :

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and –	
BURLINGTON LOAN MANAGEMENT DAC	**Respondent**

- -

John Brinsmead-Stockham KC and Edward Hellier (instructed by **The General Counsel and Solicitor for HMRC**) for the **Appellants**
Sam Grodzinski KC (instructed by **Simmons & Simmons LLP**) for the **Respondent**

Hearing dates: 10 and 11 December 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 20 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This appeal concerns the tax treatment of interest received by the Respondent ("BLM") in respect of a debt claim in the administration in England of Lehman Brothers International (Europe) ("LBIE" and the "LBIE administration").

2. BLM is resident in the Republic of Ireland. BLM purchased the rights to the claim (the "SAAD Claim") in February 2018, by way of a back-to-back assignment via a broker (the "Assignment") from SAAD Investments Company Ltd ("SICL"), a company resident in the Cayman Islands.

3. The issue is whether BLM's entitlement to receive about £90.8 million of post-administration interest in respect of the SAAD Claim was exempt from UK withholding tax ("UK WHT") by virtue of Article 12 of the UK-Ireland double taxation treaty signed on 2 June 1976 (as amended by protocols from time to time) ("Article 12" and the "UK-Ireland Treaty").

4. So far as material, at the relevant time Article 12 provided,

> "Interest
>
> (1) Interest derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State.
>
> (2) The term "interest" as used in this Article means income from … debt-claims of every kind …
>
> …
>
> (5) The provisions of this Article shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment."

5. The First Tier Tribunal ("FTT") and the Upper Tribunal ("UT") both held that the payment of interest to BLM from the LBIE administration was taxable only in Ireland by reason of Article 12(1). HMRC appeals on the basis that the FTT and UT should have found that Article 12(1) was disapplied by Article 12(5) because "the main purpose or one of the main purposes" of BLM was "to take advantage of [Article 12] by means of [the] assignment" of the SAAD Claim.

6. For reasons set out below, I would uphold the decision of the FTT and the UT and dismiss HMRC's appeal. I would also dismiss a respondent's notice filed by BLM.

The Facts

7. The FTT made extensive findings of fact that were not in dispute before the UT or before us. The following summary will suffice for the purposes of this appeal.

8. LBIE went into administration in England and Wales on 15 September 2008. It transpired that it had a surplus of assets over claims admitted in the administration, with the result that creditors holding admitted claims were entitled to be paid post-administration interest pursuant to The Insolvency (England and Wales) Rules 2016.

9. SICL was the original owner of the SAAD Claim. It was resident in the Cayman Islands and had been in liquidation there since 2009. On 31 August 2016 the principal amount of the SAAD Claim was agreed by the administrators of LBIE to be just over £142 million. That principal amount was paid in full by the LBIE administrators to SICL's liquidators on 7 September 2016.

10. That left the potential for payment of post-administration interest on the SAAD Claim. Given the length of time that LBIE had been in administration and the applicable statutory rate, such interest could have amounted to about £90 million. However, at the end of 2017 there were three issues with the claim to post-administration interest:

    i) if LBIE went into liquidation, there would be no entitlement to post-administration interest at all (the "liquidation lacuna" risk). In reality, this was not thought to be a significant risk;

    ii) it had not been finally resolved whether post-administration interest fell to be calculated from the date LBIE went into administration (15 September 2008) or the later date that SICL terminated its contract with LBIE (21 October 2011). The Court of Appeal had held on 24 October 2017 (*Lomas v Burlington Loan Management Ltd* [2017] EWCA Civ 1462) that interest should be calculated from the earlier date, but an application had been made to the UK Supreme Court for permission to appeal. Use of the later date would reduce the interest on the SAAD Claim by about £10 million (the "late termination" risk); and

    iii) it had also not finally been resolved whether section 874 of the Income Tax Act 2007 applied to impose withholding tax on payments of post-administration interest at all. Although it had been held at first instance by Hildyard J that deduction of UK WHT did not need to be made, in a judgment delivered on 19 December 2017 (*HMRC v Lomas* [2017] EWCA Civ 2124) the Court of Appeal held that such payments were subject to UK WHT pursuant to section 874. Permission to appeal was then sought from the UK Supreme Court.

11. As indicated above, SICL was resident in the Cayman Islands. The UK-Cayman Islands double tax arrangement signed on 15 June 2009 did not contain any provision exempting interest on debt-claims from UK WHT, but instead provided for relief against double taxation by means of a credit being given against tax in the Cayman Islands. Given the financial position of SICL, however, that meant that if the decision in *HMRC v Lomas* was upheld by the Supreme Court (as in fact turned out to be the case – see [2019] UKSC 12), SICL would in practice be subject to an irrecoverable tax cost of 20% of the post-administration interest payable on the SAAD Claim by reason of application of UK WHT.

12. In light of these considerations, in early February 2018, SICL's liquidators instructed a third-party broker ("Jefferies") to market the rights to receive any further monies that might be payable in relation to the SAAD Claim.

13. BLM is a substantial investment company which is tax-resident in Ireland. BLM started acquiring admitted claims in the LBIE administration in 2011, and by 2018 it had acquired an interest, either by legal assignment or by way of a participation, in 443 such claims. As is apparent from the reference to *Lomas v Burlington Loan Management Ltd* above, BLM had also been a respondent in the litigation in relation to the late termination risk.

14. After being instructed by SICL, Jefferies approached BLM's investment manager, Davidson Kempner Capital Management ("DKCM") to see if BLM was interested in acquiring the remaining rights in relation to the SAAD Claim. Commercial terms were agreed on 8 February 2018, and a trade was confirmed by email on 12 February 2018 (the "Trade Date"). Formal written agreements were executed on 9 March 2018.

15. In paragraph 165 of its decision, the FTT made the following findings as to the state of knowledge of SICL (in the person of its liquidators) at the relevant times:

    i) SICL knew that the value of the SAAD Claim to it could be approximately 80% of the post-administration interest because of the likelihood of suffering irrecoverable UK WHT when interest was paid. The reference to "approximately 80%" was because of the liquidation lacuna risk and the late termination risk;

    ii) SICL knew that there were people in the market for whom UK WHT would not be a permanent cost. These would include UK resident corporates with losses to offset against the income, and residents of other jurisdictions with treaties providing a full exemption who would be able to reclaim any UK WHT paid.[1] Such persons would likely be prepared to pay more for the SAAD Claim than the value which it would have to SICL in the absence of a sale;

    iii) SICL wanted to realise the greatest value possible for the SAAD Claim, bearing in mind the potential market;

    iv) when the commercial terms were agreed on or about 8 February 2018, SICL did not know, and did not care about, the identity of the purchaser;

    v) after agreeing the commercial terms, SICL took steps to ascertain the identity of the purchaser of the SAAD Claim. However, it did not do so with a view to ascertaining the purchaser's tax residence or seeking to renegotiate or walk away from the transaction, because by then SICL's liquidators considered that they were "morally bound" to proceed with the sale at the agreed price; and

    vi) by the Trade Date of 12 February 2018, SICL knew that the purchaser was BLM and that BLM was resident in Ireland for tax purposes.

[1] Such persons would also include UK based exempt investors such as pension funds.

16. In paragraph 164 of its decision, the FTT made the following findings as to the state of BLM's knowledge (in the person of the relevant employee of DKCM) at the relevant times:

    i) when the opportunity to acquire the SAAD Claim was offered to it, BLM knew that in the absence of a sale, because of the likelihood of SICL suffering irrecoverable UK WHT, the value of the SAAD Claim to SICL was approximately 80% of the post-administration interest payable. The reference to "approximately 80%" was because of the liquidation lacuna risk and the late termination risk;

    ii) BLM also knew that whatever the precise value of the SAAD Claim to SICL if it were to be retained, SICL would be likely to be willing to sell the claim for the best price that it could get in excess of that value;

    iii) BLM was aware that the SAAD Claim would have a value to BLM of approximately 100% of the interest payable because of BLM's ability to reclaim any UK WHT which might be payable in respect of that interest. Again, the reference to "approximately 100%" was because of the liquidation lacuna risk and the late termination risk;

    iv) BLM knew that it was not the only prospective purchaser of the SAAD Claim for whom UK WHT on the interest payable would not be a permanent cost. It also knew that although Jefferies had not initially marketed the SAAD Claim to other potential purchasers, it would do so if BLM put in a "low ball" offer;

    v) BLM took into account the following factors when setting the price to offer for the SAAD Claim,

        a) first and most importantly, the quantum and timing of the expected cash flows from the SAAD Claim;

        b) second, the price would need to be low enough to enable BLM to obtain an internal rate of return of 10% on the assets that it purchased;

        c) third, the price would need to be low enough for the loss to be acceptable if the late termination risk materialised; and

        d) finally, BLM's appraisal of the price which SICL would be likely to accept bearing in mind (i) the value of the SAAD Claim to SICL if it were to retain the claim, and (ii) that BLM was not the only potential bidder for the SAAD Claim and that there were others in the market for whom UK WHT would not be a permanent cost.

17. Completion took place in two preordained stages on 9 March 2018. At the first stage, the liquidators of SICL assigned the SAAD Claim to Jefferies for a consideration of £82,400,000. At the second stage, Jefferies assigned the SAAD Claim to BLM for a consideration of £83,550,000.

