Neutral Citation: [2022] UKFTT 00290 (TC)

Case Number: TC08572

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/02155; TC/2020/02847; TC 2020/03081

INCOME TAX – appeal by the Appellant, an Irish resident company, against a refusal by the Respondents to repay to the Appellant income tax withheld at source in respect of interest paid on a debt owed by a UK resident company – refusal based on the Respondents' view that Article 12(1) of the double tax treaty between the UK and the Republic of Ireland (the "Treaty") did not apply to the interest as a result of Article 12(5) of the Treaty, which precluded the article from applying where one of the persons concerned with the assignment had a main purpose of taking advantage of the article by means of the assignment – held that Article 12(5) of the Treaty did not apply to the Appellant in respect of the interest because no person who was concerned with the assignment of the debt had obtaining the benefit of Article 12(1) of the Treaty by means of the assignment as one of its main purposes

Heard on: 19, 20 AND 21 JULY 2022
Judgment date: 22 August 2022

Before

TRIBUNAL JUDGE TONY BEARE
MS REBECCA NEWNS

Between

BURLINGTON LOAN MANAGEMENT DAC

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Sam Grodzinski QC, instructed by Simmons & Simmons LLP

For the Respondents: Mr John Brinsmead-Stockham and Mr Ronan Magee of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to the question of whether a payment of interest which was received by the Appellant ("BLM") in respect of a debt claim in the administration of Lehman Brothers International (Europe) ("LBIE") qualified for the exemption in Article 12(1) of the double tax treaty between the United Kingdom and the Republic of Ireland (the "ROI") of 2 June 1976, as amended by protocols signed on 28 October 1976, 7 November 1994 and 4 November 1998 (the "Treaty") from UK income tax withheld at source. More specifically, the question which this decision addresses is whether Article 12(5) of the Treaty ("Article 12(5)") applied to the interest so that the exemption in Article 12(1) of the Treaty ("Article 12(1)") was precluded from applying.

2. The debt claim in question (claim 11610_C_1) (the "SAAD Claim") had the principal amount of £142,164,241.51, which:

(1) was confirmed by the partners in the professional services firm PricewaterhouseCoopers LLP ("PWC"), as the administrators of LBIE (the "LBIE Administrators") to be outstanding by LBIE to the relevant creditor, SAAD Investments Company Ltd ("SICL"), pursuant to a deed of settlement executed by SICL, LBIE and the LBIE Administrators on 31 August 2016; and

(2) was paid in full by the LBIE Administrators on 7 September 2016.

3. Following the discharge in full of the principal amount as described in paragraph 2 above, SICL retained the right to receive all other amounts which might be payable in respect of the SAAD Claim, which essentially comprised the interest payable in respect of the SAAD Claim, amounting to £90,736,521.36. SICL had been in liquidation since 2009 and Hugh Dickson of Grant Thornton Special Services (Cayman) Limited and Mark Byers and Stephen Akers, both of Grant Thornton UK LLP (together, the "SICL Liquidators") retained a broker/intermediary named Jefferies Leveraged Credit Products, LLC ("Jefferies") to market the SAAD Claim.

4. Following negotiations which took place between the SICL Liquidators and Jefferies and between Jefferies and BLM in February 2018, the SAAD Claim was assigned to BLM by the execution of two agreement as follows:

(1) an assignment from the SICL Liquidators to Jefferies of 9 March 2018; and

(2) an assignment from Jefferies to BLM of the same date.

The amount paid by Jefferies to the SICL Liquidators under the assignment specified in paragraph 4(1) above was £82,400,000 and the amount paid by BLM to Jefferies under the assignment specified in paragraph 4(2) above was £83,550,000.00. The latter amount was equal to 92% of the amount of the interest which payable in respect of the SAAD Claim.

5. Notice of the two assignments specified in paragraph 4 above was given to the LBIE Administrators by way of transfer notices dated 19 March 2018.

6. The interest in respect of the SAAD Claim was discharged by the LBIE Administrators on 25 July 2018. On that date, the LBIE Administrators paid 80% of the interest to BLM (£72,589,217.09) and withheld 20% of the interest (£18,147,304.27) in compliance with their obligations to withhold UK income tax. In September 2018, the LBIE Administrators accounted to the Respondents for the tax so withheld, pursuant to their obligations under Section 874 of the Income Tax Act 2007 (the "ITA"). It is BLM's alleged entitlement to the repayment of that tax which is the subject of this dispute.

THE AGREED FACTS

7. The parties to the appeal have agreed the following facts in connection with the appeal.

BLM

8. BLM is a "designated activity company" under the Companies Act 2014 of the ROI.

9. BLM was incorporated in the ROI on 24 April 2009 as a private limited company. BLM converted to being a designated activity company on 28 June 2016 and has remained such a company ever since.

10. The shares in BLM are and have at all material times been held on trust for charitable purposes.

11. As a matter of ROI law, BLM is, and has at all material times been, a tax resident of the ROI.

12. BLM was, at all material times, a resident of the ROI for the purposes of the Treaty.

13. BLM is, and at all material times has been, the principal European fund investment corporate vehicle for Davidson Kempner Capital Management ("DKCM"), an asset manager headquartered in New York City, New York, United States of America.

14. BLM appointed DKCM to act as its investment manager with authority to make investments on behalf of BLM and DKCM operated in this capacity at all material times.

15. As at the date of its 2017 financial statements, BLM held, directly and indirectly, approximately $6.9 billion of assets, of which (using the descriptions in those financial statements) approximately 12% were bonds, 28% were equities, 34% were term loans, 11% were trade claims (of which most were claims in the administration of LBIE) and 14% were investments in structured entities. The geographic split of those assets was 29% United Kingdom, 6% United States, 14% Germany, 2% Iceland, 6% Ireland, 4% United Arab Emirates, 16% Spain and 23% other jurisdictions.

The administration of Lehman Brothers

16. LBIE is an unlimited company registered in England.

17. LBIE was part of the global financial services group Lehman Brothers ("Lehman").

18. In September 2008, at the start of the "global financial crisis", the global business of Lehman was commercially insolvent. Attempts were made to find a buyer for LBIE, but they were unsuccessful.

19. On 15 September 2008, the LBIE Administrators were appointed.

20. A secondary market emerged in claims in the administration of LBIE where the creditor had demonstrated to the satisfaction of the LBIE Administrators their entitlement, subject to the prevailing Insolvency Rules, to payments in respect of claims admitted in the administration ("proved claims").

21. Financial investors such as BLM participated in this market.

22. In April 2014, the LBIE Administrators concluded the process of paying the principal amounts of the proved claims. BLM received payments in respect of the principal amounts of proved claims as part of this process.

23. The LBIE Administrators were able to realise from the assets of LBIE approximately £7 billion more than was required to satisfy all proved claims in the administration (the "Surplus").

24. The Insolvency (England and Wales) Rules 2016/1024 required, at rule 14.23(7), that "any surplus remaining after payment of the debts proved must, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the relevant date". This required the LBIE Administrators to use the Surplus to pay what is referred to as "Post-Administration Interest" on proved claims. The rate of the interest payable, under rule 14.23(7)(c), was the greater of the "judgment debt" rate under section 17 of the Judgments Act 1838, which was 8% per annum, and the "rate applicable to the debt apart from the administration".

25. The LBIE administration generated a number of disputes. Materially:

(1) in November 2013, the High Court heard the "Waterfall I" case, which concerned, inter alia, whether creditors who had been exposed to foreign exchange-related losses on claims in the LBIE administration denominated in non-sterling currencies could recover the shortfall from the LBIE Administrators as a non-provable claim (i.e. a claim of a sort that does not fall within the category of "provable claims" in the Insolvency Rules) in the administration ("Currency Conversion Claims"). In 2014, the High Court, and in 2015 the Court of Appeal, decided that Currency Conversion Claims could be made against the LBIE Administrators. In 2017, the Supreme Court decided that there was no right to Currency Conversion Claims against the LBIE Administrators.

(2) in July 2015, the High Court decided, in the "Waterfall II" case (to which BLM was a party), that Post-Administration Interest was calculated from the date of the administration, not the point at which the original creditor terminated its contract with LBIE. The Court of Appeal upheld this decision in 2017. The decision was appealed to the Supreme Court by a number of parties, including the "Senior Creditor Group" of which BLM was a part. The appeal was resolved without a judgment following the entry into force of the Scheme of Arrangement (as described in paragraph 28 below); and

(3) in October 2016, the High Court decided that Post-Administration Interest was not "yearly interest" within the meaning of Section 874 of the ITA and therefore the LBIE Administrators were not subject to an obligation to withhold an amount representing the basic rate of UK income tax on payments of Post-Administration Interest, including to overseas creditors. The Respondents appealed against that decision and the Court of Appeal upheld their appeal in December 2017, concluding that Post-Administration Interest was "yearly interest", so that the LBIE Administrators were subject to the withholding obligation (subject to statutory exceptions or relevant relief under a double tax treaty). The Supreme Court confirmed the decision of the Court of Appeal on 13 March 2019 (the "Withholding Tax Litigation").

26. Over the course of the LBIE administration, financial investors, including BLM, began to accumulate significant proportions of the proved claims in the administration.

27. In 2016, the LBIE Administrators set up an auction process (the "LACA"), which the LBIE Administrators described as an opportunity for "eligible creditors who have an admitted claim with a value of less than £10 million [...] to participate in an auction process, pursuant to which it is intended that they will sell their admitted claim to third party purchasers." BLM purchased claims in the LACA.

28. On 20 June 2018, a scheme of arrangement was approved by courts in the UK and the US (the "Scheme of Arrangement"). The Scheme of Arrangement resolved a number of outstanding issues in the administration, including the appeals to the Supreme Court in the "Waterfall II" case.

29. In July 2018, the LBIE Administrators made payments of Post-Administration Interest, net of UK withholding tax, which was remitted to the Respondents in September 2018.

BLM's purchases of claims in the LBIE administration

30. BLM acquired its first proved claim in the LBIE administration in 2011.

31. In total, BLM acquired interests in respect of 443 proved claims in the administration, together with a small number of Contractual Rights (as defined in paragraph 32 below).

32. BLM acquired proved claims, or interests in respect of proved claims, broadly in three ways:

(1) BLM purchased the numerical majority of its proved claims as "Direct Claims". A Direct Claim is a proved claim in respect of which BLM became the lender of record in the administration in respect of that proved claim;

(2) BLM also purchased "Participation Claims". A Participation Claim is a proved claim in respect of which BLM acquired a beneficial interest under a participation agreement, but was not the lender of record; and

(3) BLM also entered into certain contracts, the effect of which was that BLM acquired a contractual right to the "economic benefit" of a given proved claim, but did not acquire a direct beneficial interest in that proved claim ("Contractual Rights").

33. Some of the interests acquired by BLM were purchased after the existing creditor had already received payment from LBIE in respect of the principal amount of the proved claim. In those circumstances, BLM was (broadly) acquiring rights in respect of future payments which might arise from the proved claim, including Post-Administration Interest.

The English Law Participation Claims

34. The majority of Participation Claims were acquired by BLM under participation agreements governed by the law of New York.

35. BLM entered into seven participation agreements governed by English law, each with CVI GF Lux Ninety Nine SARL ("CVI Lux"), relating respectively to claims 8211_C_1, 952233_C_1, 1071427_C_1, 1634918_C_1, 1823777_C_1, 1872899_C_1 and 1991106_C_1 (the "English Law Participation Agreements" and the "English Law Participation Claims").

The SAAD Claim

36. The original creditor of the SAAD Claim was SICL, a company incorporated in the Cayman Islands.

37. A "Deed of Settlement" had been granted by the LBIE Administrators in respect of the SAAD Claim on 31 August 2016, confirming the principal amount of the proved claim.

38. The principal amount of the SAAD Claim was paid to SICL on 7 September 2016.

39. In February 2018, SICL was in liquidation, having entered liquidation in 2009.

40. The SICL Liquidators retained Jefferies to market the SAAD Claim.

41. On 9 March 2018, the SAAD Claim was assigned by SICL to Jefferies under an assignment of claim agreement and then, under a second assignment of claim agreement, by Jefferies to BLM.

UK withholding tax

42. On 18 April 2018, following the decision of the Court of Appeal in the Withholding Tax Litigation in December 2017 – to the effect that payments of Post-Administration Interest would be subject to deduction of UK income tax at source (subject to statutory

exceptions or relevant relief under a double tax treaty) - the LBIE Administrators announced the results of a "discussion with [the Respondents] to ensure creditors can apply to receive statutory interest payments without (or at a reduced rate of) [UK withholding tax], if applicable, while the litigation continues". So far as is relevant to the position of BLM, the proposal was that creditors should apply directly to the Respondents for a direction that LBIE should make payments without the imposition of UK withholding tax (a "Relief at Source Application").

43. On 27 April 2018, BLM, through its tax advisers, PWC, made a Relief at Source Application in respect of its Direct Claims (including the SAAD Claim); that is, an application for a direction that LBIE should make payments of interest without UK withholding tax. BLM later made a Relief at Source Application in respect of its Participation Claims.

44. In July 2018, the LBIE Administrators made payments of Post-Administration Interest to the lenders of record in respect of each of their proved claims in the LBIE administration. Unless the contrary was agreed with the Respondents, these payments were made net of UK withholding tax, which was subsequently accounted for and paid to the Respondents by the LBIE Administrators.

45. On 27 July 2018, the Respondents wrote to BLM to inform BLM that "[the] LBIE administration has a large number of admitted claims and [the Respondents have] received many claims for treaty benefits. All applications for the treaty rate to apply to the statutory interest payments will be reviewed". The letter set out a number of issues the Respondents intended to explore.

46. On 1 March 2019, following a period of correspondence between the Respondents and PWC, the Respondents wrote to PWC to explain that they would be unable to respond further until the decision of the Supreme Court in the Withholding Tax Litigation had been handed down.

47. The judgment of the Supreme Court in the Withholding Tax Litigation was handed down on 13 March 2019. It confirmed that Post-Administration Interest was "yearly interest" and so within the obligation to withhold tax imposed by Section 874 of the ITA.

48. On 22 March 2019, PWC wrote to the Respondents, noting the decision of the Supreme Court in the Withholding Tax Litigation and expressing the view that BLM was entitled to a refund of withholding tax withheld by the LBIE Administrators on payments of Post-Administration Interest.

49. The letter explained that, because Post-Administration Interest had now been paid net of UK withholding tax and that the UK withholding tax had been remitted by the LBIE Administrators to the Respondents, "the process in which [BLM] and [the Respondents] are engaged has migrated in nature from an application for [UK] withholding tax relief at source (in April and May 2018), to a [UK] withholding tax reclaim application", and enclosed four copies of Form Company – Ireland, which is the prescribed form for claiming refunds of UK withholding tax where the claimant is an [ROI] tax resident company such as BLM (the "UK WHT Reclaims").

50. The four copies of Form Company – Ireland corresponded to the four categories of claims by reference to which PWC and the Respondents had been communicating: "Batch 1 Claims", "Batch 2 Claims", other Direct Claims, and Participation Claims. The SAAD Claim was among the Batch 1 Claims.

51. On 26 March 2019, the Respondents wrote to PWC acknowledging the Relief at Source Applications, notifying BLM of an enquiry to check BLM's "claim for repayment of [UK] withholding tax", and requesting documentation.

52. On 30 April 2019, the Respondents wrote to PWC explaining that they planned to review the UK WHT Reclaims and stating that they could "confirm that the applications made by [BLM] on 27 April 2018 and 8 May 2018 have been converted from applications for a treaty direction to repayment applications".

53. Email correspondence between PWC and the Respondents followed over the summer of 2019.

54. On 2 July 2019, Simmons & Simmons LLP ("Simmons"), legal advisers to BLM, wrote to the Respondents seeking a "fully reasoned closure notice" by 31 July 2019.

55. On 17 July 2019, the Respondents responded to Simmons' letter of 2 July 2019, explaining that the Respondents would reply by 31 July 2019.

56. On 22 July 2019, Simmons wrote to the Respondents noting that Simmons had inferred that "[the Respondents have] all of the information and documentation that [they require] and that a closure notice will be issued by 31 July 2019". The Respondents replied that day to the effect that "[nothing] in correspondence to date should be taken as a reference to [the Respondents'] position regarding information required or [the Respondents'] position regarding the administrative procedures which can reasonably be followed."

57. The Respondents replied substantively on 30 July 2019 to the effect that:

(1) there remained further issues for the Respondents to consider before a repayment could be made; and

(2) where "[BLM] has acquired rights to the debt proved in the administration, i.e. the transaction was entered into before LBIE announced full payment of the debt on 23 April 2014" (which the parties have described as a "Category 1 claim"), the Respondents were inclined to accept that BLM was entitled to a refund of UK withholding tax unless any anti-abuse provisions applied.