18. On 25 July 2018, the gross amount of the post-administration interest payable in respect of the SAAD Claim was £90.7 million. LBIE's administrators paid 80% of this sum to BLM (£72.6 million) in cash on that date. They withheld 20% of the post-

administration interest (£18.1 million) in accordance with section 874 and paid it over to HMRC in September 2018.

19. Using these figures, this meant that SICL sold the SAAD Claim for 90.81% of the total amount of the post-administration interest payable, and Jefferies earned a commission of 1.27% of that total amount. BLM paid about 92.08% of the amount of post-administration interest payable to acquire the SAAD Claim, meaning that if it were able to reclaim the UK WHT, it would make a profit equating to 7.92% of the interest payable.

The decision of the FTT

20. The issue which the parties agreed the FTT had to determine was stated in paragraph 75 of its decision. It was whether, on the basis of the facts as agreed or found, it was the main purpose or one of the main purposes of any person concerned with the Assignment of the SAAD Claim to BLM to take advantage of Article 12(1) within the meaning of Article 12(5) of the UK-Ireland Treaty. Before the FTT, HMRC contended that this was indeed so, both as regards SICL and BLM. That contention was disputed by BLM.

21. In its decision, the FTT held that this question should be answered in the negative as regards both SICL and BLM.

22. After reviewing various materials, the FTT summarised what it considered to be the relevant legal framework in paragraph 168 of its decision as follows,

> "(1) the burden of proof in this case is on [HMRC];
>
> (2) SICL is a relevant "person" for the purposes of Article 12(5);
>
> (3) accordingly, [HMRC] need to show that either BLM or SICL (or both) had, as its main purpose or one of its main purposes, "taking advantage" of Article 12(1) by means of the assignment of the SAAD Claim;
>
> (4) the main purposes of each of BLM and SICL in relation to the assignment of the SAAD Claim are to be determined subjectively in the light of all of the evidence, including (but not exclusively) inevitable and inexorable consequences;
>
> (5) it is not necessary in order for Article 12(5) to apply for there to have been any artificial steps or arrangements. It is merely necessary for one or both of BLM and SICL to have had a main purpose of "taking advantage" of Article 12(1) by means of the assignment of the SAAD Claim; and
>
> (6) so far as the main purposes of SICL are concerned, it is insufficient in order for Article 12(5) to apply for SICL to have had a main purpose of "taking advantage" of a

> provision of UK domestic law or a treaty which was unknown to SICL. Instead, in order for Article 12(5) to be capable of applying, SICL needed to have had a main purpose of "taking advantage" of Article 12(1) specifically."

23. The FTT also held, at paragraph 170, that Article 12(5) required the person whose purposes are being considered to have a main purpose of taking advantage of Article 12(1) for itself. The FTT held that having a main purpose of enabling another person to take advantage of Article 12(1) was not within the scope of Article 12(5). That finding was not challenged on appeal.

24. Applying these principles to the facts, the FTT held, first, that BLM did not have, as one of its main purposes, taking advantage of Article 12(1) by means of the Assignment.

25. The FTT noted that BLM was an established business that had received UK source income many times before on LBIE claims. The FTT held that BLM had an implicit understanding (it was an "accepted fact") that UK WHT would not be a permanent cost for BLM in acquiring such claims, because this was an inevitable consequence of BLM being resident in Ireland. BLM could therefore include this factor in the decision as to how much to pay for UK-source debts. The UK WHT exemption was, the FTT said, therefore "merely part of the scenery – the 'setting' in which BLM made its offer for the SAAD Claim".

26. Against that background, the FTT held, at paragraph 176,

> "… *The sole purpose of BLM in acquiring each such claim, including the SAAD Claim, was to realise a profit by reference to the difference between its purchase price and the cash flows that it received as result of its acquisition of the relevant claim.* That was the main focus of [the relevant employee of DKCM] when she was considering whether or not to make an offer for the SAAD Claim and, if so, the amount of that offer. She was solely interested in determining the profit which BLM might make from its acquisition of the SAAD Claim and the risks associated with acquiring the SAAD Claim. The fact that BLM's ability to benefit from Article 12(1) was a component in the calculation which informed that judgment did not make that ability any part of BLM's subjective purpose in acquiring the SAAD Claim."
>
> (my emphasis)

The FTT added that it did not view BLM's acquisition of the SAAD Claim as different in any material respect, except price, from its other acquisitions of interest-bearing claims in the LBIE administration.

27. Secondly, the FTT held that SICL also did not have, as one of its main purposes, taking advantage of Article 12(1) by means of the Assignment. The key to that conclusion was the FTT's finding, summarised in paragraphs 187-188, that at the time

that the liquidators reached the agreement in principle to sell the SAAD Claim, they had not inquired about the identity of the end-purchaser. They thus had no way of knowing that the purchaser could offer the price that it had because it was able to benefit from Article 12(1) rather than, say, benefitting from some other exemption from UK WHT, or because it had significant tax losses against which to offset the interest received.

28. The FTT also rejected the suggestion that it made any difference that, by the time that the SICL liquidators entered into the formal assignment of the SAAD Claim, they knew that BLM was relying on Article 12(1) for its exemption from UK WHT.

29. The FTT noted that HMRC was effectively arguing that a seller would be "taking advantage" of Article 12(1) as long as it knew that its purchaser was taking into account its exemption from UK WHT in framing its offer. The FTT observed, at paragraph 195,

> "It would have an enormous impact on the secondary debt market if purchasers were to be unable to obtain the benefit of an applicable treaty simply because:
>
> (1) there were people in the market with different tax attributes;
>
> (2) those different tax attributes were reflected in the market price of the debt claim which was the subject of the transaction; and
>
> (3) the seller happened to know the reason why its purchaser had the necessary tax attributes to be able to pay the market price of the debt claim."

30. The FTT further rejected the submission by HMRC that this situation was akin to the case of a "conduit company" or "treaty shopping". In that regard, the FTT referred to a report from the OECD Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies" (the "Conduit Report") and explained, at paragraphs 197-199,

> "197. … there is, in our view, a meaningful difference between a case where a person disposes outright of a debt claim bearing the right to interest for a market price which happens to reflect the fact that its purchaser, along with many others, enjoys tax attributes which it does not have – such as an exemption from UK withholding tax under UK domestic law or under an applicable treaty – and the cases at which Article 12(5) and its equivalent in other treaties are aimed, such as transactions involving conduits or "treaty-shopping".
>
> 198. A feature of the latter type of cases is that the resident of the non-treaty jurisdiction typically retains an indirect economic interest in the debt claim generating the flow of income which passes through the person claiming the benefit of

> the treaty … In that way, the resident of the non-treaty jurisdiction can be said to be "acting through" the person located in the treaty jurisdiction … It thereby "takes advantage" of the benefit of the treaty by accessing the benefit of the treaty indirectly.
>
> 199. In contrast, in a case where the debt claim is sold outright, the seller does not retain any ongoing economic interest in the flow of income from the debt claim. Instead, it simply sells the entitlement to the debt claim (and that income) outright. In that case, we consider that, even if the market price at which the seller realises the debt claim is attributable to the purchaser's entitlement to an exemption from UK withholding tax in relation to the interest which will be payable in respect of the debt claim following the sale, it is not appropriate to describe the seller as having a main purpose of "taking advantage" of the domestic law or treaty provision which confers that exemption on the purchaser. Instead, the seller's only purpose is to realise the debt claim at a price which reflects the market. There will be all sorts of factors which feed into the calculation of the sale price, one of which will be the tax attributes of the potential purchasers of the debt claim, because those tax attributes will affect the price which the market is prepared to pay for the debt claim. The fact that the particular purchaser happens to fall within one of the categories of persons enjoying the tax attributes which enable it to pay the market price and that the seller is aware of that does not mean that the seller thereby has a purpose of "taking advantage" of the domestic law or treaty provision which gives rise to that particular purchaser's specific tax attributes and enables the particular purchaser to pay the market price."

31. The FTT concluded, at paragraph 201, that although Article 12(5) should not be construed as applying only to transactions involving artificial steps or arrangements,

> " … in order for a person to be said to have a main purpose of "taking advantage" of a treaty relief itself in relation to a debt claim, something more is required than simply selling the debt claim outright, for a market price which happens to reflect the fact that certain potential purchasers of the debt claim have tax attributes which the seller does not have, to a purchaser which happens to be able to pay that market price because it has those tax attributes by virtue of being entitled to relief under a treaty."

The decision of the UT

32. HMRC appealed to the UT, contending, in essence, that the FTT had misinterpreted Article 12, and had reached the wrong conclusion as to BLM's and SICL's purposes on the facts.

33. In relation to the approach to interpretation of Article 12, the UT referred to various parts of the Conduit Report and the OECD Commentary on the Model Tax Convention (the "Commentary" and the "MTC") upon which the UK-Ireland Treaty was based, before noting, at paragraph 58, that,

> "58. In the light of the OECD materials, the parties were rightly agreed that Article 12(5) of the UK-Ireland treaty is in the nature of an "anti-abuse" provision. Indeed, as noted above, the relevant commentary in the Conduit Report (at paragraph 6) actually uses the language of "takes advantage of" in circumstances where it is plain that abuse or unintended benefits of a treaty are in contemplation. The question raised by both BLM's Respondent's Notice and HMRC's Ground 1 is what type of "abuse" Article 12(5) seeks to counteract."

34. In that regard, at paragraph 60, the UT endorsed the view of the FTT that the application of Article 12(5) was not limited to cases involving artificial steps or arrangements. The UT also held, at paragraph 64, that it would be wrong to start from the position that interest on the SAAD Claim should be subject to UK WHT, merely because that was the position prior to the Assignment. Rather, the UT held at paragraph 65, that the correct starting point for the analysis was that unless there was an abusive arrangement falling within Article 12(5), BLM, as a resident of Ireland and beneficial owner of the SAAD Claim, was only to be taxed on the interest in Ireland.

35. The UT then considered HMRC's argument that the only (or at least a main) economic purpose of SICL and BLM in entering into the Assignment was to engage in what HMRC termed "UK WHT arbitrage".

36. HMRC argued that by the time the Assignment was entered into, both BLM and SICL knew about their own and their counterparty's positions in relation to UK WHT, and that the commercial rationale for the transaction was entirely based upon BLM's ability to recover UK WHT under Article 12(1), when SICL could not. HMRC argued that the "profit" made on the transaction by both SICL and BLM in comparison to the counterfactual in which there had been no assignment, was solely dependent upon BLM being able to rely upon Article 12(1). They further argued that the transaction was similar to a conduit arrangement, because in economic terms the interest payable was routed from the UK to SICL in the Cayman Islands via BLM in Ireland, free of UK WHT.

37. The UT rejected these arguments. In essence it concluded that Article 12(5) did not just invite an analysis of the economic effect of the Assignment. It concluded that the FTT had been right to focus instead on whether SICL's or BLM's subjective purposes in entering into the Assignment constituted an abuse of the UK-Ireland Treaty.

38. In that regard, the UT held that the FTT had been entitled on the evidence and the facts that it found, to come to the evaluative conclusion that BLM's sole purpose was to realise a profit from the transaction, and that the existence of the UK-Ireland treaty was simply the setting in which BLM decided how much to offer for the SAAD Claim. The UT also held that the FTT had been entitled to conclude that SICL's sole purpose at all times was simply to realise the SAAD Claim for the best possible price, and that this did not change from the time at which it agreed in principle to sell the

claim, when it did not know or care about the identity of the purchaser or the specific reasons why it was prepared to offer more for the SAAD Claim than SICL was likely to obtain by retaining the claim.

The appeal

39. On appeal to this Court, HMRC no longer maintained that any of SICL's purposes for entering into the Assignment fell foul of Article 12(5). Instead, HMRC focused their appeal on the FTT's, and UT's findings as regards the purposes of BLM.

40. HMRC's first Ground of Appeal contended that, instead of simply applying the words of Article 12(5), the UT wrongly superimposed an additional (and undefined) requirement that it could only apply where the arrangement in question amounted to an "abuse". HMRC also contended that in analysing whether Article 12(5) applied, the UT wrongly focused on the situation resulting from the Assignment, rather than starting from the position that subsisted prior to the Assignment.

41. HMRC's second Ground of Appeal contended that the FTT and UT wrongly failed to take account of the fact that BLM's assumed ability to obtain the benefit of Article 12(1) was the only basis for its decision to enter into the Assignment on the terms that it did, in the sense that without being able to reclaim the UK WHT, the transaction would not have been profitable for BLM. HMRC contend that this should have led the FTT and UT to conclude that BLM's main purpose (or certainly a main purpose) in entering into the Assignment was to obtain the benefit of Article 12(1); and that it was no answer to that contention for the FTT and UT to find that BLM's sole purpose was to realise a profit from the difference between the purchase price and the interest received.

42. In summary, HMRC contended that Article 12(5) should simply be applied in accordance with its terms, and that in circumstances in which the profitability of the Assignment for BLM was entirely a function of its assumed ability to obtain a refund of UK WHT under Article 12(1), the FTT and UT should have found that a main purpose of BLM was "to take advantage" of Article 12(1) within the meaning of Article 12(5). In making his submissions on behalf of HMRC, Mr. Brinsmead-Stockham KC did not shy away from the proposition that "to take advantage of" Article 12(1) means no more than "to obtain the benefit" of that Article.

43. BLM filed a respondent's notice, contending that the decision of the UT should be upheld on the basis that, contrary to the UT's decision at paragraphs 59-60, Article 12(5) is limited in scope to transactions that involve artificial steps or arrangements. BLM contended that there was nothing artificial about the Assignment of the SAAD claim, which was a genuine commercial transaction entered into at arm's length between SICL and BLM.

Analysis

The approach to interpretation of Article 12

44. The correct approach to interpretation of an international double tax treaty was not disputed between the parties. It was explained by Falk LJ in *Royal Bank of Canada v HMRC* [2023] EWCA Civ 695, in a passage that has been affirmed and applied in a number of cases since,

"23. … Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention") requires a treaty to be:

> "… interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

24. Article 31 also provides that the context extends beyond the treaty itself to certain other sources, including subsequent agreements between the parties in respect of the interpretation of the treaty, subsequent practice that establishes such an agreement and any relevant rules of international law.

25. Article 32 permits recourse to further supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine that meaning when it would otherwise be ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

26. As Lord Reed explained in *Anson v HMRC* [2015] UKSC 44:

> "[56] Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."

27. Later in his judgment Lord Reed commented on the fact that the process of interpretation must take account of the fact that what is being interpreted is an international convention, not a UK statute. He said this:

> "[110] Article 31(1) of the Vienna Convention requires a treaty to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It is accordingly the ordinary (contextual) meaning which is relevant. As Robert Walker J observed at first instance in *Memec* [1996] STC 1336 at 1349, a treaty should be

> construed in a manner which is "international, not exclusively English".
>
> [111] That approach reflects the fact that a treaty is a text agreed upon by negotiation between the contracting governments…"

He went on to emphasise in the same paragraph the courts' predisposition, when faced with "narrow and technical constructions", to favour an interpretation which reflects the "ordinary meaning of the words used and the object" of the treaty.

28. This echoes the well-known passage of Lord Diplock's speech in *Fothergill v Monarch Airlines* [1981] AC 251, 281-282:

> "The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan v Babco Forwarding & Shipping* [1978] AC 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation'."

29. The Treaty we are concerned with here, like most bilateral double tax treaties, is based on the OECD Model Tax Convention ("MTC"). As explained by Lord Briggs in *Fowler v HMRC* [2020] UKSC 22, guidance as to how such a treaty is to be interpreted can also be found in OECD Commentaries on the MTC, which (even where they post-date the treaty in question) should be "given such persuasive force as aids to interpretation as the cogency of their reasoning deserves" (see at [16] and [18], citing Patten LJ's judgment in *Smallwood v HMRC* [2010] EWCA Civ 778 …)…"

The OECD materials

45. In the instant case, the most relevant version of the Commentary on the MTC dates from 2014. In a section in the commentary on Article 1 headed "Improper use of the Convention", the Commentary contained a lengthy discussion of the use and abuse of double tax treaties (conventions).

46. Importantly, the Commentary first explained, at paragraph 7,

> "The principal purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. It is also a purpose of tax conventions to prevent tax avoidance and evasion."

47. At paragraphs 8 and 9, the Commentary identified that a fundamental question is whether the benefits of a tax convention – e.g. the reliefs from taxation – must be granted where the transaction in question constitutes an abuse of the provisions of the convention. In that regard, the Commentary continued, at paragraphs 9.3-9.5,

> "9.3 … [Some States] consider that a proper construction of tax conventions allows them to disregard abusive transactions, such as those entered into with the view to obtaining unintended benefits under the provisions of these conventions. This interpretation results from the object and purpose of tax conventions as well as the obligation to interpret them in good faith (see Article 31 of the Vienna Convention on the Law of Treaties).
>
> 9.4 … it is agreed that States do not have to grant the benefits of a double taxation convention where arrangements that constitute an abuse of the provisions of the convention have been entered into.
>
> 9.5 It is important to note, however, that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. *A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions*."
>
> (my emphasis)

48. The Commentary then contained an extensive analysis of a number of types of treaty provisions that have been designed to catch various forms of abuse. One of the types of abuse concerned the payment of interest on debt-claims, which was addressed in the Commentary at paragraph 21.4,

> "**Anti-abuse rules dealing with source taxation of specific types of income**
>
> 21.4 The following provision has the effect of denying the benefits of specific Articles of the convention that restrict source taxation where transactions have been entered into for the main purpose of obtaining these benefits. The Articles concerned are 10, 11, 12 and 21; the provision should be

> slightly modified as indicated below to deal with the specific type of income covered by each of these Articles:
>
> > The provisions of this Article shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the [Article 10: "shares or other rights"; Article 11: "debt-claim"; Articles 12 and 21: "rights"] in respect of which the [Article 10: "dividend"; Article 11: "interest"; Articles 12 "royalties" and Article 21: "income"] is paid to take advantage of this Article by means of that creation or assignment."

It is readily apparent that this example is in the same form as Article 12(5) of the UK-Ireland Treaty which is in issue in this case.

Artificiality and genuine commercial transactions

49. Before turning to the main points in issue between the parties on the appeal, it is convenient to dispose of the argument made in the Respondent's Notice. As indicated above, the FTT and UT rejected BLM's related contentions (i) that Article 12(5) only applies to "artificial" transactions, or transactions "involving an element of artificiality", and (ii) that Article 12(5) does not apply to transactions entered into for a genuine commercial purpose. I would also reject those contentions.