58. On 19 August 2019, Simmons emailed the Respondents attaching a letter and an Excel spreadsheet with a breakdown of all of BLM's claims in the LBIE administration. The spreadsheets differentiated between claims that the parties have described as:

(1) "Category 1", being claims where BLM had acquired rights to the debt proved in the administration; and

(2) "Category 2", being claims purchased by BLM after the principal amount had been paid (and thus regarded by the parties as carrying merely the right to statutory interest).

The claims that the Respondents had indicated that they might in principle repay were listed. In the covering email, Simmons drew the Respondents attention to an error in the copy in the Form Company-Ireland submitted on 22 March 2019 in relation to the Participation Claims.

59. On 22 August 2019, BLM made an application to the First-tier Tribunal for an order directing the Respondents to issue a closure notice in their enquiry (the "Closure Notice Application").

60. On 21 January 2020, the Closure Notice Application was part-heard by Tribunal Judge Sukul in the First-tier Tribunal. Following the hearing, Judge Sukul endorsed directions agreed by the parties requiring the Respondents to make any further information requests of

BLM by 30 January 2020, BLM to respond by 13 February 2020, and the parties to exchange skeleton arguments on 26 February 2020 ahead of a re-convened hearing.

61. The parties complied with the first two directions.

62. On 4 February 2020, the Respondents made a repayment to BLM relating to Category 1 claims that were Direct Claims.

63. On 25 February 2020, the parties made a joint application for an order directing the Respondents to close its enquiry and issue a closure notice by 29 May 2020.

64. On 7 April 2020, the Respondents made a repayment to BLM relating to Category 2 claims that were Direct Claims and claims purchased in the LACA.

65. On 22 May 2020, the Respondents issued a penalty assessment to BLM in respect of a claim which the parties refer to as the "Mackay Shields claim". (BLM appealed against that assessment on 19 June 2020. The Respondents re-issued the penalty assessment on 31 July 2020 and BLM appealed against the re-issued penalty assessment on 14 August 2020. The penalty assessment and the re-issued penalty assessment are referred to in the rest of this decision as the "Penalty").

66. On 11 May 2020, the Respondents made a further repayment relating to 102 Participation Claims. The Respondents withheld payment in relation to two Participation Claims they considered to be potentially duplicative. A repayment in relation to these claims was made on 27 July 2020.

67. On 29 May 2020, the Respondents issued a closure notice. The closure notice:

(1) allowed UK WHT Reclaims in the amount of £114,395,107; and

(2) refused UK WHT Reclaims of £18,147,304.27 in respect of the SAAD Claim, £45,019.10 in respect of the two potentially duplicative claims (later repaid as described in paragraph 66 above), £391,929.20 in respect of the English Law Participation Claims, and £2,123,438.13 in respect of the "Mackay Shields claim" (which the Respondents described as having been withdrawn by BLM).

68. The closure notice explained that:

(1) the repayment of UK withholding tax in relation to the SAAD Claim was refused "in accordance with Article 12(5) …because [the Respondents consider] that the main purpose, or one of the main purposes, of the assignment of this debt-claim by [SICL] to [BLM] was to take advantage of Article 12 of the Treaty"; and

(2) the repayment of UK withholding tax in relation to the English Law Participation Claims was refused "because [the Respondents are] not satisfied that [BLM] acquired beneficial ownership of any percentage part of these 7 debt-claims. Consequently, [the Respondents [are] not satisfied that [BLM] is the beneficial owner of the statutory interest arising thereon. [BLM] must be the beneficial owner of the interest in order to access the Treaty."

69. On 6 January 2021, the Respondents served their Statement of Case.

70. On 17 November 2021, the Respondents, by letter, notified BLM that they were no longer pursuing their case in relation to the English Law Participation Claims.

71. On 13 May 2022, the parties entered into an agreement under Section 54 of the Taxes Management Act 1970 (the "TMA"), disposing of the appeals in relation to the Penalty, on confidential terms, and BLM's appeals against the Penalty were subsequently withdrawn.

THE RELEVANT PROVISION OF THE TREATY

72. It is common ground that the provision of the Treaty which is of central relevance to this appeal is Article 12 of the Treaty. At all times relevant to this appeal, Article 12 of the Treaty provided as follows:

"Article 12

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 Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and other debt- claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises but shall not include any income which is treated as a distribution under Article 11.

(3) The provisions of paragraph (1) of this Article shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, has in the other Contracting State a permanent establishment and the debt-claim from which the interest arises is effectively connected with a business carried on through that permanent establishment. In such a case, the provisions of Article 8 shall apply.

(4) Where, owing to a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest paid exceeds for whatever reason the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

(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."

73. It is also common ground that, at all times relevant to this appeal, the Treaty (including Article 12 of the Treaty) was given effect in UK domestic law by reason of the operation of Section 2 of the Taxation (International and Other Provisions) Act 2010 and a number of statutory instruments, including:

(1) The Double Taxation Relief (Taxes on Income) (Republic of Ireland) Order 1976 (SI 1976/2151); and

(2) The Double Taxation Relief (Taxes on Income) (Ireland) Order 1998 (SI 1998/3151) (the "1998 Order").

THE AGREED ISSUE

74. The parties are agreed that:

(1) absent the application of the Treaty, BLM would have had no entitlement to recover the UK income tax which was withheld at source by the LBIE Administrators when they discharged the interest in respect of the SAAD Claim;

(2) Article 12(1), were it to have applied, would have operated to exempt the payment made in the discharge of that interest from UK tax and therefore entitled BLM to recover all of the UK income tax so withheld; and

(3) the only reason why Article 12(1) would not have applied to exempt the payment made in the discharge of that interest from UK tax was if Article 12(5) applied to that payment.

75. This means that the only issue which we are required to address in this decision – which is agreed by the parties to be the sole issue between them – is whether, on the basis of the agreed facts described above, along with the facts which we find in the light of the evidence with which we have been provided, 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 of the Treaty, within the meaning of that Article.

76. Our task in this respect naturally divides into:

(1) questions of law – i.e. what is the meaning of Article 12(5)?; and

(2) questions of fact – i.e. how does the law as so construed apply to the agreed facts and the facts which we find in the light of the evidence with which we have been provided?

THE EVIDENCE

77. The evidence in the appeal took the form of various documents in the documents bundle, along with the witness evidence of Ms Suzanne Gibbons, a partner in, and managing member of, DKCM, the investment manager of BLM.

The documents

78. The documents bundle contained a number of documents (largely emails) which were written in relation to the subject matter of the appeal in the period immediately before and after the assignment of the SAAD Claim by SICL to Jefferies and by Jefferies to BLM. In order to assist the reader's understanding of the documents which we describe in paragraph 79 below, we set out below the names of the various people who sent or received the documents, in each case along with the relevant person's organisation and, in some cases, role at the time of the transaction which is the subject of the appeal:

(1) Mr Brian Bonneson – an associate in DKCM's distressed investing team in New York, responsible for executing trades;

(2) Ms Jennifer Donovan – a principal in DKCM's distressed investing team in New York, responsible for closing trades;

(3) Ms Suzanne Gibbons – a managing director in DKCM's distressed investing team in New York, responsible for analysing and recommending trades;

(4) Mr Christopher McGrath – a managing director in DKCM's distressed investing team in New York, responsible for executing trades;

(5) Mr Gregory Miesner – Jefferies;

(6) Ms Julie Nettleton - Grant Thornton UK LLP, one of the SICL Liquidators;

(7) Mr Naveen Sabharwal – a member of the team in the European affiliate of DKCM in London, responsible for claims against SICL;

(8) Mr Gabriel Schwartz – a partner in, and managing member of, DKCM's distressed investing team in New York and the most senior member of the team implementing the transaction;

(9) Mr Travis Troyer – a principal lawyer in DKCM's legal team in New York; and

(10) Ms Aileen Watson – a managing director in DKCM's distressed investing team in New York, responsible for executing trades.

79. The documents which are relevant to this appeal may be summarised as follows:

(1) a form UCC3 relating to the SAAD Claim dated 29 September 2017, which recorded that:

(a) the principal amount of the SAAD Claim had been repaid;

(b) statutory interest of £90,736,521.36 remained outstanding; and

(c) SICL, the holder of the SAAD Claim, fell within "tax category 4 – other", which, the accompanying explanatory notes clarified, meant that, based on the information then available to LBIE, SICL was resident in a jurisdiction which did not have a treaty with the UK;

(2) an email of 12 December 2017 from Ms Nettleton to Mr Sabharwal, in which Ms Nettleton asked "have you been able to consult your NY colleagues on the thinking around a "reserve" price for SICL's LBIE interest claim?";

(3) an email of the same date from Mr Sabharwal to Ms Nettleton in which Mr Sabharwal replied:

"We are in consultation with NY and also the LC.

Will revert as soon as we can. In the meantime…please pause this work-stream until we have more clarity on how we would like to proceed";

(4) an announcement made by the LBIE Administrators on 22 December 2017 (the "Progress Report"), in which the LBIE Administrators informed creditors of LBIE that:

(a) it was in the course of preparing a proposal to effect the Scheme of Arrangement;

(b) the Scheme of Arrangement would, inter alia, result in the settlement of all disputes in relation to entitlements to the surplus in LBIE and allow payment of the Post-Administration Interest accruing from the date of LBIE's administration;

(c) the proposal had secured the backing of two of the most significant creditor groups which were stakeholders in the LBIE administration; and

(d) the Withholding Tax Litigation was continuing and appropriate mechanics would be needed in the Scheme of Arrangement to deal with the possible eventual outcome of that litigation;

(5) an email from Mr Sabharwal to Ms Nettleton of 2 January 2018, to which Mr Sabharwal had attached the Progress Report and in which Mr Sabharwal said as follows:

"…I assume you saw the below update from the LBIE JOL's?

My reading of the proposal is that it should result in a full payment of all statutory interest claims (including SICL's) from the date of the administration … This is obviously good news for the SICL estate.

Could you please confirm you have seen this and that my interpretation is correct?";

(6) an email of the same date from Ms Nettleton to Mr Sabharwal, in which Ms Nettleton replied:

"yes, I have seen this…I think we all interpret this in the same way as regards the calculation of interest and I agree that it looks like good news for the SICL estate.

Of course, it doesn't deal with the withholding tax issue which, as things stand following the Court of Appeal decision of 19 December, could see SICL losing 20% of its interest in withholding tax, with no ability to reclaim that sum from [the Respondents]. As you know, this is one of the factors which motivates the discussion around the sale of the claim.

In light of the announcement re the scheme proposal, we are updating our assessment on the sale/hold strategy and will be in touch with the LC about that in due course";

(7) an email of 5 February 2018 from Mr McGrath to Mr Troyer, copied to Mr Schwartz, Ms Gibbons and Ms Watson, attaching a non-disclosure agreement (an "NDA") which had been sent to Mr McGrath by Jefferies in relation to "the LBIE poss sale from SAAD estate";

(8) an email of the same date from Mr Troyer to Mr McGrath and the other recipients of Mr McGrath's email, in which Mr Troyer replied that he would get the document signed up that day and asked Mr McGrath if, inter alia, Mr McGrath was happy with the three year term of the NDA;

(9) an email of the same date from Ms Gibbons to the same group, in which she replied, inter alia, that she was prepared to accept the term of the NDA if it was non-negotiable;

(10) an email of the same date from Ms Watson to Ms Gibbons and Mr McGrath, in which Ms Watson asked whether London needed to "to okay this re SAAD";

(11) an email of the same date from Ms Gibbons to Mr Schwartz, Mr McGrath and Ms Watson, in which she replied:

"Looping in Gabe, I believe he discussed with them last week. This is being sold for withholding tax reasons";

(12) an email of the same date from Mr Schwartz to the same group, and copying in Mr Sabharwal and Mr Troyer, in which he confirmed that he had discussed the proposed transaction with Mr Sabharwal and that he saw no issue with the proposed transaction because the details of the SAAD Claim had already been disclosed in the SICL creditor reports;

(13) an email of the same date from Mr Sabharwal to the same group in which he confirmed that he agreed with Mr Schwartz;

(14) a financial model of 6 February 2018 prepared by Ms Gibbons in which:

(a) the impact of the "liquidation lacuna" risk – as described in more detail in setting out Ms Gibbons' evidence in paragraph 80(5)(a) below - was not reflected;

(b) the impact of the "late termination" risk – as described in more detail in setting out Ms Gibbons' evidence in paragraph 80(5)(b) below – was reflected in the downside case shown in figures at the top of the financial model and in the section headed "Down (Late Term)". The downside case so arising showed a reduction in the expected payment of interest of almost £10 million and a total receipt of interest and repayment of UK withholding tax that was only 97% of the purchase price; and

(c) set out the impact on BLM's internal rate of return ("IRR") of receiving each of the interest payment and the repayment of the UK withholding tax on two possible dates;

(15) email exchanges of 6 and 7 February 2018 between Ms Gibbons and a number of her colleagues, including Mr Schwartz, Mr McGrath, Ms Donovan and Ms Watson, in which:

(a) Ms Gibbons confirmed that DKCM would like to bid on the SAAD Claim, using BLM as the buyer and with the assignment to be completed by 15 March 2018;

(b) Ms Donovan confirmed that no special terms were required and a simple assignment agreement would suffice;

(c) Ms Donovan summarised the details of the SAAD Claim and confirmed that, following the decision of the Court of Appeal in the Waterfall II case, the interest payable in respect of the SAAD Claim would accrue from the date of LBIE's administration and, as Ms Donovan put it, the SAAD Claim was "a clean claim"; and

(d) it was agreed between the relevant individuals that the purchase price to be offered to Jefferies was £84,388,693.76 (which was 93% of the amount of interest payable in respect of the SAAD Claim);

(16) an email of 8 February 2018 from Ms Watson to Mr Schwartz, Ms Gibbons and Ms Donovan, in which Ms Watson confirmed that:

(a) the commercial terms of the deal were now agreed but that, before SICL could enter into a legally binding contract to assign the SAAD Claim and therefore before Jefferies and BLM could do the same, the representative entering into the assignment to Jefferies on behalf of SICL would need to go to the Cayman Islands (as that was where SICL was resident) and that he or she was expected to be there on the following Monday, 12 February 2018; and

(b) barring unforeseen circumstances, BLM would be purchasing the SAAD Claim for £83,550,000 (which was 92% of the amount of interest payable in respect of the SAAD Claim);

(17) an email of 9 February 2018 from Ms Watson to Mr Sabharwal and others in which she said:

"I was trying to avoid this but the Seller is insisting they know the identity of the end-buyer for Monday's close. They don't seem to understand their buyer is Jefferies.

Gabe and Suzanne were fine with this, but we want to make sure you had no objection to our name give-up.

This is going to be a problem for them to say 'done' unless they know. They have assured Greg that the buyer's identity would change nothing";

(18) an email of 10 February 2018 from Mr Sabharwal to Ms Watson and the same group in which Mr Sabharwal confirmed that he was content for Ms Watson to inform the SICL Liquidators that BLM was the end-purchaser of the SAAD Claim and said that the SICL Liquidators would know who BLM was because BLM was the lender of record to SICL as well;

(19) an email of 12 February 2018 from Mr Miesner to Ms Watson which confirmed that the trade between Jefferies and DKCM had been executed "subject to successful

buy in of the underlying claim" and "subject to all due diligence" and setting out the main terms of the assignment as to completion and price;

(20) an email of the same date from Ms Watson to Mr Miesner confirming that DKCM was in agreement with the terms set out in Mr Miesner's earlier email but pointing out that the purchaser was in fact BLM and not DKCM;

(21) an email of 22 February 2018 from Ms Gibbons to Mr Bonneson, copying Mr Schwartz, in which Ms Gibbons said, in relation to LBIE, that the timing for the Scheme of Arrangement had slipped from April to May because of a German tax problem and then adding:

"We purchased SICL's LBIE claim at an attractive price since they had a withholding tax issue";

(22) an email of the same date from Mr Schwartz to Ms Gibbons and Mr Bonneson, in which Mr Schwartz amended Ms Gibbons' comment in relation to LBIE by truncating the sentence referred to in paragraph 79(21) above to:

"We purchased a large LBIE claim";

(23) an email of 26 March 2018 from Mr Prashan Patel of Grant Thornton UK LLP, on behalf of the SICL Liquidators, containing an update on the SAAD Claim, in which he reminded readers that the interest payable in respect of the SAAD Claim was subject to the Waterfall II proceedings and other live matters which had arisen since the last report of the SICL Liquidators relating to UK withholding tax and the "liquidation lacuna" and went on:

"As a result of those matters, the range of recovery for SICL moved to between £nil and £90,736,521.36.

The JOLs are pleased to report that they have successfully sold SICL's claim in the LBIE administration to a third party for an amount of £82,400,000. This represents the sale of the potential statutory interest distribution on SICL's claim in the LBIE administration, and has no effect on the principal distribution that SICL has already received.