50. I start by considering the express wording of Article 12(5). Although it is common ground that Article 12(5) is an anti-abuse provision, there is nothing in the express wording of Article 12(5) to indicate that it is only intended to apply to "artificial" transactions, or transactions "involving an element of artificiality" (whatever those rather elusive concepts might mean). There is also nothing in the provisions of the Commentary set out above to indicate that the concept of improper use of a double tax treaty should be limited to arrangements involving some artificiality.

51. Nor is there anything in the express wording of Article 12(5) to indicate that the fact that parties may have entered into an assignment of a debt-claim for genuine commercial reasons means that Article 12(5) cannot apply. Indeed, the history of the UK-Ireland Treaty shows very clearly an intention that Article 12(5), as now formulated, should be capable of applying even if the parties have genuine commercial reasons to buy and sell a debt-claim.

52. As originally signed in 1976, Article 12(5) of the UK-Ireland Treaty provided,

> "(5) The provisions of this Article shall not apply if the debt-claim in respect of which the interest is paid was created or assigned mainly for the purpose of taking advantage of this Article *and not for bona fide commercial reasons*."
>
> (my emphasis)

There were thus two express requirements for the operation of Article 12(5), namely (i) that the assignment of the debt-claim was "mainly for the purpose of taking

advantage of" Article 12, and (ii) that the assignment was "not for bona fide commercial reasons".

53. That provision was, however, replaced in 1998 by the current wording of Article 12(5) as a result of the signature of a Protocol between the UK and Ireland on 4 November 1998. That was subsequently enacted in the UK by The Double Taxation Relief (Taxes on Income) (Ireland) Order 1998 (SI 1998/3151). As is evident, the amendment deleted the requirement that the assignment should not be for bona fide commercial reasons.

54. By its very nature, the deletion of the requirement for the application of Article 12(5) that an assignment not be for bona fide commercial reasons clearly indicated an intention on the part of the UK and Ireland that Article 12(5) should thereafter be capable of applying to assignments entered into for genuine commercial reasons. That change is understandable and consistent with the broader approach to anti-abuse provisions in double tax treaties outlined in the extracts from the Commentary set out above. Although parties might, from their own perspective, have good commercial reasons for entering into an assignment of a debt-claim, they might nevertheless seek to construct that transaction in a way that enables either or both of them to obtain benefits that are contrary to the objects and purposes of the treaty.

55. In passing, I note that at paragraphs 141-143 of its decision, the FTT considered whether comments made by the then Financial Secretary to the Treasury in the Standing Committee debate on the 1998 Order, were admissible as an aid to interpretation of Article 12(5). The high-water mark of BLM's contentions in that respect related to a comment from the Financial Secretary in the debate in answer to a question about the reasons for the change to the "mainly for the purpose" wording. She simply answered,

> "The article is an anti-abuse measure designed to prevent artificial arrangements which exist mainly to obtain the benefits of the convention."

The FTT decided that such comments were not admissible, because they were simply a unilateral statement from one of the treaty states, which by parity of reasoning to domestic principles in relation to interpretation of contracts, would not be admissible; and that in any event they did not assist BLM. The UT agreed, at paragraph 53, that the statements were not of any assistance.

56. I would not wish to express any concluded view on the question of admissibility, since we did not receive any detailed argument on the point. However, I would agree with the FTT and the UT that the Financial Secretary's statements do not assist BLM. Her short answer neither engaged with the question asked, nor addressed the relevant question for present purposes, which it is whether, even if the new Article 12(5) was designed to prevent artificial arrangements, it was intended only to apply to such arrangements.

57. A similar observation can be made in relation to the oblique reference in paragraph 23 of the commentary on Article 11 in the United Nations Model Double Tax Convention (2017 update) that some experts "had pointed out that there are many artificial devices entered into by persons to take advantage of [provisions similar to

Article 12(1)]". In suggesting that this could be addressed by use of a provision similar to Article 12(5), the commentary did not deal with the issue of whether such a provision should only apply where the arrangements in question amounted to an "artificial device".

58. I would therefore agree with HMRC that finding an element of artificiality is not a condition for the application of Article 12(5); nor does the fact that parties have genuine commercial reasons for entering into an assignment mean that Article 12(5) cannot apply.

59. However, questions of whether there are artificial aspects to a transaction and whether it has a genuine commercial rationale apart from obtaining a tax benefit, must remain highly relevant for the purposes of Article 12(5). As indicated above, double tax treaties are designed to encourage exchanges of goods and services, and the movement of capital and persons between the contracting states. The interests of the contracting states in promoting such trade will only be advanced by genuine commercial transactions. As such, the presence in a transaction of artificial features or steps that have no real business purpose may indicate that the parties have a purpose that is not consistent with the objectives of the double tax treaty.

Determining the main purposes of a party to an assignment

60. I therefore turn to consider what is meant by the expression "the main purpose or one of the main purposes" in Article 12(5), and how the Court should approach the determination of that issue.

61. It was common ground between the parties on the appeal that when seeking to identify "the main purpose or one of the main purposes" of a person for the purposes of Article 12(5), the Court should apply Article 3(2) of the Treaty,

> "(2) As regards the application of this Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of this Convention."

The parties agreed that this meant that the Court should have regard to English domestic law cases on the meaning of "main purpose or one of the main purposes".[2]

62. The approach of the English courts to the task of ascertaining the objects or purposes of a person in the context of tax legislation was summarised, after a thorough review of the authorities, by Falk LJ in *BlackRock Holdco 5 v HMRC* [2024] EWCA Civ 330 at paragraph 124,

> "(a) Save in 'obvious' cases, ascertaining the object or purpose of something involves an inquiry into the subjective

[2] Although I do not think that anything turns on this in the instant case, I would wish to reserve my position on whether the parties were correct to agree this approach. I am far from convinced that the expression "main purpose or one of the main purposes" in Article 12(5) is a "term" of the UK-Ireland Treaty to which Article 3(2) could apply; or that the contracting states should be taken to have intended that this Court should simply apply domestic English law authorities on the meaning of that phrase without also taking into account the wider principles of interpretation of international treaties outlined in *Royal Bank of Canada v HMRC* (supra).

> intentions of the relevant actor.
>
> (b) Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes.
>
> (c) Subjective intentions are not limited to conscious motives.
>
> (d) Further, motives are not necessarily the same as objects or purposes.
>
> (e) 'Some' results or consequences are 'so inevitably and inextricably involved' in an activity that, unless they are merely incidental, they must be a purpose for it.
>
> (f) It is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker."

That summary was repeated and applied in *Kwik-Fit Group v HMRC* [2024] EWCA Civ 434 at paragraph 54.

63. The emphasis on ascertaining the subjective intentions of a party in (a), and the contrast between objects and purposes (on the one hand) and consequences and effects (on the other hand) in (b) are clear enough. However, the reference in sub-paragraph (c) to subjective intentions not being limited to conscious motives, and the reference in (e) to some results or consequences being "so inevitably and inextricably involved" in an activity that they must be taken to have been a purpose for it, require a little unpacking.

64. These references are based upon the well-known decision in *Mallalieu v Drummond* [1983] 2 AC 861. The taxpayer barrister, Miss Mallalieu, sought tax deductions for the cost of replacing and cleaning the clothing that she wore in and on her way to court, on the basis that they were "wholly and exclusively laid out or expended for the purposes" of her profession. At page 875, Lord Brightman rejected the lower courts' conclusion that all that mattered was the taxpayer's conscious state of mind, and that fulfilling the requirements of warmth and decency were merely incidental effects. Lord Brightman said,

> "Of course Miss Mallalieu thought only of the requirements of her profession when she first bought (as a capital expense) her wardrobe of subdued clothing and, no doubt, as and when she replaced items or sent them to the launderers or the cleaners she would, if asked, have repeated that she was maintaining her wardrobe because of those requirements. It is the natural way that anyone incurring such expenditure would think and speak. But she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. *I reject the notion that the object of a*

> *taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the commissioners are entitled to find to exist.* In my opinion the commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion."
>
> (my emphasis)

65. That decision, and in particular, the point that if a result that is so inevitably and inextricably involved in a particular activity, achieving that result must be taken to have been a purpose of the taxpayer in undertaking that activity, even if it had not featured consciously in the taxpayer's thought process, was the subject of further comment by the House of Lords in *MacKinley v Arthur Young McClelland Moores* [1990] 2 AC 239. At page 255, Lord Oliver said,

> "Your Lordships have been referred to what may be regarded as a seminal decision of this House in *Mallalieu v Drummond* [1983] 2 AC 861 and much argument has been addressed to the question whether the purpose of the particular payment falls to be ascertained objectively or by reference only to the subjective intention of the payer. For my part, I think that the difficulties suggested here are more illusory than real. The question in each case is what was the object to be served by the disbursement or expense? As was pointed out by Lord Brightman in *Mallalieu's* case, this cannot be answered simply by evidence of what the payer says that he intended to achieve. *Some results are so inevitably and inextricably involved in particular activities that they cannot but be said to be a purpose of the activity.* Miss Mallalieu's restrained and sober garb inevitably served and cannot but have been intended to serve the purpose of preserving warmth and decency and her purpose in buying cannot but have been, in part at least, to serve that purpose whether she consciously thought about it or not."
>
> (my emphasis)

66. Because the identification of the objects or purposes of a party is a question of fact which requires an evaluation of all the evidence, the scope for interference with such finding by an appellate court is limited: see e.g. *Re Brebner* [1967] AC 18. In general, an appellate court should only interfere with such a finding if it can be shown to be wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion: see *Re Sprintroom Limited* [2019] EWCA Civ 932 at [76], affirmed by the Supreme Court in *Lifestyle Equities CV v Amazon UK Services Limited* [2024] UKSC 8 at [49].

67. Moreover, in the context of a tax appeal, the error in approach must be one that can properly be said to amount to an error of law: see *Edwards v Bairstow* [1956] AC 14 and *Kwik-Fit Group* at [87]. But it is implicit in the decisions and reasoning in *Mallalieu v Drummond* and *MacKinley v Arthur Young* that a failure by a tribunal to find that achieving a result that was inextricably linked with the carrying out of a particular activity was a purpose of the party who engaged in that activity, would amount to such an error of law.

The purposes of SICL in entering into the Assignment

68. I therefore turn to consider the purposes of SICL and BLM in entering into the Assignment. I consider the position in relation to SICL, not because it is the subject of HMRC's appeal, but because it provides a relevant backdrop to the consideration of BLM's purposes.

69. The decision by SICL's liquidators to sell the SAAD Claim was clearly motivated by the realisation that, unless the Supreme Court came to their rescue in *HMRC v Lomas*, SICL would suffer an irrecoverable loss of post-administration interest due to the imposition of UK WHT. They also had the clear aim, consistent with their duties, to maximise the amount that they could realise from the SAAD Claim.

70. However, on the facts as found by the FTT, Article 12 was not in the minds of the liquidators, consciously or subconsciously, when they agreed to market and sell the SAAD Claim. The liquidators simply instructed SICL's brokers to find a third party purchaser who would be prepared to offer more for the SAAD Claim than it would likely be worth to SICL if it retained the claim.

71. Moreover, and crucially, as the FTT found in paragraph 165 of its decision, although SICL's liquidators would have appreciated that the purchaser was prepared to offer the price that it had because UK WHT would not be a permanent cost to it, they did not know the reason for that. They did not know, for example whether the purchaser might simply have had UK tax losses against which to offset the interest received, whether it might be exempt from UK WHT for some reason unrelated to a double tax treaty, or if the purchaser was relying on a double tax treaty with the UK, which other country was a party to such treaty and what the terms of the treaty were.

72. These factual findings set the case of SICL apart from the analysis in *Mallalieu v Drummond* and *MacKinley v Arthur Young* that because certain results are inevitably and inextricably linked with an activity, they must be regarded as a purpose of it. From the perspective of SICL, there was no inevitability whatsoever that the purchaser would be relying on Article 12(1) when making its offer for the SAAD Claim. The FTT and UT were therefore entirely justified in concluding that SICL's liquidators did not have any purpose of taking advantage of Article 12(1) when they agreed to sell the SAAD Claim, and Article 12(5) was therefore not engaged. In my view, HMRC were right not to pursue an appeal on that point.

The purposes of BLM in entering into the Assignment

73. The same reasoning does not, however, apply to BLM, because the FTT found that the relevant persons at DKCM who acted for BLM did understand that BLM would be relying on Article 12(1). Although the relevant person(s) at DKCM may have had

other commercial factors at the forefront of their minds when deciding what price to offer for the SAAD Claim (see paragraph 16(v) above), they made the offer to acquire the SAAD Claim on the basis of an assumption that BLM would be entitled to the benefit of Article 12(1) (see paragraph 16(iii) above).

74. It is also clear that this was an important factor in the decision taken by DKCM on behalf of BLM. As Mr. Brinsmead-Stockham KC emphasised, if BLM was not able to obtain a refund of UK WHT under Article 12(1), the acquisition of the SAAD Claim on the terms of the Assignment would have made no economic sense for BLM and would not have fulfilled DKCM's investment management criteria. Given those economics, HMRC contend that applying the approach in *Mallalieu v Drummond* and *MacKinley v Arthur Young* must lead to the conclusion that obtaining the benefit of Article 12(1) was a main purpose of BLM in entering into the Assignment, and the FTT and UT were wrong in law to find otherwise.

75. HMRC further contend that it was no answer to the application of Article 12(5) that BLM's sole purpose in entering into the Assignment was to make a profit, and the UT erred in law to find otherwise. HMRC submit that the ultimate result that most commercial (and tax-motivated) transactions seek to achieve is to make a profit or avoid a loss. If seeking to achieve such a result was sufficient to displace any other purpose when considering the application of Article 12(5), then that provision would hardly ever apply and would be deprived of much of its utility. HMRC contend that cannot have been the intention of the contracting states.

76. HMRC support their contentions by reference to the decision of this Court in *Fisher v HMRC* [2021] EWCA Civ 1438 (reversed on other grounds [2023] UKSC 44). In that case, the taxpayers were members of a family that had built up a telephone betting business through an English company, SJA. In 1999, a major competitor of SJA moved its entire tele-betting business to Gibraltar, which charged much lower duty on bets. Once UK customers found out that it was possible to avoid the higher betting duty in the UK by placing a telephone bet with a company in Gibraltar, they flocked to the Gibraltar company. Within nine months, all the other UK based tele-betting operators had followed suit. As part of that exodus from the UK, SJA sold its business to a Gibraltar company, SJG, in which the taxpayers were also shareholders.

77. HMRC assessed the taxpayers to income tax on the subsequent profits of SJG under what was then Chapter III of Part XVII of the Income and Corporation Taxes Act 1988. Those provisions included, in particular, section 739, which was designed to prevent the avoidance of income tax by residents of the UK by means of transfers of assets which had the consequence that income became payable to persons resident outside the UK.

78. However, section 739 was subject to a "motive defence" in section 741, which was in the following terms,

> "Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either - (a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or (b) that the transfer and any associated operations were bona fide

> commercial transactions and were not designed for the purpose of avoiding liability to taxation."

79. The relevance of the case for present purposes is the Court of Appeal's approach to the test in section 741(a). The FTT and UT had both held that there had been avoidance of taxation (betting duty), but had differed on whether that had been the purpose, or one of the purposes, of the transfer of SJA's business to SJG in Gibraltar. Although the taxpayers contended that the main reason for the transfer was the survival of the business, the FTT held that it was inconceivable that the transfer of business would have gone ahead were it not for the betting duty being lower in Gibraltar, and the desired consequence of saving the business could not prevent the avoidance of betting duty being the main purpose of the transfer of business. The UT disagreed, holding that to the extent betting duty avoidance was involved in the transactions, it was simply the means of achieving the main purpose of saving the business, for which main purpose the transactions were designed.

80. The Court of Appeal reversed the UT. At paragraph 91, Newey LJ explained,

> "Further, the UT was not, in my view, entitled to interfere with the FTT's conclusion on the basis that the main purpose was saving the business and betting duty avoidance was "simply the means of achieving" that purpose. The avoidance of betting duty and saving of the business were inseparable. The main purpose of the transfer of the business was to avoid betting duty and thereby to save the business: the two were perceived as going together. Put slightly differently, there can be no question of section 741 of ICTA applying because a transferor hopes that an intended avoidance of liability to taxation will achieve some further end. It will rarely, if ever, be the case that a transferor wishes to avoid liability to tax for the sake of it; in normal circumstances, a transferor will be intending to use the avoidance of tax to attain another object. That being so, were someone able to escape section 739 by looking beyond the tax avoidance to its consequences, the motive defence would, as the FTT pointed out, be generally available. That will not have been Parliament's intention."

81. In response, BLM submits that the FTT and UT were right, and at very least entitled to reach the opposite conclusion on the facts, namely that BLM's sole purpose was to make a profit from the Assignment and that the subsequent receipt of interest from LBIE, and its ability to reclaim UK WHT under Article 12(1) was simply part of the equation (the "setting") in which DKCM determined the price BLM should offer for the SAAD Claim.

82. BLM supports its contention by relying on the approach taken by Cross J in *IRC v Kleinwort Benson* [1969] 2 Ch 221. In *Kleinwort Benson*, the taxpayer merchant bank carried on a business of dealing in securities. In October and November 1962, it paid a total of £305,101 to acquire certain secured redeemable debenture stock of a company ("EC") which had gone into receivership in 1939 and had not paid interest on the debentures since. However, in the previous month, September 1962, the Court had directed the receiver of EC to accept an offer for the company's assets that would

see the secured creditors paid in full together with interest; and at the end of November 1962 the Court duly directed the receiver to use the proceeds of the sale to redeem the debentures.

83. The secured debenture stock held by the bank was due to be redeemed by repayment of £148,269 in respect of principal and premium, and a payment of arrears of interest of £185,761, totalling £334,030. The payment of interest would, however, be subject to deduction of tax at source in the sum of £71,982, with the result that the bank only stood to receive £262,048. On the face of it, this would have meant that the bank would make a loss on the transaction of about £43,053 (£262,048 - £305,101).