The sale eliminates the risk to SICL of statutory interest not being received at all due to the "liquidation lacuna". It also protects the SICL estate from the deduction by the LBIE administrators of withholding tax on SICL's statutory interest. The administrators would have been required to make that deduction as SICL is not resident in the UK for tax purposes. Had the tax been deducted, SICL would not have had any ability to reclaim that tax"; and

(24) two assignment of claim agreements in relation to the SAAD Claim, each dated 9 March 2018 – one between SICL and Jefferies and the other between Jefferies and BLM – in similar form. Each assignment of claim agreement specified a trade date of 12 February and provided for the assignment of the entire SAAD Claim excluding what it referred to as the "Retained Distribution", being the principal amount of the SAAD Claim already repaid. Clause 9 in each assignment of claim agreement provided that the purchaser was entitled to transfer the SAAD Claim, together with all rights, title and interests of the purchaser under the relevant assignment of claim agreement without the consent of the seller.

The testimony of Ms Gibbons

80. The testimony of Ms Gibbons was as follows:

(1) although she was now a partner in, and managing member of, DKCM, at the time of the transaction which is the subject of the appeal she was a managing director in the distressed investing team. She was responsible for analysing and recommending the transaction to the team. The role of the team was to identify value in distressed or highly-leveraged assets;

(2) tax was one of the issues which was taken into account by the team in its analysis of the risks associated with its investments. Although she herself was not a tax expert, she had access to tax advice both from external counsel and from the DKCM internal tax team;

(3) in making its investments, the team had various metrics. One of those was the expected IRR, which was the return which the investment was expected to generate, taking into account time. In addition, the team took into account the perceived downside risk and the perceived upside (the gross return). The team would not invest in an asset unless it had an expected IRR of at least 10%;

(4) she had been involved in acquiring assets in the LBIE administration since 2008. In total, DKCM had purchased 443 claims in the LBIE estate on behalf of BLM, of which 332 were Direct Claims and the remainder were Participation Claims. BLM was the natural purchaser of the claims in the LBIE estate as it was DKCM's principal European investment platform. She personally had been involved in the purchase of more than 100 of those claims and many of them made since 2014 had effectively been limited to the statutory interest payable in respect of them as the principal amount in respect of them had already been repaid;

(5) at the time when the team were considering its acquisition of the SAAD Claim, the two outstanding downside risks associated with the SAAD Claim from BLM's perspective were that:

(a) LBIE would go into liquidation so that, unlike administration, no statutory interest would be paid in respect of its debts. This was referred to colloquially as the "liquidation lacuna" risk. Although the downside to which the "liquidation lacuna" risk would have given rise if it materialised was catastrophic – in that it would mean that the SAAD Claim at the time of BLM's acquisition had a nil value – she did not perceive it to be a significant risk at the time when she was analysing the SAAD Claim because of its low probability. The team had been advised that it was highly unlikely to happen. It was more of a threat used by the LBIE Administrators in negotiations than a likely outcome and the announcement in December 2017 to the effect that agreement had been reached between the LBIE Administrators and the major creditor groups in relation to the terms of what became the Scheme of Arrangement made the "liquidation lacuna" risk even less likely to materialise; and

(b) the statutory interest payable in the administration might fall to be calculated with effect from the date when the relevant creditor terminated its contract with LBIE following the start of the administration instead of from the date of the administration. This was the subject of the Waterfall II litigation mentioned in paragraph 25(2) above and it was referred to colloquially as the "late termination" risk. At the time when the team were considering an acquisition of the SAAD Claim, the Court of Appeal had held that the statutory interest should accrue from the date of the administration but that decision had been appealed to the Supreme Court and therefore the outcome remained

uncertain. The amount of this downside risk in the case of the SAAD Claim was approximately £10 million;

(6) she had valued the SAAD Claim by reference to a financial model which she had produced on 6 February 2018. In preparing that financial model, she had accorded a value of 100% to the interest which was expected to be paid in respect of the SAAD Claim. That was because she knew that any UK withholding tax which might arise on the payment of that interest could be recovered by BLM. The only significance of the UK withholding tax was timing – i.e. the time that it would take for the Respondents to repay the UK withholding tax to BLM. From her own personal perspective, although she knew that the UK withholding tax was not expected to be a permanent cost for BLM because of its tax residence in the ROI, she wasn't sure that she knew exactly why that was the case. It was just her implicit understanding of the situation. Her awareness of the specifics of the Treaty arose only later, after the SAAD Claim had been acquired;

(7) in preparing the financial model, she had taken no account of the "liquidation lacuna" risk as, in her view, it was remote and, in any event, if it came to pass, it would mean that the SAAD Claim produced nothing and there would be no IRR or gross return to calculate in respect of it. Moreover, as BLM had a position in the debt of LBIE's parent company, which would give rise to a greater return on that position in the event that the "liquidation lacuna" risk materialised, BLM was hedged to some extent in relation to that risk. In preparing the financial model, she had, however, taken the "late termination" risk into account (in the event that the Scheme of Arrangement did not materialise and the Supreme Court were to overrule the Court of Appeal in relation to the Waterfall II litigation). The financial model showed that, in that event, BLM would receive only 97% of the price which it was prepared to offer – a loss of 3%;

(8) the financial model showed that, as long as the "late termination" risk did not materialise, a gross return of 9% (8.6% rounded up) would arise. In that case, the financial model assumed alternative dates for both the payment of the interest – an upside case of 30 April 2018 and a downside case of 30 June 2018 - and the repayment of the UK withholding tax – an upside case of 31 December 2018 and a downside case of 30 June 2019. The upside case produced an IRR of 28.93%, whilst the downside case produced an IRR of 16.11%;

(9) the higher the purchase price:

(a) the greater would have been the loss in the event that the "late termination" risk materialised; and

(b) the lower the IRR would have been in the event that that risk did not materialise.

For example, a 95% purchase price would not have been viable because the downside risk in that event would have been too great. It would have produced a downside of 6% instead of 3%. In addition, a 95% purchase price would have been incapable of producing an IRR of 10% or more. It was vital that, in addition to not being too exposed in circumstances where the "late termination" risk materialised, BLM could realise an IRR of at least 10% in the event that the "late termination" risk did not materialise;

(10) at one stage in her testimony, she said that, at the time of calculating her offer price for the SAAD Claim, she was aware that SICL was expected to suffer, as a

permanent cost, the UK withholding on the interest payable in respect of the SAAD Claim, but she had not factored that fact into her calculation of the offer price for the SAAD Claim. As far as she was concerned, it was simply a matter for SICL and didn't affect the value of the SAAD Claim for BLM, which was her sole concern. She said that, as a general proposition, she "did not consider the seller's position because it isn't relevant" and that "the seller's position or motivations are not relevant to me as a purchaser";

(11) at another, she accepted that, as a general proposition, she did take the seller's position into account in terms of considering what price the seller would be inclined to accept. Her aim always was to offer the lowest price which might be acceptable to the relevant seller but bearing in mind that there were other purchasers in the market who might be prepared to bid more;

(12) in this case, Jefferies had not marketed the SAAD Claim widely to prospective purchasers. Instead, it had given BLM the opportunity to make an offer. This was because BLM had for many years been an aggressive buyer of claims in the LBIE administration. However, if she had made a "low-ball" offer for the SAAD Claim, then Jefferies would have started to look elsewhere. That meant that she wanted to submit a bid that was realistic and fair, which would both result in SICL's receiving a price that was acceptable to SICL and produce a good return for BLM;

(13) she did not know why:

(a) having produced a financial model on the basis of a 92% purchase price, she and her colleagues had agreed to make an offer on the basis of a 93% purchase price (see paragraph 79(15)(d) above); or

(b) having made an offer on the basis of a 93% purchase price, the eventual purchase price paid to Jefferies was 92%.

She could only surmise that those changes must have resulted from discussions at the time as the team members all sat in close proximity to each other in New York;

(14) she also did not know why the SICL Liquidators had asked for the name of the end-purchaser before agreeing to finalise the trade although she surmised that this was for regulatory reasons and not tax-related reasons, given the assurance in the email from Ms Watson to Mr Sabharwal that the SICL Liquidators' knowing the identity of the end-purchaser would not change anything. She rejected the proposition put to her by Mr Brinsmead-Stockham that, in saying that their knowledge of the purchaser's identity would not change anything, the SICL Liquidators were leaving open the possibility of negotiating for a greater purchase price if the end-purchaser was not exempt from UK withholding tax under an applicable treaty. As far as she was concerned, the terms of the deal (including the purchase price) had all been agreed and the SICL Liquidators simply wanted to know the identity of the end-purchaser for reasons unrelated to tax. There never was any intention on the part of the SICL Liquidators to re-open the deal once they became aware of the identity of the end-purchaser. All the SICL Liquidators cared about was that they were getting a price with which they were content and they had already determined by that stage that they were;

(15) as regards the statement by Ms Nettleton in her email of 2 January 2018 to the effect that UK withholding tax was "one of the factors which motivates the discussion around the sale of the claim", she postulated that another factor might have been the disappointment felt by SICL at the unfortunate outcome to the Waterfall I litigation

which had led to SICL's making a lower return from the SAAD Claim than it might at one stage have expected. This might have made SICL less willing to retain exposure to the SAAD Claim, with its "liquidation lacuna" and "late termination" risks, and more willing to get rid of the asset – so-called "seller fatigue". In addition, as SICL was in liquidation, that too might have made the SICL Liquidators keen to sell the asset;

(16) since DKCM-managed funds were creditors in the SICL liquidation, DKCM was a member of the SICL creditors' committee. However, responsibility for SICL was located in DKCM's London office and not in her team in New York. As such, her only involvement with SICL had been in briefing her London colleagues on how they should approach value in relation to the SAAD Claim so that they could factor those thoughts into their recovery model in relation to SICL;

(17) she had no specific recollection of speaking to Mr Sabharwal about the request for a "reserve price" made to him by Ms Nettleton on 12 December 2017 (because he could have consulted on that question with a variety of different people in New York at that time, including Mr Schwartz) but she had definitely spoken to him about the value of the SAAD Claim at some point in the past. Her reading of that exchange was that Ms Nettleton was enquiring about an appropriate market price for the SAAD Claim, bearing in mind DKCM's involvement in the market; and, since New York was where the DKCM group responsible for marking to market the assets of the LBIE estate resided, it would have been logical for Mr Sabharwal to consult with New York about the market price;

(18) she wasn't sure how many LACA there had been but certainly more than two. The aim of the LACA was to enable creditors with smaller claims to dispose of their claims and the LACA operated by enabling potential purchasers to acquire a batch of different claims for a single aggregate price; and

(19) it was normal for sales through a broker to be structured in the way this one was – on a "back-to-back" basis – but she accepted that the turn made by Jefferies in this case, which amounted to 1.39% of the sale price received by SICL, was surprisingly high. She said that commissions on the sales of plain vanilla debts tended to be in the region of 0.25%. Having said that, she noted that:

(a) she had not been aware of the amount of Jefferies' commission at the time of the transaction; and

(b) it was not unknown for brokers to charge more substantial commissions than the 0.25% previously mentioned. She gave an example of a 3% commission of which she had become aware in another case.

THE SUBMISSIONS OF THE PARTIES – THE LAW

Introduction

81. The parties are agreed that:

(1) there is no direct case law authority as to the correct construction and application of Article 12(5) (or an equivalent provision in any other double tax treaty between the United Kingdom and any other jurisdiction); and

(2) in the absence of any such direct authority, our task is:

(a) to identify the correct approach to the interpretation of double tax treaties in general; and then

(b) in the light of our conclusions in relation to the issue described in paragraph 81(2)(a) above, to determine the meaning of Article 12(5) in particular.

General approach to the interpretation of treaties

82. So far as the first of those tasks is concerned, the parties were agreed that the correct approach to the interpretation of double tax treaties had been set out in a number of authorities at the level of the Court of Appeal and the Supreme Court. The relevant principles were set out in:

(1) *Smallwood v The Commissioners for Her Majesty's Revenue and Customs* [2010] STC 2045 ("*Smallwood*") per Patten LJ, at paragraphs [26]-[29];

(2) *The Commissioners for Her Majesty's Revenue and Customs v Anson* [2015] STC 1777 ("*Anson*") per Lord Reed, at paragraphs [54]-[56] and [110]-[111]; and

(3) *Fowler v The Commissioners for Her Majesty's Revenue and Customs* [2020] STC 1476 ("*Fowler*") at paragraphs [16]-[19].

83. The principles enumerated in those cases were lengthy but they made it clear that:

(1) double tax treaties had to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "VCLT"); and

(2) consequently, a double tax treaty had 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" (see Article 31(1) of the VCLT).

84. Thus, it was common ground that Article 31(1) of the VCLT applied in this case, so that Article 12(5) must be interpreted in good faith and in accordance with its "ordinary meaning" in its context and in the light of its object and purpose, in accordance with the terms of Article 31(1) of the VCLT.

Article 12(5)

Introduction

85. Whilst the parties were on common ground in relation to the general approach to the interpretation of treaties, the same cannot be said about how each of them sought to apply that general approach in the specific context of Article 12(5). For this purpose, it is helpful to break the article down into its three constituent phrases, as follows:

(1) "the main purpose or one of the main purposes";

(2) "any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid"; and

(3) "take advantage of this Article".

Main purpose or one of the main purposes

86. The parties were largely agreed in relation to the "ordinary meaning" of this phrase. They agreed that:

(1) the phrase "main purpose or one of the main purposes" was not defined in the Treaty;

(2) however, it was legitimate to interpret the phrase in accordance with relevant UK case law pursuant to Article 3(2) of the Treaty, which specified that terms which were not defined in the Treaty were to be interpreted in accordance with the provisions of the tax law of the relevant contracting state (in this case, the UK);

(3) determining a person's main purpose was a question of fact – see *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18 ("*Brebner*") at paragraphs 26B-C and 30C-E;

(4) the conclusion of fact was to be made "upon a consideration of all the relevant evidence…and the proper inferences to be drawn from that evidence" – see *Brebner* at paragraph 30G;

(5) the test required consideration of the subjective intentions of the relevant person – see *Brebner* at 27D-E and 30B;

(6) the word "main" did not mean "more than trivial". Instead, it had the connotation of importance – *Travel Document Services v The Commissioners for Her Majesty's Revenue and Customs* [2018] STC 723 ("*TDS*") at paragraph [48]; and

(7) in order for this test to be satisfied, it was not necessary for the relevant matter – in this case, taking advantage of Article 12(5) – to be the sole purpose or the only main purpose. It was sufficient for the relevant matter to be one of several main purposes.

87. However, there was one fairly significant disagreement between the parties in this context. Mr Brinsmead-Stockham said that, in searching for a person's subjective intentions, a court was not limited to that person's conscious motives at the time in question. In making that submission, he relied on the words of Millet LJ in *Vodafone Cellular Ltd v Shaw* [1997] STC 734 ("*Shaw*"), to the effect that, in determining a taxpayer's subjective intentions in making a payment, a court was not limited to the conscious motives of the taxpayer because "[some] consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made". Mr Grodzinski said that that statement was made in a completely different context from the one pertaining in the present case. *Shaw* was a case concerning whether a payment was made wholly and exclusively for the purposes of a taxpayer's trade. It therefore shed no light on how to determine the sole or main purpose of a person for the purposes of Article 12(5). In response, Mr Brinsmead-Stockham said that, although the case related to a different area of tax law, it still relevantly elucidated the meaning of purpose because it was concerned with determining the intentions of the relevant person.

Any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid

88. Mr Grodzinski submitted that SICL was not a "person concerned with the creation or assignment of the debt-claim in respect of which the interest [was] paid". In saying this, he did not seek to rely on the argument that, because the assignment of the SAAD Claim was effected on a "back-to-back" basis through Jefferies, SICL was not "concerned with the assignment". Instead, he relied on the fact that, because Article 1 of the Treaty stipulated that "the [Treaty] shall apply to persons who are residents of one or both of the Contracting States", the reference in Article 12(5) to "any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid" must necessarily be confined to persons who were resident in one of the contracting states and therefore the purposes of SICL could not be taken into account in this context. He noted that this interpretation was supported by Schwarz on Tax Treaties (6th Edition, 2021) ("Schwarz"), which stated at 17.13 that "[the] plain meaning of the words" was that residents of a country other than the two contracting state did not count as "persons" for this purpose.