84. However, the Special Commissioners found that when it made the acquisition, the bank calculated that it would make a profit on the transaction. The reason for the bank's view was that it assumed that when drawing up its profit and loss account for the purpose of income tax, it would be able to do so in accordance with the ordinary practice of a dealer in securities who received interest paid subject to deduction of tax, and leave the entire amount of interest out of account. Cross J explained, at page 235E,

> "In consequence that account showed the result of the transaction as a loss of £156,833, that is, the excess of, the purchase price paid (£305,101) over the money received in respect of principal and premium (£148,269). The result therefore was that the taxpayers having borne tax on £185,761 when the money was received, recouped itself to the extent of tax on £156,833 by being allowed to show a loss of that amount in computing its taxable profits for the year 1963 …"

85. The Inland Revenue Commissioners served a notice cancelling the bank's inclusion in its annual accounts of the "loss" of £156,833 on the basis that it was an impermissible "tax advantage" resulting from a transaction in securities falling within section 28 of the Finance Act 1960. The definition of "tax advantage" in section 43 of the Finance Act 1960 was very wide and it was conceded by the bank that the ability to disregard the interest so as to be able to show the transaction as realising a loss when computing its annual profits was such an advantage. The Commissioners claimed that such deduction was "by reason of a fall in value of the stock resulting from the payment of [interest]" within the meaning of section 28(2)(b); and that the bank had not shown that the tax advantage which it had thereby obtained was not "their main object or one of their main objects" in entering into the transaction in securities within the meaning of section 28(1)(b).

86. Cross J decided the case on the basis of the first point, namely that on the true interpretation of the statute, the fall in value referred to in section 28(2)(b) was a fall in the price which could be obtained if the stock in question was sold in the market. It did not mean a fall in the figure attributed to the stock in the books of the bank as a result of the payment of the amounts owing on the stock. However, Cross J also went on to express the view, *obiter*, that obtaining the tax advantage of a reduction in annual profits of £156,833 had not been one of the purposes of the bank when it purchased the debenture stock.

87. At pages 237-238, Cross J explained his reasoning,

> "The special commissioners have held that it was one of the main objects of the taxpayers in purchasing this stock to obtain the right to diminish its taxable profits by deducting the sum of £156,000-odd. Section 28 was, of course, aimed primarily at purely artificial transactions into which no one would have thought of entering apart from the wish to reap a "tax advantage", but it is clear that the section is so framed as to cover bona fide commercial transactions which are combined with the securing of a tax advantage …
>
> … Here there was only a single indivisible transaction and it was an ordinary commercial transaction, a simple purchase of debenture stock. As the purchaser was a dealer he was entitled to keep the interest element out of his tax return and so was able to pay a higher price than an ordinary taxpayer would have been able to pay. Similarly, a charity, because it would have been able to reclaim the tax, would have been able to pay an equally large price and still make a profit. But it is to my mind an abuse of language to say that the object of a dealer or a charity in entering into such a transaction is to obtain a tax advantage.
>
> When a trader buys goods for £20 and sells them for £30, he intends to bring in the £20 as a deduction in computing his gross receipts for tax purposes. If one chooses to describe his right to deduct the £20 (very tendentiously be it said) as a "tax advantage", one may say that he intended from the first to secure this tax advantage. But it would be ridiculous to say that his object in entering into the transaction was to obtain this tax advantage. In the same way I do not think that one can fairly say that the object of a charity or a dealer in shares who buys a security with arrears of interest accruing on it, is to obtain a tax advantage, simply because the charity or the dealer in calculating the price which they are prepared to pay proceed on the footing that they will have the right which the law gives them either to recover the tax or to exclude the interest as the case may be. One may, of course, think that it is wrong that charities and dealers should be in this privileged position. But if the Crown thinks so it ought to deal with the matter by trying to persuade Parliament to insert provisions in a Finance Act depriving them of their privileges, not by seeking to achieve this result by a back door by invoking section 28. So, if I had thought that the case fell within section 28(2)(b), I should have held that the gaining of a tax advantage was not the object or a main object of the transaction."

88. Although made before the decisions in *Mallalieu v Drummond* and *MacKinley v Arthur Young*, Cross J's obiter dicta in *Kleinwort Benson* have been referred to without disapproval in a number of cases since: see, in particular, *Kwik-Fit Group v HMRC* (supra) at [86]-[87].

89. I do not find the differing approaches evident in *Kleinwort Benson* and *Fisher* easy to reconcile, but neither of them is binding on this Court on the very different facts of the instant case. Moreover, because of the clear view that I have formed on the meaning of to "take advantage of" in Article 12(5) (see below), even if HMRC were right that the approach in *Fisher* should be preferred to that in *Kleinwort Benson*, I do not consider that would change the result in the instant case. I therefore consider that it would be better to leave the resolution of this issue to a case in which it is necessary to decide it.

What does "to take advantage of" Article 12 mean?

90. I therefore assume, for the purposes of argument, that BLM's main purposes in entering into the Assignment included reclaiming UK WHT in reliance on Article 12(1), and turn to the central issue of whether the concept in Article 12(5) of having a main purpose to "take advantage of" Article 12(1) simply means to have a main purpose of "obtaining the benefit of" that article, or whether it means something else.

91. That point was recently considered in relation to a provision in the double tax treaty between the UK and Japan in *Vietjet Aviation JSC v FW Aviation (Holdings) Limited* [2025] EWCA Civ 783 ("*Vietjet*"). *Vietjet* was not a tax case, but a commercial dispute relating to aircraft financing agreements that were in default. However, one of the issues was whether the claimant assignee of the aircraft loans, FWC, was a permitted assignee within the meaning of the financing documents. Those documents required any assignee to be an entity which "benefits from a double tax treaty with Japan so that no withholding tax will be levied in relation to payments of interest…"

92. The relevant provisions of the UK-Japan double tax treaty were Articles 11.1 and 11.7, which were in materially identical terms to Articles 12(1) and 12(5) of the UK-Ireland Treaty. The argument made by the defendant, Vietjet, was that FWC had been deliberately incorporated in England so as to be able to benefit from Article 11.1 and thus come within the class of permitted assignees, and that this meant that it was "taking advantage of" Article 11 within the disapplication provisions of Article 11.7

93. Popplewell LJ rejected that argument. He gave two reasons for doing so. The first was at paragraphs 107-112. Popplewell LJ said,

> "107. The first is that "taking advantage" in Article 11.7 does not mean simply taking the benefit of Article 11 of the [double tax treaty]. It means doing so contrary to the object and purpose of the treaty. In other words it is an anti-abuse provision. That is clear from the object and purpose of the treaty, and from the OECD Commentary on the Model Convention.
>
> 108. As to the object and purpose of the treaty, it is to attribute the right to tax persons in the state of residence or state of source in accordance with its detailed provisions, and … to avoid double taxation and non-taxation. Article 11 applies that purpose in respect of debt income. If a taxpayer is "taking advantage of" the Article in the sense which VietJet contends the words bear of simply taking the benefit of Article 11, that would involve it paying tax in the state which Article 11

> provides for. If so, to treat Article 11.7 as preventing it from doing so it would be the very opposite of giving effect to the object and purpose of the treaty; it would disapply the treaty and so subvert the allocation of taxing rights and benefits which the contracting States have thereby agreed."

94. Popplewell LJ then referred, at paragraph 112, to the paragraphs of the Commentary set out above,

> "112. [Paragraph 21.4 of the Commentary] is clearly the source for Article 11.7 of the [double tax treaty], and is in terms explained as an anti-abuse provision in a section of the Commentary addressed to meeting "Improper use of the Convention". It is therefore to be interpreted as catching and only catching abusive conduct, that is to say taking advantage of Article 11 as a main purpose where that is contrary to the object and purpose of the [double tax treaty] in its application to the taxpayer."

95. *VietJet* is a significant recent decision that was not available either to the FTT or the UT in the instant case. In light of the OECD materials to which I have referred, I agree with Popplewell LJ's conclusion in paragraphs 107-108 that to "take advantage" of a provision such as Article 12(1), within the meaning of an anti-abuse provision such as Article 12(5), cannot simply be synonymous with to "obtain the benefit" of that provision. That would have the result that the treaty would be self-defeating. As Popplewell LJ held, "to take advantage of" the article in question must mean obtaining the benefit of the article in a way that is contrary to the object and purpose of the treaty. In my view, that approach is evident, in particular, from Paragraph 9.5 of the Commentary (above).

Was BLM's reliance on Article 12(1) contrary to the object and purpose of the UK-Ireland Treaty?

96. As I have indicated, and as stated in the Commentary at paragraph 7, the principal purpose of double tax conventions is for the convention states to encourage commerce between them by ensuring that their residents are not subject to international double taxation. By using a provision in the form of Article 12(1), the contracting states fulfil this aim by agreeing that only one state will levy tax in the situation in question, and that the other will provide the taxpayer with an exemption from tax or the ability to claim tax relief.

97. It must follow, as Popplewell LJ held in *Vietjet* at paragraph 108, that without more, it cannot be an abuse for a taxpayer who is resident in one of the contracting states to acquire a debt-claim in the expectation that he will enjoy the very benefit of exemption from tax which the treaty expressly provides that someone in his position is to have.