89. In response, Mr Brinsmead-Stockham pointed out that:

(1) the word "person" was defined in Article 3(1)(g) of the Treaty as comprising "an individual, a company and any other body of persons";

(2) that definition was not subject to any form of restriction as to residence, nationality, or citizenship;

(3) the language cited by Mr Grodzinski from Article 1 of the Treaty merely meant that the Treaty applied only to persons who were resident in one of the contracting states so that, for example, in this context, Article 12(1) could apply to exempt the interest income only of persons resident in the ROI such as BLM, from UK income tax. However, it did not mean that, in applying a provision in the Treaty such as Article 12(5) to BLM or any other resident of the ROI, the word "person" in Article 12(5) of the Treaty should be limited to persons resident in a contracting state. In other words, the Respondents were not seeking to apply the Treaty to SICL. Instead, they were simply saying that, in applying Article 12(1) to BLM, SICL fell within the category of "persons" whose purposes were relevant for the purposes of Article 12(5); and

(4) Mr Grodzinski's construction would undermine a large number of provisions in the Treaty. For example:

(a) it would mean that the "other person" to which reference was made in Article 12(4) of the Treaty would need to be limited to persons resident in either the UK or the ROI, which plainly would not accord with the purpose of that provision; and

(b) it would make Article 4 of the Treaty circular and unworkable as it would mean that "any person" could be a resident of a Contracting State (under Article 4) only if the Treaty applied to it (under Article 1), but, in order for the Treaty to apply to it (under Article 1), the relevant person would need to be a "resident of a Contracting State" (under Article 4).

Take advantage of this Article

Introduction

90. The parties were agreed that the phrase "take advantage of" was not defined in the Treaty and had therefore to be given its "ordinary meaning". However, they disagreed on what that "ordinary meaning" was.

91. Both counsel relied on the definition in the Oxford English Dictionary (the "OED") to support their respective positions. The definition in question was:

"to take an opportunity provided by favourable circumstances; to avail oneself of a person or thing. Frequently in a negative sense: to seize an opportunity of unfairly profiting by a person or thing, esp. sexually
With of (also †by), specifying the person who or thing which is used, exploited, or availed of".

92. Mr Grodzinski submitted that, as noted in the definition, the words "take advantage" generally had a negative sense and that, when viewed in the context of where they appeared in the Treaty, the words connoted the concept of taking artificial steps or making artificial arrangements to obtain a treaty benefit which would not ordinarily follow as a consequence of the relevant person's residence, in a practice commonly known as "treaty-shopping". Thus, he maintained that the reference in the definition to "a negative sense" and "unfairly profiting" showed that, in this context, the phrase was referring to both artifice and abuse.

93. For his part, Mr Brinsmead Stockham said that there was no basis for the gloss which Mr Grodzinski was seeking to place on the phrase "take advantage" to the effect that it connoted a requirement for there to be artificial steps or arrangements before the article could apply or that the article was confined to "treaty-shopping". The ordinary meaning of the phrase "take advantage" was merely "to avail oneself", "to use" or "to obtain the benefit of". That was the ordinary meaning of the words, as defined in the OED.

94. In relation to whether the phrase inevitably had a negative meaning, he pointed out that "frequently" did not mean "invariably". It was perfectly possible for the phrase to be used in a positive sense, as in the case where someone taking a holiday in a particular place chose to "take advantage" of his location to enjoy a particular tourist attraction. Having said that, he accepted that, in this context, the phrase was to be read in a negative sense of its being an abuse of Article 12(1) for a person to have, as its main purpose or one of its main purposes, obtaining the benefit of Article 12(1) in circumstances where the article ought not to apply. Thus, he accepted that, in the context of Article 12(5), the phrase "take advantage" was referring to an abuse of Article 12(1). However, it was not the Respondents' case that Article 12(5) was not referring to an abuse. It was merely the Respondents' case that an abuse did not, of itself, connote any requirement for there to be artificial steps or arrangements.

95. As to the requirement for there to be artificial steps or arrangements, he noted that the phrase was not used in Article 12(5) and that, had the UK and the ROI intended the article to be so limited, they could easily have inserted an express term to that effect.

Huitson

96. Mr Grodzinski submitted that, although it did not concern Article 12(5), the Court of Appeal decision in *R (Huitson) v The Commissioners for Her Majesty's Revenue and Customs* [2012] 2 WLR 490 ("*Huitson*") showed very clearly what the Court of Appeal considered to be the meaning of the words "take advantage". In that case, the judge at first instance had referred to attempts, "through artificial arrangements, to take advantage of a double taxation agreement", a theme which was picked up by Mummery LJ in saying that it was a legitimate public policy aim to ensure that treaties did not "serve as an instrument used by taxpayers who choose to participate in artificial arrangements to avoid or reduce their level of taxation" (see *Huitson* at paragraphs [26] and [34]).

97. Mr Brinsmead-Stockham replied that the statements from *Huitson* on which Mr Grodzinski was relying were irrelevant because:

(1) the case was not concerned with the application of Article 12(5) (or a similar provision) at all;

(2) the phrase "to take advantage of" had no particular significance in the context of the decision. It was not a feature of the legislation which was in issue and the court was not considering the meaning of the phrase;

(3) the references in the decision to "artificial arrangements" were simply the way in which the facts of the particular tax avoidance scheme that was relevant in that case were described. The court was not seeking to limit the meaning of the phrase "take advantage" solely to artificial steps or arrangements; and

(4) in any event, the Respondents accepted that Article 12(5) could apply in cases involving artificial steps or arrangements. That was not the point. The Respondents' position was merely that the existence of artificial steps or arrangements was not a necessary condition in order for a person to be regarded as "taking advantage" of Article 12(1) for the purposes of Article 12(5).

The preamble to the Treaty

98. Mr Grodzinski said that his contention to the effect that Article 12(5) was aimed at artificial steps or arrangements was consistent with the preamble to the Treaty, which stated that the purpose of the Treaty was "the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains".

99. Mr Brinsmead-Stockham said that the reference in the preamble to the Treaty to "the prevention of fiscal evasion" did not imply any requirement for there to be artificial steps or arrangements before Article 12(5) could apply. This was because:

(1) the phrase "fiscal evasion" was not defined in the Treaty and could not, of itself, be said to import into any of the anti-avoidance provisions in the Treaty a requirement for there to be artificial steps or arrangements before the provision could apply;

(2) the phrase was not actually used in the operative provisions of the Treaty at all. The preamble was simply the standard in many of the treaties to which the UK was party. It did not mean that operative provisions in those treaties were confined to cases of fiscal evasion;

(3) Article 12(5) was, in any event, an anti-avoidance provision and not an anti-evasion provision. It was the information-sharing provisions in Article 25 of the Treaty which were anti-evasion provisions in the context of the Treaty; and

(4) in *Bayfine UK v The Commissioners for Her Majesty's Revenue and Customs* [2011] STC 717 ("*Bayfine*"), Arden LJ had said that the reference in the preamble to the treaty that was relevant in that case to "fiscal evasion" "would include the avoidance of taxation". On that basis, Article 12(5), as an anti-avoidance provision, would be within the scope of the reference to "fiscal evasion" in the preamble to the Treaty in any event.

Parliamentary statements and the explanatory note to the 1998 Order

100. Mr Grodzinski submitted that the intended meaning of the phrase could be discerned from the statements made in Parliament by the Financial Secretary to HM Treasury (Dawn Primarolo MP) when the 1998 Order was being considered in committee, along with the explanatory note to the 1998 Order.

101. The statements made in Parliament were to the effect that:

(1) Article 12(5) was being introduced to counter arrangements intended to take advantage of Article 12(1) and that such arrangements "could consist of routing interest from the UK through Ireland to a third country in order to take advantage of the relief from UK tax under the [Treaty]"; and

(2) Article 12(5) was "an anti-abuse measure designed to prevent artificial arrangements which exist mainly to obtain the benefits of the [Treaty]".

102. The explanatory note to the 1998 Order stated that Article 12(5) (and the equivalent provision which had been inserted into Article 20 of the Treaty) had been introduced to "provide effective provisions against abuse of these Articles". Mr Grodzinski said that an abuse of a treaty generally entailed the use of artificial steps or arrangements.

103. Mr Brinsmead-Stockham said that as regards the first of the two statements made in Parliament, that passage:

(1) did nothing more than identify one type of transaction that could fall within Article 12(5). It was not exhaustive;

(2) made no reference to artificial steps or arrangement; and

(3) in any event, in its terms, described the very economic effect of what had actually happened in this case when SICL, a company which could not benefit from the Treaty or any other treaty to which the UK was party with an equivalent provision to Article 12(1), effectively routed its receipt of the interest payable in respect of the SAAD Claim through the ROI in a manner which avoided the charge to UK income tax.

104. Turning to the second of the two statements made in Parliament, Mr Brinsmead-Stockham said that, although that did refer to "artificial arrangements", it merely said that the article was "designed to prevent" such "artificial arrangements". It did not say that Article 12(5) was confined in its application to such "artificial arrangements".

105. As for the explanatory note to the 1998 Order, Mr Brinsmead-Stockham said that it was of no assistance to BLM for two reasons:

(1) first, it made no reference to artificial steps or arrangements. It merely referred to the abuse of articles such as Article 12(1). Exactly what constituted abuse in that context was to be determined by reference to the language used in Article 12(5) itself and there was nothing in that language to support the contention that the article was confined to artificial steps or arrangements; and

(2) secondly, there was no reference to artificial steps or arrangements in the explanatory note to the equivalent order which implemented the 1998 protocol to the Treaty into Irish law (SI1998/494 of the ROI) (the "ROI Order"). The ROI Order simply stated that Article 12(5) meant that "[the] provisions of the Article will not apply where the main purpose of the transaction is to take advantage of the Article".

106. In relation to the point set out in paragraph 105(2) above, Mr Grodzinski pointed out that, in contrast to the explanatory note to the 1998 Order – which, although it was not part of the order, he submitted was admissible as an aid to the interpretation of the order - the explanatory note to the ROI Order expressly stated that the note was not part of the of the order and "[did] not purport to be a legal interpretation".

107. Quite apart from the dispute as to whether or not the terms of the statements made in Parliament and the explanatory note to the 1998 Order were supportive of Mr Grodzinski's interpretation of Article 12(5), an issue arose between the parties as to the admissibility of the statements and the explanatory note as aids in interpreting Article 12(5).

108. Mr Grodzinski said that the statements and the explanatory note were admissible aids to the interpretation of Article 12(5) because:

(1) as regards the statements, as a matter of UK domestic law, the present circumstances clearly met the requirements which Lord Browne-Wilkinson in *Pepper v Hart* AC [1993] 593 ("*Hart*") had laid down as being necessary in order for reliance to be placed on Parliamentary statements in construing legislation. Those were that:

(a) the relevant legislation must be ambiguous or obscure or must lead to an absurdity;

(b) the material relied upon must consist of one or more statements by a Minister or other promoter of the Bill together, if necessary, with such other Parliamentary material as is necessary to understand such statements and their effect; and

(c) the statements relied upon must be clear;

(2) the reason that the above tests were met in the present case was that:

(a) the parties were arguing about the meaning of the phrase "take advantage", so that, by definition, the meaning of the phrase must be ambiguous;

(b) the statements in question had been made by the Minister promoting the 1998 Order; and

(c) the explanation which Ms Primarolo had given was clear;

(3) if the statements would have been admissible in a UK domestic law context, then it must follow that they were admissible too in construing the terms of Article 12(5). This was because Article 3(2) of the Treaty provided that:

"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 to this convention."

Since it was possible to apply the *Hart* principle to interpret the meaning of the phrase "take advantage" as a matter of UK law, it must follow from Article 3(2) of the Treaty that the *Hart* principle could be used to interpret the use of the phrase "take advantage" in Article 12(5);

(4) in any event, the statements and the explanatory note fell within the ambit of Article 32 of the VCLT and were therefore a permissible aid to the interpretation of the Treaty. This was because:

(a) contrary to Mr Brinsmead-Stockham's reading of it (as to which, see paragraph 109(1)(a) below), Article 32 of the VCLT could be invoked, even in the absence of ambiguity or obscurity or a manifestly absurd or unreasonable result, to confirm the meaning resulting from the application of Article 31 of the VCLT; and

(b) the statements and the explanatory note fell with the phrase "supplementary means of interpretation" in Article 32 of the VCLT even though they did not fall within the specific examples given in that article (of preparatory work and the circumstances of a treaty's conclusion). This was because, in the case of the statements, they had been made by the Economic Secretary to one of the two contracting states, presumably after being briefed by those involved in the negotiations leading up to the protocol to which the 1998 Order related and, in the case of the explanatory note, it had been produced in similar circumstances;

(5) in *Fowler*, at first instance (*Fowler v The Commissioners for Her Majesty's Revenue and Customs* [2016] SFTD 535 ("*Fowler FTT*"), the First-tier Tribunal had used statements made in Parliament in relation to a section of the UK legislation as an aid in interpreting the treaty in that case (see *Fowler FTT* at paragraphs [63] to [65]) and the Supreme Court in *Fowler* had not criticised this approach; and

(6) it was wrong to approach the interpretation of a treaty as if it were a private contract. If that were appropriate, then OECD and UN commentaries would not be admissible aids to interpretation of treaties whereas it was common ground that they were. If one were to approach the interpretation of a treaty as if it were a private contract, then those commentaries would not be admissible in interpreting a treaty because a third party's commentary on a bilateral private contract was not admissible in interpreting that private contract. It would be very odd if it were permissible to take into account those commentaries on the meaning of a treaty and not a clear explanation of the treaty's purpose given by one of the two contracting states.

109. In reply, Mr Brinsmead-Stockham said that:

(1) the statements and the explanatory note were irrelevant to the construction of the Treaty because:

(a) Article 32 of the VCLT could apply only when the interpretation according to Article 31 of the VCLT left the meaning ambiguous or obscure or led to a

manifestly absurd or unreasonable result and neither of those was true in the present case; and

(b) even if Article 32 of the VCLT could be said to apply, the statements and the explanatory note did not fall within the categories of materials identified in Article 32 of the VCLT as being relevant to the interpretation of treaties. They did not relate to the preparation or conclusion of the Treaty but were instead comments made by one of the contracting states following the conclusion of the Treaty. Although Article 32 was framed inclusively, in order for materials which were not expressly mentioned to be admissible under that article, they would need to be of a similar kind to the materials that were so listed;

(2) it could not be correct that the UK, having entered into a bilateral treaty provision with another jurisdiction, could then rely on a subsequent unilateral statement made in Parliament or an explanatory note in the enactment bringing the treaty provision into UK domestic law as to the meaning of that treaty provision in order to affect or alter the meaning of the treaty provision;

(3) there was clear authority in the UK that a unilateral statement made by one party to a treaty could not inform the interpretation of that treaty. In *Irish Bank Resolution Corporation Ltd and another v The Commissioners for Her Majesty's Revenue and Customs* [2020] STC 1946 ("*Irish Bank*"), at paragraphs [22] and [23], Patten LJ had endorsed the statement of the Upper Tribunal in the same case (at paragraph [31]) to the effect that:

"We do not consider that the unilateral practice of a contracting party - even if that practice shows a careful attempt by that party to abide by a treaty - can affect the meaning of that treaty or constitute material going to its construction".

Although that extract was dealing specifically with the practice of the Respondents, the reasoning of the Court of Appeal was not so limited. The same reasoning was apt to apply to any unilateral act of one of the parties to a treaty after the treaty was signed;

(4) as regards the point made by Mr Grodzinski in paragraph 108(3) above, there was a distinction between:

(a) a statement or explanatory note which went to the meaning under UK law of a specific term which was used in the Treaty; and

(b) a statement or explanatory note which went to the meaning of the Treaty or an article in the Treaty.

The statements in this case fell within the category described in paragraph 109(4)(b) above, whereas only statements falling within the category described in paragraph 109(4)(a) above were potentially relevant (pursuant to Article 3(2) of the Treaty) in interpreting the Treaty;

(5) by way of example, the second of the two statements, upon which Mr Grodzinski was placing greater reliance, did not go to the meaning of any term of UK domestic law. In the first place, it was merely a statement in relation to the meaning of a treaty provision. As such, it did not fall to be taken into account in interpreting the Treaty pursuant to Article 3(2) of the Treaty. And, even if it might be alleged that it related not to the meaning of a treaty provision but rather to the meaning of the term "take advantage", Mr Grodzinski had not pointed to any context in which the phrase "take advantage" was a term which had any particular meaning as a matter of UK domestic law;

(6) Mr Grodzinski's reliance on the decision in *Hart* was misplaced. *Hart* laid down a principle for the interpretation of UK domestic law. The principle was not applicable in the context of construing a treaty;

(7) in any event, the principle laid down in *Hart* had no application in this case for a further reason and that was that the first limb of the principle – which required the relevant legislation to be ambiguous or obscure or to lead to an absurdity – was not satisfied here. In his view, when viewed objectively, the meaning of Article 12(5) was plain and it did not become ambiguous merely because BLM disputed that plain meaning; and

(8) as regards the point made by Mr Grodzinski in paragraph 108(5) above, the First-tier Tribunal in *Fowler FTT* had looked at statements in Hansard not in order to interpret a treaty provision but rather in order to interpret a provision of UK domestic law, which it thought would be helpful to its interpretation of the treaty – see *Fowler FTT* at paragraphs [63] and [94].

110. Mr Grodzinski said that the statement made in the *Irish Bank* decision on which Mr Brinsmead-Stockham sought to rely was irrelevant in the present context as it related to the Respondents' practice (see *Irish Bank* at paragraphs [18] to [23]). The Respondents' practice was irrelevant as an aid to construing a treaty just as it was irrelevant as an aid to construing UK domestic legislation. The unilateral practice of a tax authority was a very different thing from a statement made in Parliament on the introduction of the order giving effect to the relevant provision of a treaty or an explanatory note accompanying that order.

OECD and UN materials

111. It was common ground that, even where they post-dated Article 12(5), OECD and UN materials could be taken into account in interpreting the phrase (see Robert Walker J in *Memec plc v Inland Revenue Commissioners* [1996] STC 1336 at 1349d, *Smallwood* at paragraph [26(5)] and *Fowler* at paragraph [18]).)

112. Mr Grodzinski said that his interpretation of the phrase was supported by the terms of the commentary on Article 1 of the OECD model convention (the "Commentary"), the OECD report on conduit companies (the "Conduit Report") and the UN report on the model double taxation convention between developed and developing countries (the UN Report"). He pointed out that:

(1) in paragraphs 7 to 26 of the Commentary, under the heading "Improper use of the Convention", the Commentary stated that:

(a) it was a purpose of treaties "to prevent tax avoidance and evasion";

(b) treaties increased the risk of abuse by "facilitating the use of artificial legal constructions aimed at securing the benefits of both the tax advantages available under certain domestic laws and the reliefs from tax provided for in double tax conventions" and an example of such an abuse was the use of conduit companies, where a person acted through a legal entity established in a contracting state in order to obtain benefits which would not otherwise be available directly;

(c) "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"; and

(d) in designing treaty provisions to deal with abuse, one of the factors which the contracting states should take into account was "the extent to which bona fide economic activities might be unintentionally disqualified by such provisions",

and then set out the form of treaty article corresponding to Article 12(5) under the heading "Anti-abuse rules dealing with source taxation of specific types of income";

(2) in the Conduit Report, the OECD referred to the use of conduit companies as "treaty shopping" and noted, in paragraph 9, that treaty benefits should not be denied in the case of bona fide transactions because they clearly involved no improper use of the treaty; and

(3) in the UN Report, it was noted in paragraph 23 that some members of the former group of experts established by the UN to consider the model form of treaty had pointed out that "there are many artificial devices entered into by persons to take advantage of the provisions of Article 11 through, inter alia, creation or assignment of debt claims in respect of which interest is charged" and that member states might want to address the issue specifically by including an article in the form of Article 12(5) in their treaties.

113. Mr Brinsmead-Stockham submitted that:

(1) in commenting on the article in the form of Article 12(5), paragraph 21.4 of the Commentary merely referred to the application of the provision to deny treaty benefits "where transactions have been entered into for the main purpose of obtaining these benefits". There was no reference to a need for artificial steps or arrangements;

(2) similarly, there was no mention of artificial steps or arrangements in the reference in paragraph 12 of the Commentary to the need to ensure that bona fide economic activities were not unintentionally disqualified by provisions such as Article 12(5) or in the paragraphs which followed that relating to conduit companies;

(3) conduit companies were simply one example of abusing treaties - and thus one way of engaging Article 12(5) - but that did not mean that Article 12(5) could not apply where there was no conduit company;

(4) the earlier version of the anti-abuse provision in Article 12 of the Treaty before its replacement by Article 12(5) pursuant to the 1998 Order had contained an exclusion for bona fide commercial transactions. Thus, the UK and the ROI must be taken to have agreed that, even if a transaction was bona fide and commercial, it could still fall within Article 12(5) if it had a main purpose of taking advantage of Article 12(1). Having said that, Mr Brinsmead-Stockham did not consider this transaction to be bona fide and commercial in any event. The mere fact that SICL wished to realise the best price it could for the SAAD Claim was of no avail if the basis for its obtaining that price was to take advantage of Article 12(1); and

(5) although paragraph 23 in the UN Report had referred to "artificial devices", that was just one example of the types of transactions which would fall within Article 12(5).

114. In response to the point set out in paragraph 113(4) above, Mr Grodzinski said that, whilst the removal of the bona fide exclusion in the earlier version of the anti-abuse provision meant that a person who had implemented a bona fide commercial transaction was no longer automatically excluded from the scope of the provision, the basic purpose of the provision had not changed. The target of the provision continued to be artificial steps or arrangements and not arrangements which were fundamentally commercial in nature.

The Respondents' International Manual

115. Mr Grodzinski submitted that the language used in Article 12(5) was materially identical to the language used in Section 765 of the Income Tax (Trading and Other Income) Act 2005 and that the Respondents' International Manual at INTM 400110 stated that that section "closely follows the anti treaty-shopping provisions which are to be found in many of the interest and royalty articles of double taxation agreements". Thus, the Respondents themselves saw Article 12(5) as an anti-"treaty-shopping" provision. Whilst there was no single definition of the phrase "treaty-shopping", it typically involved the use of conduit arrangements whereby a resident of one state artificially directed an investment through a legal entity in another state in order to obtain treaty benefits under the latter state's treaty with the ultimate source state. As explained in Schwarz at paragraph 17.04, "... all forms of treaty shopping involve a taxpayer selecting from various tax treaties that may be available through the use of intermediate entities in order to produce the least amount of tax".

116. Mr Brinsmead-Stockham said that neither Article 12(5) nor any of the commentaries referred to above made an express reference to the article's being confined to "treaty-shopping". Mr Grodzinski had not identified any authority for the proposition that the article was confined to "treaty-shopping" – his argument relied exclusively on a statement in the Respondents' International Manual. Moreover, he had accepted that there was no single definition of "treaty-shopping". Thus, the phrase had no clear meaning and could not operate to inform the construction of Article 12(5) so as to prevent it from applying on the facts of this case.

117. He added that, in any event, the facts of this case did involve a form of "treaty-shopping" in that, by entering into the transaction, SICL realized the value of the SAAD Claim in such a manner as effectively to be able to rely on the terms of Article 12(1) in economic terms despite the fact that it was resident in the Cayman Island and not the ROI.

The necessary purpose

118. Mr Grodzinski was also keen to point out that the test for Article 12(5) to apply was not that the relevant person had, as its main purpose or one of its main purposes:

(1) the obtaining of a tax advantage in general; or even

(2) "taking advantage" of the exemption from UK withholding tax in some unknown and unidentified treaty.

Instead, the relevant person needed to have, as its main purpose or one of its main purposes, "taking advantage" of Article 12(1) specifically.

119. In this case, the persons who would have been able to receive the interest without suffering a permanent UK withholding tax cost included UK resident companies as well as residents of jurisdictions other than the ROI which had treaties with the UK containing a full exemption from withholding tax. Assuming for the moment that a person selling for a price which reflected the purchaser's ability to benefit from an exemption from UK withholding tax could be said to involve the seller's having a main purpose of "taking advantage" of the provision conferring the exemption from UK withholding tax on the purchaser, it was insufficient to engage Article 12(5) for the seller to be able to infer that the purchaser was able to benefit from an exemption of some kind but without knowing that the exemption arose by virtue of Article 12(1).

120. Mr Brinsmead-Stockham said that the point raised above was relevant only to SICL because, clearly, so far as BLM's purpose was concerned, it knew that it was "taking advantage" of Article 12(1) specifically. Moreover, as regards SICL:

(1) by the time that the trades were executed on 12 February 2018, SICL did in fact know that it was "taking advantage" of Article 12(1) specifically because it knew that the end-purchaser was BLM; and

(2) in any event, it was sufficient to satisfy this test for SICL to know in general terms that its end-purchaser was benefiting from an exemption from UK withholding tax of some sort – whether under an applicable treaty or because it was UK resident - and for the end-purchaser in fact to be relying on Article 12(1) specifically. Otherwise, it would always be possible for a person deliberately to close its eyes as to the basis on which its purchaser was obtaining its exemption and thus prevent Article 12(5) from applying.

121. However, Mr Grodzinski said that a distinction could be drawn between deliberately closing one's eyes to a specific fact the knowledge of which one knew would disqualify one from receiving the benefit of a treaty and a general awareness that there were people in the market who would be prepared to pay more for an asset because of their more favourable tax position but without making further enquiry.

Burden of proof

122. Mr Grodzinski said that the burden of proof in this case was on the Respondents for the following reasons:

(1) the appeal stemmed from a claim made by BLM under paragraph 2(3) of Schedule 1A to the TMA ("Schedule 1A") and the closure notice had been issued under paragraph 7 of Schedule 1A. Since the claim was for a repayment of tax, the closure notice had been issued under paragraph 7(2) of Schedule 1A (and not paragraph 7(3) of Schedule 1A, which dealt with other claims);

(2) the appeal had thus been brought under paragraph 9(3) of Schedule 1A, which provided as follows:

"(3) In the case of an appeal against an amendment made by a closure notice under paragraph 7(2) above, …the tribunal may vary the amendment appealed against whether or not the variation is to the advantage of the appellant";

(3) in contrast to the language used in paragraph 9(3) of Schedule 1A, paragraph 9(5) of Schedule 1A – which related to appeals against closure notices issued under paragraph 7(3) of Schedule 1A – provided as follows:

"(5) If, on an appeal notified to the tribunal, the tribunal decides that a claim which was the subject of a decision contained in a closure notice under paragraph 7(3) above should have been allowed or disallowed to an extent different from that specified in the notice, the claim shall be allowed or disallowed accordingly to the extent that appears … appropriate, but otherwise the decision in the notice shall stand good";

(4) it was significant that the language in paragraph 9(3) of Schedule 1A differed from the language in paragraph 9(5) of Schedule 1A in not providing for the closure notice to "stand good" in the event that the tribunal decided not to vary the closure notice. The formulation in paragraph 9(5) of Schedule 1A – which contained a statement to that effect– tracked the language in Section 50(6) of the TMA and the absence of equivalent language in paragraph 9(3) of Schedule 1A was therefore critical;

(5) this could be seen in the decision of Henderson J (as he then was) in *The Commissioners for Her Majesty's Revenue and Customs v Household Estate Agents Ltd* [2008] STC 2045 ("*Household*") at paragraph [49]. In that paragraph, Henderson J had noted that "Section 50(6) in its present and earlier incarnations has always been the principal

justification for holding that the burden lies on the taxpayer to displace an assessment made within normal time limits". The same view had been expressed by Dillon LJ in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 ("*Lotus*") at 639 et seq.;

(6) in the part of his decision in *Household* dealing with the burden of proof, at paragraphs [43] to [50], Henderson J had held that, once the Respondents had satisfied the court that they were prima facie entitled to make a discovery assessment under paragraph 42 of Schedule 18 to the Finance Act 1998 ("Schedule 18") (because the conditions in one of paragraphs 43 or 44 of Schedule 18 were satisfied), the burden was on the taxpayer to show that the discovery assessment could not be made because the conditions in paragraph 45 of Schedule 18 were satisfied;

(7) Henderson J had said that he was disinclined to base that conclusion on the fact that any objection to a discovery assessment would need to be by way of an appeal against the relevant assessment and that this therefore brought Section 50(6) of the TMA into play. Instead, he had said that the language in Section 50(6) of the TMA became significant only once it was shown that the relevant assessment had been validly made. If, however, an issue arose as to whether an assessment had been validly made in the first place, then Section 50(6) of the TMA provided no assistance in answering the question of where the burden of proof lay in relation to the alleged invalidity;

(8) he had therefore preferred to base his conclusion on:

(a) the structure and wording of the relevant paragraphs and the general principle that the burden of proof "lies upon the party who substantially asserts the affirmative of the issue" (see *Household* at paragraph [46]); and

(b) the fact that the matters referred to in paragraph 45 of Schedule 18 were either within the exclusive knowledge of the taxpayers or depended on the evidence of the taxpayers and their professional advisers at least as much as the practice of the Respondents (see *Household* at paragraph [47]); and

(9) therefore, in the present case, the Respondents should bear the burden of proof for the following reasons:

(a) it was the Respondents who were advancing the affirmative case that a relevant person had a main purpose of taking advantage of Article 12(1);

(b) regardless of whether the relevant persons whose purposes were to be tested were confined to residents of the contracting states or extended to residents of third states, the category of relevant persons in any particular case was clearly not just confined to the claimant. Thus, the claimant would not necessarily be aware of the subjective purposes of all of the relevant persons whereas the Respondents, as a tax authority, were in a position to use their information-seeking powers to obtain that information; and

(c) Article 12 of the Treaty was not a provision of UK domestic law but instead represented an agreement between two contracting states in relation to the allocation of taxing rights over a particular source of income between the two states. Thus, if one of the contracting states sought to disapply the general rule – to the effect that UK source interest paid to an ROI resident should be taxable only in the ROI – then one would expect that it would be for that contracting state (here the UK) to have the burden of proof in establishing that the conditions necessary for that disapplication had been satisfied.

123. Mr Brinsmead-Stockham said that, although Section 50(6) of the TMA did not apply to the appeal in this case, the usual rule applicable to appeals against closure notices – which was that the burden of proof was on the appellant – applied. He relied on the fact that:

(1) the appeal related to main purpose and, in the context of a similar main purpose test in *Oxford Instruments UK 2013 Limited v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 254 (TC) ("*Oxford Instruments*"), the First-tier Tribunal had held that, in the absence of any guidance in relation to the burden of proof in the language of the relevant statutory provision in that case, the usual rule applied – see *Oxford Instruments* at paragraphs [91] to [97];

(2) the fact that paragraph 9(3) of Schedule 1A did not contain the language used in paragraph 9(5) of Schedule 1A (or Section 50(6) of the TMA) to the effect that the relevant closure notice or assessment would stand good if the taxpayer did not establish that it was incorrect was irrelevant because those words were no more than a truism. Their absence therefore could not affect the location of the burden of proof;

(3) in *Household* at paragraph [49], Henderson J had held that the "true proposition…is that if an assessment is validly made the onus is then on the taxpayer to displace it, in the absence of specific provision to the contrary". Although Henderson J had said that the principal justification for this was the language in Section 50(6) of the TMA, he had not said that it was the only reason for it. Moreover, in *Household* at paragraph [47], Henderson J had also identified a policy reason for the taxpayer to bear the burden of proof in a case where the matter in issue depended on the exclusive knowledge of the taxpayer and/or his advisers. That was the case here as the matter in issue depended on the subjective purposes of BLM and SICL and those were not matters of which the Respondents had any direct knowledge;

(4) as for the suggestion that, because the Treaty represented an agreement between two contracting states in relation to the allocation of taxing rights over a particular source of income, the burden of proving that Article 12(5) applied should fall on the relevant contracting state, that went too far. That reasoning would suggest that, in relation to Article 12(1), the Respondents would have the burden of proving that the relevant claimant was not resident in the ROI whereas it was plain that the claimant had the burden of proving residence in the ROI for the purposes of Article 12(1);

(5) paragraph 9(5) of Schedule 1A had been inserted into Schedule 1A by the Finance Act 1996 and therefore two years after paragraph 9(3) of Schedule 1A had been introduced in the Finance 1994. As such, the language used in paragraph 9(5) of Schedule 1A shed no light on the meaning of the language used in paragraph 9(3) of Schedule 1A. It was not as if Parliament was seeking to make any point in omitting the relevant words from the earlier paragraph. Moreover, there was no reason to think that Parliament would have intended the burden of proof under Schedule 1A to be different depending on the type of closure notice which had been issued; and

(6) in any case, the burden of proof was of significance only in cases where the relevant tribunal was left in doubt – see Mustill LJ in *Lotus* at 644h - and the evidence in this case pointed overwhelmingly toward the conclusion advanced by the Respondents.

DISCUSSION - QUESTIONS OF LAW

Introduction

124. We have recorded in paragraphs 85 to 123 above the areas of disagreement between the parties in relation to questions of law. Those may be summarised as follows:

(1) the meaning of the phrase "main purpose or one of the main purposes" in the context of Article 12(5);

(2) whether SICL was a "person" concerned with the assignment of the SAAD Claim for the purposes of Article 12(5);

(3) the meaning of the phrase "take advantage" in the context of Article 12(5);

(4) the purpose which it is necessary for a person concerned with an assignment to have before Article 12(5) can be engaged; and

(5) the burden of proof.

125. We set out below our conclusions in relation to each of those issues and the basis for those conclusions, referring in each case to the arguments set out in the relevant paragraphs with which we agree.

Main purpose or one of the main purposes

126. With one exception, the parties were agreed on the "ordinary meaning" of the phrase "main purpose or one of the main purposes". The one exception was over whether the subjective purposes of a person could be determined by reference to the inevitable and inextricable consequences of his or her actions even if the purpose was unconscious (see paragraph 87 above).