98. It follows that I would also agree with the UT that when determining whether a purpose of the purchaser of a debt-claim is contrary to the object and purpose of the UK-Ireland Treaty within the meaning of Article 12(5), it is illogical to analyse the position from the starting point that the very assignment that Article 12(5) envisages

has taken place has not, in fact, taken place. Although I accept that the position may be different where the assignee is a company which is connected with the assignor (see the conduit cases that I consider below) or otherwise does not act at arm's length through a market purchase, when looking at the subjective purposes of an assignee which is independent of the assignor and which only comes to the arrangement as a market purchaser, I see no logical basis upon which to start from an assumption that the assignor will be retaining the claim.

99. In the instant case, as the FTT found, BLM was an independent entity which had, for some considerable time, conducted a business on its own account by acquiring claims made in the administration of LBIE. It acted at arm's length from SICL throughout and there was no element of artificiality or collusion between SICL and BLM in the fixing of the price for the SAAD Claim.

100. I therefore do not accept HMRC's central contention that the analysis should start from the position prior to the Assignment in which interest on the SAAD Claim in the hands of SICL would have been subject to UK WHT. I do not consider that HMRC are correct to proceed on the basis that because the result of the Assignment would be to change that position, the parties to the Assignment are to be regarded as having agreed to share a "profit" which is to be treated as having been made at HMRC's expense.

101. Rather, I agree with the UT when it held, at paragraph 65, that the correct starting point for the analysis is that by Article 12(1), the UK agreed that BLM, as a resident of Ireland and the beneficial owner of the SAAD Claim, should only be taxed on the interest payable in Ireland. BLM was entitled to conduct its own affairs and offer to acquire the SAAD Claim on that basis.

102. Further, and analysing BLM's purposes from its perspective in this way, its reliance on Article 12(1) was entirely in accord with the objects and purposes of the UK-Ireland Treaty. As indicated above, in common with double tax treaties generally, one of the principal objectives of the UK-Ireland Treaty was to promote the movement of capital between the UK and Ireland by the elimination of double taxation. In the current context, the movement of capital in question was the payment of interest on the SAAD Claim from a source in the UK. The objectives of the UK-Ireland Treaty were served by encouraging BLM, a long-established resident of Ireland, to make a higher offer to acquire the rights to receive such capital, rather than those rights being retained by SICL in the Cayman Islands, or being acquired by a buyer resident in another jurisdiction. Put another way, enabling BLM, as a resident of Ireland, to bid a higher price to acquire the SAAD Claim on the assumption that it would only be taxed on those monies in Ireland and not also in the UK was precisely in line with the objects and purposes of the UK-Ireland Treaty.

103. The fact that HMRC will, as a result of the Assignment, recover less UK WHT than it would have done if the SAAD Claim had not been sold by SICL, is also nothing to the point. It is no part of the object and purpose of Article 12 to maximise tax revenues for HMRC, and Article 12(5) does not prohibit assignments simply on the basis that they have the consequence that less tax will be recoverable by HMRC than if the assignment had not taken place.

104. Accordingly, even on the basis that BLM could be said to have had a purpose of obtaining the benefit of Article 12(1) when it made an offer to acquire the SAAD Claim and entered into the Assignment, in my judgment the FTT and UT were correct to conclude there was nothing more to justify a conclusion that one of BLM's purposes was thereby to "take advantage" of Article 12(1) within the meaning of Article 12(5).

The conduit company cases

105. That conclusion is supported by a comparison with the examples of abuse highlighted in the OECD Commentary and the Conduit Report relating to the use of so-called "conduit" companies. These examples give an insight into the type of improper use of a double tax treaty that Article 12(5) is intended to catch.

106. Paragraph 11 of the Commentary identified the issue as follows,

> "11. A further example is provided by two particularly prevalent forms of improper use of the Convention which are discussed in two reports from the Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Base Companies" and "Double Taxation Conventions and the Use of Conduit Companies". As indicated in these reports, the concern expressed in paragraph 9 above has proved to be valid as there has been a growing tendency toward the use of conduit companies to obtain treaty benefits not intended by the Contracting States in their bilateral negotiations. This has led an increasing number of member countries to implement treaty provisions (both general and specific) to counter abuse and to preserve anti-avoidance legislation in their domestic laws."

107. The Conduit Report identified the problem in paragraphs 1 and 2 as follows,

> "1. In its Commentary on Article 1 of the 1977 OECD Model Convention, the Committee on Fiscal Affairs expressed its concern about improper use of tax conventions (see paragraph 9) by a person (whether or not a resident of a Contracting State), acting through a legal entity created in a State with the main or sole purpose of obtaining treaty benefits which would not be available directly to such person.
>
> 2. This report deals with the most important situation of this kind, where a company situated in a treaty country is acting as a conduit for channelling income economically accruing to a person in another State who is thereby able to take advantage "improperly" of the benefits provided by a tax treaty. This situation is often referred to as "treaty shopping". The "conduit company" which is characteristic of such schemes is usually a corporation, but may also be a partnership, a trust or a similar entity. The tax advantages with which this report is primarily concerned occur to the detriment of the country of source of income. Whilst there is some brief consideration of taxation in

> the country of residence of the person to whom the income economically accrues, this is dealt with mainly in the foregoing report on "base companies"."

108. The abuse identified is of a person who, because of his residence, would not directly be able to obtain the benefit of a dual tax treaty "acting through [another] legal entity" to obtain the benefits of the treaty. The paradigm example given in paragraph 2 is of the creation of a new entity in a treaty country acting as a conduit through which income accruing to a person who is not resident in a treaty country is "channelled", thereby enabling that non-resident person to take economic advantage of the benefits provided by the tax treaty.

109. That example is illustrated in paragraph 4.1,

> "A company resident of State A receives dividends, interest or royalties from State B. Under the tax treaty between States A and B, the company claims that it is fully or partially exempted from the withholding taxes of State B. The company is wholly owned by a resident of a third State not entitled to the benefit of the treaty between States A and B. *It has been created with a view to taking advantage of this treaty's benefits and for this purpose the assets and rights giving rise to the dividends, interest or royalties were transferred to it.* The income is tax-exempt in State A, e.g. in the case of dividends, by virtue of a parent-subsidiary regime provided for under the domestic laws of State A, or in the convention between States A and B."
>
> (my emphasis)

110. A further illustration of this type of abuse is included in paragraph 5(a),

> "A person X, resident of a State which has not concluded any tax treaties, derives interest from bonds of a number of States, which under the laws of these States is subject to withholding taxes therein. *X sets up a company in State A, which has an extended network of tax treaties; he transfers the bonds to the company.* The interest flowing now to that company is subject to no, or very low, taxation in State A due to specific tax exemptions provided for companies of that kind. *On the basis of State A's treaty network, the company claims exemption from or reduction of withholding taxes in the States where the interest arises. The interest received by the company which is a resident of State A is then transferred to X as a loan.*"
>
> (my emphasis)

111. The common feature of both these illustrations is the existence of a person (T), which is resident in a state which is not party to a double tax convention with the country from which interest will be paid (A). T identifies a state (B) which is a party to a double-tax treaty with A, and acts with the purpose of obtaining economic benefits which it could only have obtained if it had actually been a resident of B. The precise

mechanisms differ, but in each example, T decides to create a subsidiary company (S) in B, where tax exemptions apply. T then assigns the interest-bearing assets to S. S then receives the interest in state B without deduction or payment of withholding tax; and pays the whole amount free of tax to T by way of repayment of inter-company loan or dividend.

112. In passing I note that the examples of improper use of a double tax treaty given in the Conduit Report presuppose that the owner of the debt-claim has disposed of the claim outright in legal terms. If the owner had merely assigned the legal interest and retained the beneficial interest, Article 12(1) would not be available to the assignee at all. By its express terms, Article 12(1) only applies where the person receiving the interest on the debt-claim is the beneficial owner of it.

113. What the examples focus upon is a situation in which the claim is assigned outright to a subsidiary company of the assignor on terms that enable the full *economic* benefit of the tax reliefs to be claimed by the assignee and then transmitted to the assignor by means of inter-company payments. The terms envisaged are either (i) that the debt-claim is assigned to the subsidiary for a nominal consideration or as a capital contribution, with the result that the receipt by the subsidiary of the interest tax-free is a profit in its hands which is available for distribution to the assignor/parent; or (ii) that the purchase price is the full amount of the interest to be received and is left outstanding on inter-company loan, so that when the (gross) interest is received by the subsidiary, the money will be used to discharge the loan debt to the assignor/parent.

114. In the context of the instant case, one equivalent scenario to the examples in the Conduit Report would have been if SICL's liquidators had incorporated a wholly-owned subsidiary resident in Ireland (S) and had assigned the SAAD Claim to it for a nominal consideration or as a capital contribution; so that when the interest was paid, S would reclaim the UK WHT under Article 12(1), and treat the full amount received as profits available for distribution to SICL.

115. Alternatively, SICL might have assigned the SAAD Claim to S at a price which was the full value of the interest payable, but with payment left outstanding on inter-company loan. On receipt of interest from LBIE, S would then claim back the UK WHT in reliance on Article 12(1), and would use the gross interest to discharge its inter-company debt to SICL.

116. In either scenario, SICL's main purpose in creating S and assigning the SAAD Claim to it would have been to enable SICL to obtain (by subsequent distribution or payment of the price) the economic benefit of Article 12(1), notwithstanding that it was not resident in Ireland. Article 12(5) would plainly have been engaged. But that is not what occurred in the instant case.

117. Further, it is apparent that because the examples in the Conduit Report involve the creation by the assignor of a subsidiary company under its control that acts as assignee, they focus on the purposes of the assignor, and implicitly assume that the terms of the assignment have not been negotiated by the assignee on a commercial basis at arm's length. If an assignor does not have the requisite purpose to engage Article 12(5), and deals with a counterparty on a commercial basis at arm's length (as in this case), it must be inherently less likely that the assignee does have the requisite

purpose which engages Article 12(5). The possibility cannot be excluded, but it will be much less likely.

118. Those considerations are highly relevant in the instant case. As I have already observed, HMRC (rightly) did not contend on this appeal that it was SICL's purpose to take advantage of Article 12(1), and there was no suggestion that BLM and SICL dealt with each other on anything other than a commercial basis at arm's length.

Conclusion

119. BLM was an independent entity which had, for some considerable time, conducted a business on its own account by acquiring claims made in the administration of LBIE. BLM believed that because it was tax-resident in Ireland, Article 12(1) applied to it, so that if it beneficially acquired a debt-claim in the administration of LBIE, it would not be taxed in the UK on the interest paid on that claim and would only be taxed in Ireland. BLM made its offer for the SAAD Claim at arm's length on that basis. In my judgment, in the absence of anything more, BLM did not have a purpose to "take advantage" of Article 12(1) within the meaning of Article 12(5).

Disposal

120. For the reasons set out above, I would dismiss both HMRC's appeal and BLM's Respondent's Notice.

Lady Justice Falk:

121. I am grateful for Snowden LJ's clear exposition of the issues in this case, and agree with his analysis and conclusions. I do however wish to add some additional observations, primarily about *Fisher v HMRC* [2021] EWCA Civ 1438, [2022] 1 WLR 651 ("*Fisher*") and *IRC v Kleinwort Benson* [1969] 2 Ch 221 ("*Kleinwort Benson*"). In particular, given HMRC's criticisms of Cross J's obiter comments in *Kleinwort Benson* in the course of their submissions, I consider that I should add some further explanation of what I said about those comments in *Kwik-Fit Group v HMRC* [2024] EWCA Civ 434, [2024] STC 897 ("*Kwik-Fit*").

122. Starting with *Fisher*, the FTT's findings in that case were critical. As can be seen from the passage of the FTT's decision set out in Newey LJ's judgment at [86], the FTT had concluded that there was "no other reason for the transfer" apart from lower betting duty in Gibraltar. Betting duty avoidance was the "means for survival" of the business. In other words, the FTT found that the move to Gibraltar had the main purpose of avoiding betting duty, despite that being inseparable from saving the business. These findings informed Newey LJ's comment at [89] that the transfer "would not have been effected at all but for the desire to avoid betting duty", and what he said at [91] (see [80] above). In effect, tax avoidance was the means by which it was hoped to save the business.

123. The nearest analogy with the position of the taxpayer in *Fisher* (albeit one that is far from complete) is that of the seller in this case, SICL. The decision to sell the SAAD Claim was no doubt motivated by the wish on the part of SICL's liquidators to maximise the return by selling the claim for more than SICL would be likely to receive if it was retained, due to the imposition of UK WHT. But, as Snowden LJ has

explained, the liquidators did not in fact have any purpose of taking advantage of Article 12(1) when they agreed the sale.

124. HMRC's focus in this appeal is on BLM, not SICL. BLM was not in an analogous position to the taxpayer in *Fisher*. It is true that the calculation of the price that it was prepared to pay took account of its tax attributes, specifically its ability to benefit from an exemption from UK WHT under the UK-Ireland Treaty, just as it took account of other factors such as SICL's own attributes and its liquidators' ability to sell elsewhere. But the mere fact that BLM did so does not mean that it must be treated as having fallen foul of Article 12(5). The tax benefit in question was one that was intended to be conferred on entities in BLM's position.

125. This was, in essence, the point I was seeking to make when I referred to *Kleinwort Benson* in *Kwik-Fit*. *Kwik-Fit* concerned the unallowable purpose rules, which (in outline) deny tax relief for interest and other financing costs where there is a main purpose of obtaining a tax advantage. As I explained in *Kwik-Fit* at [85] with reference to *BlackRock Holdco 5 v HMRC* [2024] EWCA Civ 330, [2024] STC 740 ("*BlackRock*") at [150], relief for interest and other expenses of loan relationships is specifically provided for by the legislation. As such:

> "…it cannot have been Parliament's intention that the unallowable purpose rule will be engaged as an inevitable consequence of taking out (or, I would add, maintaining) a loan, or indeed charging interest on it at a commercial rate, subject only to consideration of whether the value of the tax benefits are sufficient to make it a 'main' purpose…"

126. I then commented on the passage in *Kleinwort Benson* set out at [87] above, as follows:

> "86. The comments of Cross J in *Kleinwort Benson*… reflect a similar point in a different context. The tax consequences he was describing for a dealer (or charity in his other example) were specifically contemplated by the legislation.
>
> 87. However, as this Court recognised in [*IRC v Sema Group Pension Scheme Trustees* [2002] EWCA Civ 1857, [2003] STC 95 *('Sema')*], Cross J's comments in *Kleinwort Benson* must be understood in the light of the facts of that case. Lightman J rightly emphasised at [53] of his decision in *Sema* … that the significance of the tax advantage to the taxpayer must be considered with care. I would add that it should also be considered in the context of the relevant legislative code. As Lightman J also explained, there is a range of possibilities. The possibilities include that the tax advantage may be a 'feature' or a 'relevant factor' without being a main object. (I would take the opportunity to clarify that Lightman J was not saying in the preceding sentence that anything that is more than 'icing on the cake' will be a main object, rather that if it is no more than that then the answer is obvious that it will not be.) But the important

> point is that whether a purpose is a main purpose is a question of fact for the fact-finding tribunal, which cannot be interfered with in the absence of an error of law."

127. There are two points here. One is that the question of main purpose is one of fact for the FTT. To the extent that Cross J was disagreeing with the fact-finding tribunal on that issue in *Kleinwort Benson*, what he said may be open to criticism for that reason.

128. However, the other point is the importance of the legislative context. Where the tax advantage in question is specifically conferred by legislation then it cannot have been intended that it should inevitably be denied by a "main purpose" rule if it forms part of the economics of a transaction. This was the point that Cross J was making with his examples and, irrespective of whether Cross J was right on the facts of *Kleinwort Benson*, the point is an important one.

129. As I said In *BlackRock* at [150], again in the context of the unallowable purpose rules:

> "The corporation tax relief available [for interest and other expenses of raising debt] is obviously a valuable relief. It is unrealistic to suppose that it will not form part of ordinary decision-making processes about methods of funding a company. Indeed, it might well be wrong for directors to ignore that consideration in deciding what is in the best interests of the company concerned … [It] cannot have been Parliament's intention that the inevitable consequence of taking out a loan should engage the unallowable purpose rules, subject only to consideration of whether the value of the tax relief is sufficient to make it a 'main' purpose. Something more is needed."

130. *Fisher* was very different. In that case it was no part of the relevant statutory code to confer the tax advantage that was sought. Rather, section 739 of the Income and Corporation Taxes Act 1988 contained provisions expressly designed to prevent tax avoidance through transfers of assets abroad.

131. Mr Brinsmead-Stockham criticised Cross J's comments as involving a non sequitur when he reasoned from the example of a trader buying for £20 and selling for £30 to cases of charities or dealers buying securities with arrears of interest. Mr Brinsmead-Stockham submitted that in the former case the trader would make a profit irrespective of any tax deduction, whereas on the facts of *Kleinwort Benson* the profit was necessarily dependent upon the tax advantage.

132. I disagree. Cross J's comments were made in 1968, at a time when both the corporation tax and income tax rates were above 40%. Even at a 40% rate, the trader in Cross J's example would not have made a post-tax profit without obtaining a deduction for the £20 cost, since tax at 40% on the sale price (£12) would have exceeded the pre-tax profit of £10.

133. Just as the unallowable purpose rules form part of a statutory code which confers tax relief for debt financing costs, and must be interpreted in that context, so too must Article 12(5). Article 12 confers on Irish resident taxpayers a potentially valuable benefit in the form of an exemption from UK WHT on interest. If HMRC's arguments

were right then it would be very hard to see how that relief could be relied on in any case where the exemption is of more than incidental economic significance.

134. As Snowden LJ has explained, the words "to take advantage of" make it clear that Article 12(5) should not be interpreted in a way that would make the treaty self-defeating. So it is not necessary to resolve the hypothetical question whether, absent those words, it could have applied to BLM's acquisition of the SAAD Claim.

135. Finally, I also wish to associate myself specifically with Snowden LJ's footnote at [61]. Like him, I am unconvinced that the expression "main purpose or one of the main purposes" in Article 12(5) should be interpreted simply by reference to domestic cases which consider that phrase in different contexts. It is far from clear that Article 3(2) applies. It should also be borne in mind that the wording is reflected in drafting proposed in the OECD Commentary: see [48] above. Provisions in the form of Article 12(5) are clearly not limited to treaties to which the UK is a party. That might be taken to indicate an expectation that a consistent interpretation should be adopted internationally.

Lord Justice Zacaroli:

136. I agree with both judgments.