127. We think that the obiter dicta of the Upper Tribunal in its recent decision in *The Commissioners for Her Majesty's Revenue and Customs v Blackrock HoldCo 5 LLC* [2022] UKUT 00199 (TCC) ("*Blackrock*") at paragraphs [153] to [182] suggests that the appropriate resolution to this disagreement lies somewhere between the differing approaches of the parties. In its analysis of the statutory main purpose test which was in dispute in that case, the Upper Tribunal concluded that it was not appropriate for a tribunal to identify a subjective purpose for entering into the loans which were the subject of that case solely by reference to the inevitable and inextricable consequences of entering into those loans. Instead, it was necessary for the tribunal to determine that subjective purpose by reference to all of the evidence before it (including, by implication, those inevitable and inextricable consequences). In other words, the evidence as a whole might reveal that a person's real subjective purpose differed from that person's stated subjective intention – as was the case on the facts in *TDS* – but that was different from saying that a person's real subjective purpose should be determined solely by reference to the inevitable and inextricable consequences of his or her actions.

128. Since the statutory main purpose test which was in issue in that case is not dissimilar from the main purpose test in Article 12(5), we are inclined to follow the Upper Tribunal's lead in that case and, in construing Article 12(5):

(1) reject the proposition that the inevitable and inextricable consequences of an action should be regarded as the sole benchmark for determining the subjective purposes of the person taking that action; and

(2) nevertheless, treat such consequences as forming part of the overall factual matrix to be considered in reaching a conclusion on that question.

Was SICL a "person" concerned with the assignment of the SAAD Claim

129. We agree with Mr Brinsmead-Stockham that there is no reason to limit the reference to "person" in Article 12(5) to persons resident in one or both of the contracting states.

130. We reach this conclusion for the reasons given by Mr Brinsmead-Stockham and set out in paragraph 89 above. The word "person" is defined in Article 3(1)(g) of the Treaty without

reference to residence. Although the definitions in Article 3 of the Treaty are expressed to be subject to the context's requiring otherwise, we are not persuaded that there is anything in the context of Article 12(5) to require a different definition of "person" to be adopted for the purposes of that article.

131. The only argument in favour of that approach is that the requisite main purpose of the "person" concerned needs to be "to take advantage of this Article" and, as Article 1 of the Treaty makes it plain that the Treaty applies only to persons who are residents of one or both contracting states, it might be said that the only "persons" who can "take advantage of this Article" are persons who are the residents of the contracting states.

132. However, we have concluded that that that is not the correct approach. In the first place, in the context of an article which is intended to prevent residents of states which are not one of the contracting states from benefiting from the Treaty, it makes sense for the word "person" to be construed in such a way as to encompass persons who are resident in such other states. Secondly, it is perfectly possible for a person who is not a resident of a contracting state to "take advantage" of Article 12 despite the fact that it is not a person to whom the Treaty applies. Indeed, that is the whole point of Article 12(5). Finally, as Mr Brinsmead-Stockham pointed out, the mere fact that the purposes of a person who is not resident in a contracting state have been referenced in order to determine the application of the Treaty to a person who is so resident does not involve applying the Treaty to the former person. The Treaty is still "applying" only to the relevant resident of the contracting state.

133. For all of these reasons, we believe that interpreting "person" in accordance with Article 3(1)(g) of the Treaty in the way we have does not run counter to the statement in Article 1 of the Treaty to the effect that the Treaty applies only to persons who are resident in one or both of the contracting states.

134. We have therefore concluded that SICL is a "person" for the purposes of Article 12(5) and, as it is common ground that SICL was "concerned with" the assignment of the SAAD Claim to BLM, SICL's purposes are relevant for the purposes of determining whether or not Article 12(5) applies in this case.

Meaning of "take advantage"

135. There were a number of disputes in relation to the meaning of this phrase and we will address them in the order set out in paragraphs 90 to 117 above.

Introduction

136. We agree with both parties that the ordinary meaning of the phrase "take advantage" where it appears in Article 12(5) has a negative sense, as the OED definition acknowledges is frequently (albeit not invariably) the case. In this case, the negative sense which the relevant provision is conveying is that entering into an assignment of a debt claim with a main purpose of benefiting from Article 12(1) by means of that assignment is an abuse of that article.

137. However, we agree with Mr Brinsmead-Stockham that, in the absence of any reference in the terms of Article 12(5) itself to there being a need for artificial steps or arrangements before the provision can apply, artificial steps or arrangements are not a pre-condition to the application of the article. Thus, we consider that Article 12(5) is not confined in its application to abusive transactions which involve artificial steps or arrangements. Whilst abusive transactions involving artificial steps or arrangements would obviously fall within the ambit of the article, the article is not confined in its application to abusive transactions of that nature. For the reasons which we rehearse in paragraphs 138 to 148 below, nothing in the

material on which Mr Grodzinski sought to rely as an interpretive aid gainsays that conclusion.

Huitson

138. We do not think that the decision in *Huitson* advances Mr Grodzinski's proposition in the slightest. Not only was *Huitson* a judicial review case involving a treaty other than the Treaty and an article in a different form from Article 12(5), but there is nothing in the decision which sheds any light on the potential scope of Article 12(5). Insofar as the decision has a broader scope than the specific facts with which it was concerned, it seems to us to relate to the use of a provision in a treaty intended to relieve a person from double taxation in order to avoid tax altogether. That is somewhat different from the rationale underlying Article 12 of the Treaty, which both parties agreed was about the allocation of taxing powers between the two contracting states.

139. In any event, we agree with Mr Brinsmead-Stockham that the references in the decision to the use of artificial arrangements were merely describing the facts in that case. Mummery LJ was not purporting to limit the application of anti-abuse provisions in all treaties to one specific category of abusive transactions – namely, those which involved artificial steps or arrangements.

The preamble to the Treaty

140. Similarly, we do not see how the preamble to the Treaty suggests that Article 12(5) should be confined to artificial steps or arrangements. As the Commentary makes clear, "it is the purpose of tax conventions to prevent tax avoidance and evasion" (see paragraph 7 in the Commentary). Even if it might be said that Article 12(5) was designed to prevent "fiscal evasion", as distinct from "fiscal avoidance" – and Arden LJ saw no distinction between the two concepts in the context of the treaty which was in issue in *Bayfine* – we can see no reason why "fiscal evasion" necessarily requires the existence of artificial steps or arrangements. For example, simply failing to tell a tax authority of the existence of a source of income amounts in our view to "fiscal evasion" and there is nothing "artificial" about that.

Parliamentary statements and the explanatory note to the 1998 Order

141. Determining whether or not the statements made in Parliament and the explanatory note to the 1998 Order are permissible aids to the interpretation of Article 12(5) has been one of the more difficult tasks arising out of this case.

142. Our conclusions in that regard are that they are not, for the following reasons:

(1) there was some discussion at the hearing in relation to whether paragraphs (a) and (b) in Article 32 of the VCLT qualified the phrase "in order to confirm the meaning resulting from the application of article 31" as well as the phrase "in order …to determine the meaning". We think that it is clear that they do not, not least because it would make no sense to be permitted to confirm a meaning resulting from the application of Article 31 of the VCLT where that meaning leads to a manifestly absurd or unreasonable result. It therefore follows that, in our view, in order to rely on Article 32 of the VCLT, there is no need for BLM to be able to establish that the meaning resulting from the application of Article 31 of the VCLT is ambiguous or obscure or leads to a manifestly absurd or unreasonable result. It is sufficient for BLM merely to be seeking to confirm the meaning resulting from the application of Article 31 of the VCLT;

(2) Article 32 of the VCLT refers in general to "supplementary means of interpretation" and then specifies that that includes "the preparatory work of the treaty and the circumstances of its conclusion". This raises the question of whether, despite

the fact that they are not specifically listed as such, unilateral statements made on behalf of one of the contracting states to a treaty may nevertheless be a permissible "supplementary means of interpretation";

(3) the decision of Patten LJ in *Irish Bank* suggests that they are not. We recognise that the question at issue in *Irish Bank* in this regard was solely the extent to which the practice of the Respondents could be taken into account in interpreting a treaty and the case is direct authority for the proposition that it cannot. However, we think that the observations made by Patten LJ in *Irish Bank* at paragraph [23] in answering that question suggest that unilateral statements made by one of the contracting states as to the meaning of the treaty should not be regarded as permissible aids for the same reason. In that paragraph, Patten LJ noted as follows:

"the Appellants have been unable to identify any established principle of international law which recognises the unilateral practice of a contracting state as an aid to the construction of a treaty. In that respect, there is no divergence between international law and the English private law system which has never received evidence of what a party to a contract believed the language of the agreement meant except in relation to a claim for rectification. The legal meaning of the words used is an abstract question of law to be determined on an objective basis";

(4) we infer from this statement that, by parity of reasoning with that applicable in the case of English private contract law, a unilateral statement made by one of the parties to a treaty is not a permissible aid to interpreting the treaty. It follows from that conclusion that such statements should not be regarded as falling within the phrase "supplementary means of interpretation" in paragraph 32 of the VCLT. Instead, that phrase should be limited in its scope to evidence which is indicative of bilateral agreement between the parties, of which preparatory work and the circumstances of the treaty's conclusion are two non-exhaustive examples;

(5) Mr Grodzinski suggested that this conclusion sits a little uneasily with the fact that the OECD and UN commentaries have long been accepted as permissible aids to the construction of treaties. He pointed out that, on the basis of the reasoning of Patten LJ in *Irish Bank*, that would be the equivalent of accepting that comments made by a third party as to the meaning of an English private law contract are a permissible aid to the interpretation of that contract. However, we think that Mr Grodzinski's analogy is imperfect in that the parties to a bilateral treaty in the form of the OECD or UN model have signed up to, and thereby implicitly agreed, the form of the commentaries to the model. The commentaries are not wholly extraneous to the treaty in the same way as would be a third party's commentary on an English private law contract;

(6) in the absence of Article 32 of the VCLT's applying, we do not see how the principle laid down in *Hart* can be engaged, even if it could be said that Article 12(5) was ambiguous or obscure (which we do not think that it is). The principle laid down in *Hart* applies in the context of interpreting UK domestic law. It is not applicable in the context of construing a treaty;

(7) the decision in *Fowler FTT* is not binding on us but, in any event, we agree with Mr Brinsmead-Stockham that the First-tier Tribunal in that case had recourse to Hansard not as an aid to the interpretation of the relevant treaty as such but rather as an aid to the interpretation of a provision of UK domestic law which it thought might be helpful to its interpretation of the treaty. As such, it has no impact on the question we are considering; and

(8) finally, we agree with Mr Brinsmead-Stockham that Article 3(2) of the Treaty is not an alternative gateway pursuant to which the statements and the explanatory note may be prayed in aid in interpreting Article 12(5). This is because Article 3(2) of the Treaty is confined in its application to specific terms which are not defined in the treaty and where the relevant specific term has a particular meaning under the domestic laws of one of the contracting states. In this case, even if the relevant material could properly be described as going to the meaning of a specific term – such as, for example, the phrase "take advantage" – as opposed to the meaning of Article 12(5) as a whole, to which we consider it does in fact relate, the phrase "take advantage" has no distinct and special meaning as a matter of UK domestic law.

143. For the reasons set out above, we consider that the statements made in Parliament and the explanatory note to the 1998 Order are not permissible aids to the interpretation of Article 12(5) but, for completeness, we should record that, even were they to be admissible, we do not think that they suggest that Article 12(5) should be construed on the basis that it is limited to artificial steps or arrangements. The first statement made in Parliament was merely to the effect that arrangements falling within the ambit of the article "could consist of routing UK source interest through [the ROI] to a third country in order to take advantage of the relief from UK under the [Treaty]". It did not say that that was the only category of arrangements falling within the ambit of the article. In addition, the explanatory note to the 1998 Order merely stated that the article had been introduced to "provide effective provisions against abuse of these Articles". Thus, neither of them referred to artificial steps or arrangements. The second statement made in Parliament did contain such a reference but, in our opinion, the fact that the article was described as being "designed to prevent artificial arrangements which exist mainly to obtain the benefits of the [Treaty]" does not mean that it was intended to be limited in its application to such arrangements.

OECD and UN materials

144. We also do not see anything in the Commentary, the Conduit Report or the UN Report with which we have been provided to suggest that Article 12(5) should be limited in its scope to transactions involving artificial steps or arrangements. In the passages which were drawn to our attention, we saw many references to abusive transactions but very few references to artifice, as such.

145. In the Commentary, paragraph 8 notes that treaties increase the risk of abuse "by facilitating the use of artificial legal constructions" and paragraph 9 gives as an example of that type of abuse the classic "treaty-shopping" structure where a person "acts through a legal entity created in a State essentially to obtain treaty benefits that would not be available directly". However, we do not see those statements as limiting in any way the scope of the clear language used in Article 12(5). The structure described in paragraph 9 and other "artificial legal constructions" might well be examples of the types of transaction which fall within Article 12(5) but that does not mean that Article 12(5) is limited in its application to such transactions.

146. On the contrary, the language used in paragraphs 9.5 and 21.4 of the Commentary suggests that merely having, as a main purpose for entering into an assignment, the securing of a more favourable tax position under a treaty is sufficient to amount to an abuse of the treaty.

147. Similarly, although paragraph 23 of the UN Report suggests that the model form equivalent of Article 12(5) can be used to counter "artificial devices" for accessing treaty-benefits, we do not read the language as limiting the application of the model form equivalent to such devices.

The Respondents' International Manual

148. We also consider that the extract from the Respondents' International Manual is not of any assistance in this context. Not only is it well-established (and common ground) that the Respondents' practice has no role to play in the interpretation of a treaty – see *Irish Bank* at paragraphs [22] and [23] - but it is also the case that, as Mr Grodzinski frankly acknowledged, there is no clear definition of "treaty-shopping". It is a phrase which is generally used as a shorthand to connote a person's seeking to access treaty benefits to which it would not itself be entitled by the interposition of another person which is located in the treaty jurisdiction but the phrase sheds no meaningful light on the interpretation of Article 12(5) or its equivalent in other treaties and it certainly does not suggest that those articles are confined in their application to artificial steps or arrangements.

The necessary purpose

149. Although we agree with Mr Brinsmead-Stockham that the existence of artificial steps or arrangements is not a necessary pre-condition to the application of Article 12(5), we do not agree with his interpretation of the nature of the purpose which is a necessary pre-condition to that application. In our view, it follows inexorably from the language used in Article 12(5) that:

(1) in order for a person to fall within the ambit of the article, it is necessary for that person to have a main purpose of "taking advantage" of Article 12(1) specifically; and

(2) a person cannot have a main purpose of "taking advantage" of a provision of UK domestic law or a treaty which it has not specifically identified.

150. Thus, we agree with Mr Grodzinski that, for this purpose, if a seller can be said to be "taking advantage" of a provision of UK domestic law or a treaty when it sells a debt for a price which reflects its purchaser's exemption from UK withholding tax pursuant to that provision, and we will address that question in due course, the seller needs to be aware that the relevant provision is Article 12(1) specifically before Article 12(5) can be said to be engaged. Merely knowing that the purchaser is entitled to an exemption from UK withholding tax but without knowing the precise basis for that exemption is insufficient to engage Article 12(5) even if, as it transpires, the purchaser's exemption stems from Article 12(1).

Burden of proof

151. We also agree with Mr Grodzinski that it is for the Respondents to show that the condition in Article 12(5) applies and not for BLM to show that it is not. We say that because:

(1) Henderson J in *Household* noted that the principal justification for holding that the burden of proof in displacing an assessment falls on the taxpayer is the language used in Section 50(6) of the TMA to the effect that the assessment must stand good if the tribunal decides not to reduce it. That language is missing from paragraph 9(3) of Schedule 1A. Whilst Henderson J acknowledged that the language used in Section 50(6) of the TMA was of no assistance in a dispute over the validity of an assessment (as opposed to a dispute over the quantum of an assessment) (see *Household* at paragraph [49]), the present case does not relate to the validity of the closure notice but simply relates to whether or not the amendment made by the closure notice was correct. As such, applying the reasoning of Henderson J in *Household*, the omission from paragraph 9(3) of Schedule 1A of the language to the effect that the assessment must stand good if the tribunal decides not to reduce it is, in our view, significant;

(2) that omission is all the more conspicuous by the appearance of that language in paragraph 9(5) of Schedule 1A, although the fact that paragraph 9(5) of Schedule 1A was introduced at a later time than paragraph 9(3) of Schedule 1A means that we would not wish to make too much of this distinction;

(3) in *Household*, where the language in question was also missing from the provision of the legislation which was in issue in that case but the case related to the validity of the assessment, Henderson J based his conclusion on:

> (a) the structure and wording of the relevant provision and the general principle that the burden of proof "lies upon the party who substantially asserts the affirmative of the issue" (see *Household* at paragraph [46]); and
>
> (b) the fact that the matters referred to in the provision were either within the exclusive knowledge of the taxpayers or depended largely on the evidence of the taxpayers and their professional advisers (see *Household* at paragraph [47]);

(4) applying the reasoning set out in paragraph 151(3)(a) above, the structure and wording of Article 12(5) very strongly points to the conclusion that it is the Respondents who have the burden of proof in this matter. On the language of the article, it is they who are asserting that a person concerned with the assignment had the requisite bad main purpose or, as Henderson J put it, who are "substantially asserting the affirmative of the issue". The article could have been phrased in such a way that it was for the person claiming the benefit of Article 12(1) to "substantially assert the affirmative of the issue". In other words, relief under Article 12(1) could have been expressed to be subject to the absence of the requisite bad main purpose in each person concerned with the assignment. Had that been the case, then, notwithstanding the absence from paragraph 9(3) of Schedule 1A of the language which appears in Section 50(6) of the TMA, the position might have been more finely-balanced. However, as it stands, both the omission from paragraph 9(3) of Schedule 1A of the language which appears in Section 50(6) of the TMA and the manner in which Article 12(5) is worded point in the same direction, which is that the burden of proof in this case is on the Respondents;

(5) the above is sufficient to dispose of this question in favour of BLM but we should note that the arguments in relation to how policy should affect the answer are quite finely-balanced. We see some force in Mr Grodzinski's submission that the person who is the claimant under Article 12(1) has no ability to access the subjective purposes of other persons who are concerned with the assignment whereas the Respondents, as a tax authority, are able to use their information-gathering powers to do that. On the other hand, we think that, so far as the subjective purposes of the claimant itself are concerned, it is the claimant who has the more direct knowledge of its purposes than do the Respondents. We therefore think that the policy arguments go both ways and we decline to decide the question on that basis; and

(6) we are also unwilling to place any reliance in deciding the question on Mr Grodzinski's argument that, as the Treaty represents an agreement between two contracting states in relation to the allocation of taxing rights over a particular source of income, the burden of proving that Article 12(5) applies should fall on the relevant contracting state. We agree with Mr Brinsmead-Stockham that, on the basis of that reasoning, in a case where Article 12(5) does not apply, it would be up to the Respondents to show that a claimant was not entitled to the benefit of Article 12(1) and that is patently not the case. We therefore consider that this argument does not advance the position either way.

THE SUBMISSIONS OF THE PARTIES – THE FACTS

152. Mr Grodzinski was keen to emphasise that BLM had been incorporated many years before the transaction to which the appeal related, had purchased a significant number of claims in the LBIE administration prior to its acquisition of the SAAD Claim and held significant assets (in terms of both value and number) which were unrelated to the LBIE administration. Thus, he said, it was perfectly obvious that BLM had not been established as a conduit to route SICL's entitlement to the interest payable in respect of the SAAD Claim through the ROI.

153. He added that:

(1) the evidence of Ms Gibbons had made it abundantly clear that, in deciding to purchase claims in the LBIE administration, BLM did not have in mind that it was taking advantage of Article 12(1) in any negative sense. Instead, BLM was simply benefiting from the tax attributes of its being resident in the ROI for tax purposes;

(2) Ms Gibbons was aware, at some level, that UK withholding tax was the reason why SICL wished to dispose of the SAAD Claim but that was the limit of her thinking on that subject and had had no impact on the amount which she was willing to offer for the SAAD Claim;

(3) it was important to view the acquisition of the SAAD Claim in context, which is that it was part of a huge number of acquisitions of claims in the LBIE administration dating back over a number of years. The acquisition of the SAAD Claim should not be viewed as if it had taken place in isolation. In respect of each of those acquisitions, BLM's focus had been on how much it expected to receive by way of principal and/or interest, taking into account a variety of different risks including the "liquidation lacuna" risk, the "late termination" risk and, at an earlier stage in the process, the currency conversion risk. What it had not focused on in any of those transactions was the characteristics (including the tax residence) of its seller;

(4) so far as this particular transaction was concerned, the price for the sale was dictated solely by the attributes of the SAAD Claim, as the relevant asset, and not the attributes of BLM, as the purchaser. Ms Gibbons had made it clear that the drivers for the transaction were the expected IRR (including the timing of the payment of interest and the UK withholding tax repayment) and the "late termination" risk and that her focus was on what she would need to offer for the SAAD Claim in order for BLM to achieve its desired commercial return whilst not leading Jefferies to offer the debt to other potential purchasers. Whilst she was clearly aware of the potential UK withholding tax risk for SICL, that did not factor into her thinking as to what to bid. The email from Ms Donovan referred to in paragraph 79(15)(c) above was indicative of the focus of BLM in deciding to make the acquisition – there was no mention of UK withholding tax and the email dealt instead with the interest accrual and the "late termination" risk. Likewise, the focus of the financial model was on the timing of receipts and, to some extent, on the "late termination" risk as these were matters which went to the IRR and the downside risk for BLM;

(5) at the time when the price and the main commercial terms of the transaction had been agreed, on or before 8 February 2018, SICL was unaware of the identity of the end-purchaser. If SICL had wished to negotiate a price which was dependent on the tax-advantageous position of its end-purchaser, then it would have insisted on knowing the identity of the end-purchaser before it agreed the price;

(6) the fact that clause 9 of the assignment between SICL and Jefferies allowed Jefferies to on-sell the SAAD Claim to whomever it wished was also inconsistent with the proposition that SICL was wishing to negotiate a price which depended on the tax-advantageous position of the end-purchaser; and

(7) finally, the terms of the report by the SICL Liquidators following the transaction made no mention of the fact that SICL had managed to achieve a sale price for the SAAD Claim which reflected the UK withholding exemption available to its purchaser under an applicable treaty. The main thrust of the report was that the sale had enabled SICL to avoid the "liquidation lacuna" risk which would have meant that it received nothing in respect of the interest. Moreover, when the UK withholding tax risk was mentioned, it was in the context that SICL was potentially subject to UK withholding tax because it was not resident in the UK. It was not in the context that SICL was potentially subject to UK withholding tax because it was resident in the Cayman Islands which did not have a treaty with the UK conferring full exemption from UK withholding tax on UK source interest.

154. Mr Brinsmead-Stockham said that any suggestion that Jefferies was going to assign the SAAD Claim to anyone other than BLM once it had acquired the SAAD Claim from SICL was fanciful. SICL knew the identity of the end-purchaser before it entered into its trade with Jefferies on 12 February 2018 because it had asked for the name of the end-purchaser before it would formally agree to that trade. Thus, by the time that that trade was completed by the assignment on 9 March 2018, SICL knew that BLM was the end-purchaser regardless of the content of clause 9 in its assignment to Jefferies.

155. Mr Brinsmead-Stockham said that, on the basis that both BLM and SICL were persons concerned with the assignment, the appeal must be dismissed if either or both of BLM or SICL had the specified main purpose. In considering the evidence, it was important to bear in mind that:

(1) the documentary record was crucial, given that, on a number of points, Ms Gibbons' oral evidence was that she was trying to reconstruct her state of mind at the time by reference to the documentary record;

(2) Ms Gibbons had had access to tax advice both externally and internally within DKCM and she was a highly-sophisticated investor;

(3) by the time of the transaction, many of the risks which had previously been associated with LBIE claims had been resolved. The only risks apart from the timing of the interest payment and the repayment of the UK withholding tax were the "liquidation lacuna" risk – which Ms Gibbons had effectively discounted and which was not factored into the financial model at all – and the "late termination" risk – which was considered to be minimal in the light of the imminent Scheme of Arrangement and was shown in the financial model only as a "bookend" possible downside; and

(4) there was very little negotiation over the purchase price in the transaction. It appeared that DKCM offered what it thought to be a fair price and that was accepted by Jefferies without much back and forth.

156. So far as BLM was concerned, in the run-up to the acquisition of the SAAD Claim, it knew that it had the benefit of Article 12(1) and that the end-seller, SICL, would be likely to suffer UK withholding tax if it held onto the SAAD Claim. That knowledge accounted for the significant discount at which BLM offered to purchase the SAAD Claim. It was simply not credible that, as the buyer of the debt, BLM would not have taken into account SICL's position. Ms Gibbons' email of 22 February 2018 demonstrated that she was aware that SICL

had a potential UK withholding tax issue and that that would enable BLM to acquire the SAAD Claim at a significant discount. Thus, a main purpose of BLM must have been to generate a profit in reliance on its exemption from UK withholding tax under Article 12(1).

157. As for SICL, the email from Ms Nettleton of 2 January 2018, the email from Ms Gibbons of 5 February 2018 and then the SICL Liquidators' report of 26 March 2018 all made it clear that the likelihood of SICL's suffering UK withholding in respect of the interest if it retained the SAAD Claim was the main driver behind the sale. By assigning the SAAD Claim for an amount equal to 92% of the interest which was payable in respect of the SAAD Claim, SICL realised more than it would have realised if it had held onto the relevant asset and it did so by "taking advantage" of Article 12(1). SICL must have known from the purchase price which it was offered that its end-purchaser had the benefit of a treaty and, by the time that it executed the relevant trade, SICL in fact knew that BLM was the end-purchaser and would be relying on Article 12(1) to avoid suffering UK withholding tax as a permanent cost.

158. For obvious forensic reasons, Mr Brinsmead-Stockham was keen to emphasize the exceptional nature of the SAAD Claim, relative to the other claims which the Appellant had purchased in the LBIE administration. Thus, he pointed out that:

(1) the principal amount of the SAAD Claim made it the largest individual LBIE claim which BLM had purchased;

(2) the SAAD Claim was the last of the LBIE claims which BLM had bought;

(3) the SAAD Claim was the only LBIE claim which had been purchased by BLM following the date of the Court of Appeal decision in the Withholding Tax Litigation to the effect that the interest on LBIE claims was annual in nature and therefore subject to UK withholding tax in the absence of any applicable exception;

(4) the SAAD Claim was the only Category 2 claim which had been acquired on a "back-to-back" basis from an end-seller which was not entitled to a full exemption from UK withholding tax under the terms of an applicable treaty; and

(5) the 1.38% spread made by Jefferies between its buy and sale prices in relation to the SAAD Claim was considerably greater than the 0.25% which Ms Gibbons in her evidence had accepted would typically be the commission on the sale of a plain vanilla debt claim.

159. He added that it was inappropriate to compare the acquisition by BLM of the SAAD Claim to the various acquisitions of Category 2 claims made by BLM in the LACA. In the first place, the identity of the sellers of Category 2 claims in the LACA had been unknown to BLM whereas, in this case, BLM had known that the end-seller was SICL all along and, in the second place, the LACA acquisitions had been made prior to the decision of the Court of Appeal to the effect that the interest payable by LBIE would be subject to UK withholding tax whereas that was not the case in relation to the present transaction.

160. For similar reasons, Mr Grodzinski was keen to emphasize that the SAAD Claim was not exceptional relative to the other LBIE claims which the Appellant had purchased. In relation to the points made in paragraph 158 above, he said that:

(1) from the economic perspective, the principal amount of the SAAD Claim was irrelevant as the principal amount had already been discharged long before the purchase of the SAAD Claim by BLM. As such, the appropriate comparator in this case was not the principal amount but the interest amount and that meant that the SAAD Claim was not the largest individual LBIE claim which BLM had purchased;

(2) in any event, the purchases of LBIE claims made by BLM in the LACA had been bulk purchases - where the aggregate amount paid by BLM in respect of certain purchases had exceeded the amount paid by BLM for the SAAD Claim - and the evidence of Ms Gibbons was that she saw no difference in economic terms between the purchase of a single LBIE claim and the purchase of multiple LBIE claims for a single purchase price;

(3) Ms Gibbons had also testified that there were very few LBIE claims in the market at the time when the Appellant purchased the SAAD Claim and that this was because:

(a) most of the holders of LBIE claims who had wished to sell their claims had disposed of their claims in the LACA; and

(b) the announcement by the LBIE Administrators on 22 December 2017 to the effect that a scheme of arrangement which would resolve most of the uncertainties in relation to the quantum and discharge of the LBIE claims was imminent meant that most of the remaining creditors were happy to hold onto their claims;

(4) thus, the fact that the SAAD Claim was the last of the LBIE claims which had been purchased by the Appellant and the only LBIE claim which had been purchased by the Appellant following the date of the Court of Appeal decision in the Withholding Tax Litigation was entirely attributable to the state of the market in LBIE claims at the time when the SAAD Claim was purchased and had nothing to do with the fact that the interest payable under the SAAD Claim was going to be subject to UK withholding tax. Ms Gibbons had testified that she never thought about the tax-status of the seller when she was making purchases;

(5) the reason why the SAAD Claim was the only Category 2 claim which had been acquired on a "back-to-back" basis from an end-seller which was not entitled to a full exemption from UK withholding tax under the terms of an applicable treaty was that most Category 2 claims had been purchased in the LACA, which involved direct acquisitions and not "back-to-back" sales. Moreover, it was not clear why the fact that the SAAD Claim had been acquired on a "back-to-back" basis as opposed to being acquired directly was relevant. BLM had made many direct acquisitions of Category 2 claims from sellers which were not entitled to a full exemption from UK withholding tax under the terms of an applicable treaty in the course of its substantial dealings in LBIE claims over the years and Ms Gibbons had testified that she viewed assets in the LBIE administration as cash flows and didn't distinguish between Category 1 claims and Category 2 claims in that regard; and

(6) the evidence of Ms Gibbons had been that, whilst the figure of 0.25% was generally indicative of commissions on the sales of plain vanilla debts, higher commissions were often paid in connection with such disposals, including one of 3% in relation to one of the transactions with which she had been concerned. Moreover, BLM had been unaware of the spread made by Jefferies in connection with the transaction until much later.

161. However, both counsel were agreed that whether or not the Respondents had been correct in repaying the UK withholding tax to BLM in respect of its prior receipts of interest from LBIE was irrelevant. The past acquisitions were relevant to the appeal only in the sense that they had occurred and were part of the factual matrix in which the transaction which was the subject of the appeal had occurred. The Respondents' treatment of those past acquisitions was irrelevant, as they were not part of the subject of the appeal.

FINDINGS OF FACT

Introduction

162. It is common ground that the purposes of BLM in entering into the transaction which is the subject of the appeal is to be determined by reference to the purposes of DKCM as BLM's investment manager and, in particular, the purposes of Ms Gibbons as the member of the DKCM distressed investing team responsible for analysing and recommending the relevant transaction. As such, references below to the state of knowledge of BLM and the purposes of BLM should be taken to be referring to the state of knowledge and purposes of the members of the DKCM distressed investing team and, in particular, Ms Gibbons.

163. Similarly, although it was not expressly articulated at the hearing (presumably because it was self-evident) we consider that the purposes of SICL in entering into the transaction which is the subject of the appeal is to be determined by reference to the purposes of the SICL Liquidators. Accordingly, references below to the state of knowledge of SICL and the purposes of SICL should be taken to be referring to the state of knowledge and purposes of the individuals representing the SICL Liquidators.

Findings of fact in relation to BLM

164. Our findings of fact in relation to BLM, along with the reasons for those findings, are as follows:

(1) FACT - at the time when the opportunity to acquire the SAAD Claim arose, BLM was well aware of the fact that, in the absence of a sale, the SAAD Claim had a value to SICL of approximately 80% of the interest which was payable in respect of the SAAD Claim because of the likelihood of SICL's suffering irrecoverable UK withholding tax when the interest in respect of the SAAD Claim was paid. We say "approximately 80%" in this context because, at the time when the opportunity arose, the SAAD Claim was subject to three significant uncertainties as follows:

(a) the "liquidation lacuna" risk – which would have meant that no interest was payable in respect of the SAAD Claim at all;

(b) the "late termination" risk – which would have meant that the interest payable in respect of the SAAD Claim was some £10 million less than it would be if the decision of the Court of Appeal to the effect that the interest accrued from the date of the administration were not to be reversed by the Supreme Court; and

(c) the UK withholding tax risk – which meant that, as things stood, certain recipients of the interest payable in respect of the SAAD Claim would suffer irrecoverable UK withholding tax unless the decision of the Court of Appeal in the Withholding Tax Litigation in December 2017 was reversed by the Supreme Court.

BLM knew that each of the above risks would have an impact on the precise value to be accorded to the SAAD Claim in SICL's hands should it choose to retain the SAAD Claim. BLM also knew that, whatever the precise value of the SAAD Claim to SICL were it to retain the SAAD Claim, SICL was likely to be willing to sell for the best price which it could get in excess of that value.

REASON - the fact that BLM was aware of SICL's position vis-à-vis the UK withholding tax can be seen from the fact that:

(i) Ms Nettleton made it clear to Mr Sabharwal in her email of 2 January 2018 – see paragraph 79(6) above;

(ii) Mr Sabharwal was in discussions about the SAAD Claim with his colleagues in the distressed investing team in New York – see paragraphs 79(3) and 79(12) above;

(iii) the UCC3 which was sent to BLM once DKCM had signed the NDA classed SICL as a "tax category 4 -other" holder – see paragraph 79(1) above;

(iv) Ms Gibbons said in her email of 5 February 2018 that the SAAD Claim was being sold "for withholding tax reasons" – see paragraph 79(11) above;

(v) Ms Gibbons said in her email of 22 February 2018 that SICL's LBIE claim had been purchased at an attractive price "since they had a withholding tax issue" – see paragraph 79(21) above; and

(vi) Ms Gibbons accepted in her oral testimony at the hearing that she was aware that SICL had a UK withholding tax issue – see paragraph 80(10) above;

(2) FACT - at the same time, BLM was aware that the SAAD Claim had a value to BLM of approximately 100% of the interest which was payable in respect of the SAAD Claim because of BLM's ability to reclaim any UK withholding tax which might arise in respect of that interest in the event that the Supreme Court were to uphold the Court of Appeal's decision in the Withholding Tax Litigation. Again, we say "approximately 100%" in this context because BLM faced the same "liquidation lacuna" and "late termination" risks as SICL in relation to the SAAD Claim and it was also aware that there was likely to be a delay of some nature both in its receiving the interest from the LBIE Administrators and in its receiving repayment of the UK withholding tax from the Respondents if the Supreme Court did not reverse the Court of Appeal in the Withholding Tax Litigation.

REASON – the fact that the SAAD Claim had this value to BLM can be seen from:

(a) the terms of the financial model – see paragraph 79(14) above; and

(b) the evidence of Ms Gibbons – see paragraphs 80(6) and 80(8) above;

(3) FACT – at the time when BLM made its offer for the SAAD Claim, BLM was aware that it was not the only prospective purchaser of the SAAD Claim for whom the UK withholding tax on the interest payable in respect of the SAAD Claim would not be a permanent cost.

REASON – the evidence of Ms Gibbons was that, if her offer price was too low, then Jefferies would have started to look for other prospective purchasers – see paragraph 80(12) above. It is possible to infer from that, and the price that was actually offered by DKCM on behalf of BLM, that Ms Gibbons knew that there were other prospective purchasers in the market for whom the UK withholding tax would not be a permanent cost; and

(4) FACT - when it came to setting the price that it was prepared to offer for the SAAD Claim, BLM took into account the following:

(a) first, and most importantly, the quantum and timing of the expected cash flows attaching to the SAAD Claim to BLM were it to acquire the SAAD Claim;

(b) secondly, the fact that it needed to obtain an IRR of at least 10% on the assets which it purchased. The price which it offered would need to be low

enough to ensure that the SAAD Claim achieved an appropriate IRR when the quantum and timing of the interest and the repayment of the UK withholding tax were taken into account;

(c) thirdly, the fact that it would suffer a loss if the "late termination" risk were to materialise. The price which it offered would need to be low enough to ensure that the amount of that loss was acceptable to it as a downside; and

(d) finally, the price which SICL was likely to accept, bearing in mind:

(i) the value of the SAAD Claim to SICL were it to retain the SAAD Claim (see paragraph 164(1) above); and

(ii) the fact that BLM was not the only potential purchaser of the SAAD Claim (see paragraph 164(3) above).

REASON - the fact that the primary driver of the purchase price paid by BLM for the SAAD Claim was the cash flows to which it was expected to give rise and that BLM was focused on achieving an appropriate IRR and avoiding too significant a downside in the event that the "late termination" risk materialised can be seen from:

(A) the terms of the financial model, which was focused exclusively on the cash flows to which the asset was expected to give rise in the event that the downside risk arising from the "late termination" risk did not materialise and the purchase price which might both avoid too significant a loss in the event that the downside occurred and achieve the desired IRR in the event that the downside did not occur– see paragraph 79(14) above;

(B) the evidence of Ms Gibbons – see paragraphs 80(2) and 80(6) to 80(9) above; and

(C) the email from Ms Donovan of 6 February 2018, immediately after receiving the information relating to the SAAD Claim, in which Ms Donovan focused exclusively on the likely cash-flows for BLM from the asset and concluded that it was, as she put it, a "clean claim". No mention was made of SICL's tax position – see paragraph 79(15)(c) above.

As regards the price which BLM considered that SICL was likely to accept, although one of the factors which BLM took into account when setting its offer price was the fact that the SAAD Claim, were it to be retained by SICL, would have a much lower value to SICL than it had to BLM, BLM also knew that the value of the SAAD Claim to SICL was much greater than that retention value because of the number of people in the market for whom the UK withholding tax would not be a permanent cost. That fact would inform the price which those potential purchasers were prepared to pay and, hence, would inform the SICL Liquidators' knowledge of the value of the SAAD Claim to SICL when it came to their agreeing a price for the SAAD Claim.

BLM knew that, although Jefferies had not initially marketed the SAAD Claim to other potential purchasers in the market, Jefferies would do so if BLM sought to "low-ball" it in this respect. This thinking can be seen in the evidence of Ms Gibbons to that effect – see paragraph 80(12) above – and, in any event, it can be reasonably inferred from the fact that both the SICL Liquidators and Jefferies would have been interested in maximising the value realised by SICL for the SAAD Claim (and, hence, maximising Jefferies' commission) that this is what Jefferies would have done.

Findings of fact in relation to SICL

165. Our findings of fact in relation to SICL, along with the reasons for those findings, are as follows:

(1) FACT - at the time when it was looking to realise the SAAD Claim, SICL was aware that, in the absence of a sale, the SAAD Claim had a value to SICL of approximately 80% of the interest which was payable in respect of the SAAD Claim because of the likelihood of its suffering irrecoverable UK withholding tax when the interest in respect of the SAAD Claim was paid. The factors which informed that value were the same as those set out in paragraph 164(1) above.

REASON - the fact that the SICL Liquidators were aware of the potential exposure to UK withholding tax on interest in respect of the SAAD Claim were they to retain the SAAD Claim can be seen in:

(a) the terms of the email from Ms Nettleton to Mr Sabharwal of 2 January 2018 – see paragraph 79(6) above; and

(b) the SICL Liquidators' report of 26 March 2018 in which they informed SICL's creditors of the sale of the SAAD Claim – see paragraph 79(23) above;

(2) FACT - at the same time, SICL was aware that there were people in the market for whom UK withholding tax would not be a permanent cost. Those people included UK resident corporates and residents of jurisdictions with treaties that provided for a full exemption from UK withholding tax on interest. SICL knew that such people would be prepared to pay more for the SAAD Claim than the value which the SAAD Claim had to SICL in the absence of a sale.

REASON - the fact that, at the time of employing Jefferies to sell the SAAD Claim, the SICL Liquidators were aware that there were purchasers in the market to whom the SAAD Claim might have a greater value than it did to SICL can be seen in the emails from Ms Nettleton to Mr Sabharwal of 12 December 2017 and 2 January 2018 – see paragraphs 79(2) and 79(6) above;

(3) FACT - when it came to agreeing the price for its sale of the SAAD Claim to Jefferies, on or before 8 February 2018, SICL wanted to realise the greatest value possible for the SAAD Claim bearing in mind the potential market.

REASON - the fact that the SICL Liquidators wanted to realise the greatest possible value from the SAAD Claim can be inferred from the fact that SICL was in liquidation and the SICL Liquidators had a duty to the creditors in, and the shareholders of, SICL to realise the assets of SICL at their greatest possible value in the liquidation;

(4) FACT - at the time when it agreed in principle to the terms and price for its sale of the SAAD Claim, on or before 8 February 2018, SICL did not know, and did not care about, the identity of the end-purchaser. All that it knew and cared about was that the terms and price which had been offered to it were acceptable to it.

REASON - the fact that, at the time when it agreed in principle to the terms and price for its sale of the SAAD Claim, SICL did not know the identity of the end-purchaser can be inferred from the fact that the SICL Liquidators did not ask about the identity of the end-purchaser until after they had reached that agreement (see Ms Watson's email to Mr Sabharwal and others of 9 February 2018 referred to in paragraph 79(17) above). The fact that, at the time when it agreed in principle to the terms and price for its sale of the SAAD Claim, SICL did not care about the identity of the end-purchaser can be inferred from the fact that the SICL Liquidators agreed to those terms on or before 8

February 2018, before it knew the identity of the end-purchaser – see the email from Ms Gibbons to her colleagues referred to in paragraph 79(16) above.

At that point, although the SICL Liquidators could not yet formally enter into the trade because they considered that they needed to be in the Cayman Islands to do that, they considered that they were morally bound to proceed at the agreed price. That was the nature of the assurance which the SICL Liquidators gave to Jefferies and which Jefferies, in turn, reported to Ms Watson, as recorded in Ms Watson's email to Mr Sabharwal and others of 9 February 2018 – see paragraph 79(17) above;

(5) FACT - the reason why SICL asked Jefferies, after it had agreed in principle to the terms and price for the sale of the SAAD Claim, for the identity of the end-purchaser had nothing whatsoever to do with checking on the tax characteristics of the end-purchaser with a view to re-negotiating the price of the transaction or walking away from the transaction.

REASON - the fact that the SICL Liquidators' request to know the identity of the end-purchaser prior to executing the transaction had nothing to do with the tax characteristics of the end-purchaser and was not made with a view to re-negotiating the price of the transaction or walking away from the transaction can be inferred on the balance of probabilities from the reported statement and conduct of the SICL Liquidators.

It is clear from Ms Watson's email to Mr Sabharwal and others of 9 February 2018 that the SICL Liquidators considered the price for the sale to have been finally agreed no matter the identity of the end-purchaser – see paragraph 79(17) above. As such, we consider that their insistence on knowing the name of the end-purchaser at that point must have been motivated by reasons unrelated to tax. In our view, the request was almost certainly motivated solely by a desire for good governance or to comply with regulatory requirements.

We can certainly see no basis for the allegation made by Mr Brinsmead-Stockham in his cross-examination of Ms Gibbons at the hearing to the effect that the enquiry was made with a view to confirming that the tax status of the end-purchaser had been adequately reflected in the price which the SICL Liquidators had already agreed, with a view to their re-opening price negotiations in the event that it hadn't.

Mr Brinsmead-Stockham's suggestion was based on the fact that the SICL Liquidators were reported by Ms Watson as saying merely that "the buyer's identity would change nothing" and not that the "buyer's identity and tax residence would change nothing". He said that this meant that the SICL Liquidators were reserving the right to increase the price if they discovered that the end-purchaser's tax residence had not been adequately factored into the offer price. Despite Mr Brinsmead-Stockham's considerable forensic skill, we can see no justification for that reading of the relevant statement;

(6) FACT - as a result of making that request and receiving the response to it, by the time that SICL formally entered into the trade with Jefferies on 12 February 2018, it was aware that the end-purchaser of the SAAD Claim was BLM and that BLM was resident in the ROI for tax purposes.

REASON - the fact that, by the time that they formally entered into the trade with Jefferies on 12 February 2018, the SICL Liquidators were aware that the end-purchaser of the SAAD Claim was BLM and that BLM was resident in the ROI for tax purposes can be inferred from the fact that:

(a) the SICL Liquidators said that they would not proceed to enter into the trade without having that knowledge;

(b) Ms Watson had been cleared by Mr Sabharwal on 10 February 2018 to provide that information to the SICL Liquidators through Jefferies; and

(c) the SICL Liquidators were aware from earlier dealings that BLM was resident in the ROI

– see paragraphs 79(17) and 79(18) above.

We do not think that the exchange between Ms Watson and Mr Miesner which we have recorded in paragraphs 79(19) and 79(20) above should be construed as evidence that BLM's identity as the end-purchaser had not yet been conveyed to Jefferies (and, hence, the SICL Liquidators) prior to the formal entry into the trades. In our view, a more likely explanation for the terms of that exchange are that Mr Miesner had temporarily forgotten that DKCM were acting for BLM and not for itself as principal when he sent his email confirming the terms of the trade. That is certainly a much more plausible interpretation of the events which transpired than that the SICL Liquidators, after making it plain that they would not enter into the trade without knowing the identity of the end-purchaser, simply forgot about that request and proceeded to enter into the trade without knowing that identity; and

(7) FACT – once SICL had been informed, immediately prior to its entering into the trade with Jefferies on 12 February 2018, that BLM was the end-purchaser, there was no prospect that Jefferies would on-sell the SAAD Claim to anyone other than BLM.

REASON – the disposal of the SAAD Claim was always intended to take the form of a "back-to-back" transaction. Once Jefferies had agreed in principle with BLM that it would on-sell the SAAD Claim to BLM and informed the SICL Liquidators that BLM was the end-purchaser, Jefferies was, for all practical purposes, limited in its choice of end-purchaser to BLM. In any event, Jefferies entered into the trade with BLM on 12 February 2018 immediately after it entered into the trade with SICL on the same day. Thus, by the time that SICL transferred the SAAD Claim to Jefferies on 9 March 2018 in completion of the trade between those parties, Jefferies was contractually bound to transfer the SAAD Claim to BLM in completion of the trade between Jefferies and BLM. As such, the freedom apparently conferred on Jefferies by clause 9 of the assignment of claim agreement to transfer the SAAD Claim to someone other than BLM was illusory.

DISCUSSION - APPLICATION OF THE LAW TO THE FACTS

Preliminary matter

166. As a preliminary matter, we should mention a point which we raised at the hearing in relation to the precise subject matter of the two assignments in this case. In order for Article 12(5) to apply to a payment of UK source interest, there needs to have been an "assignment of the debt claim in respect of which the interest [was] paid". It is of course possible that the transfer solely of a right to receive interest, without more, might be apt to fall within that language – on the basis that the right to receive the interest is itself the debt claim in respect of which the interest is then paid – but a more natural reading of the relevant language is that it requires an assignment of the underlying debt claim giving rise to the interest (as opposed to an assignment merely of the right to receive the interest). Accordingly, we considered whether, if the more natural reading was the correct one, the transaction which had occurred might not satisfy this language given that:

(1) the principal amount of the SAAD Claim had been discharged long before the assignments were made; and

(2) the commercial substance of the assignments was that they simply involved the transfer of the interest which was payable in respect of the SAAD Claim and not the right to receive the repayment of principal.

167. Both parties were of the view that the subject matter of each assignment was not the interest which was payable in respect of the SAAD Claim but instead the SAAD Claim itself and, after considering:

(1) the way in which each assignment was worded – as an assignment of the whole SAAD Claim but subject to the retention by the relevant seller of the prior payment in respect of the principal; and

(2) the language used in each notice of assignment to the LBIE Administrators – which referred to the subject matter of the relevant assignment as being the whole SAAD Claim,

we agreed that that was correct. Accordingly, we were satisfied that, on any analysis of the phrase set out above, the transaction gave rise to assignments of the debt claim in respect of which the interest was paid.

Conclusion

Introduction

168. We should start this part of our decision by briefly stating the legal framework which we need to apply to the agreed facts and our findings of fact, based on the conclusions of law which we reached in paragraphs 124 to 151 above. Those are that:

(1) the burden of proof in this case is on the Respondents;

(2) SICL is a relevant "person" for the purposes of Article 12(5);

(3) accordingly, the Respondents 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.

169. Although neither party approached it in precisely this way, we think that it is helpful to the analysis to break the question raised by Article 12(5) into 4 separate questions, as follows:

(1) did BLM have, as a main purpose in the assignment of the SAAD Claim, "taking advantage" of Article 12(1) itself by means of the assignment?

(2) did BLM have, as a main purpose in the assignment of the SAAD Claim, enabling SICL to "take advantage" of Article 12(1) by means of the assignment?

(3) did SICL have, as a main purpose in the assignment of the SAAD Claim, "taking advantage" of Article 12(1) itself by means of the assignment? and finally

(4) did SICL have, as a main purpose in the assignment of the SAAD Claim, enabling BLM to "take advantage" of Article 12(1) by means of the assignment?

170. We have broken the question down in the way we have because it seems to us that each of them raises slightly different issues. More importantly, breaking the question down in this way highlights an important point and that is whether the questions set out in paragraphs 169(2) and 169(4) are in fact relevant questions to ask at all. In our view, although we address those questions in the paragraphs which follow, they are not. This is because we think that a proper construction of Article 12(5) requires the person whose main purposes are being considered to have a main purpose of "taking advantage" of Article 12(1) itself. A main purpose of enabling another person to "take advantage" of Article 12(1) is not within the scope of the article.

171. It is not altogether clear that the Respondents accept this proposition given the submissions which Mr Brinsmead-Stockham made at the hearing and the questions which he asked of Ms Gibbons in cross-examination. It seemed to us that, whilst Mr Brinsmead-Stockham may not have been particularly focused on the answer to the question set out in paragraph 169(4) above – i.e. did SICL have a main purpose of enabling BLM to "take advantage" of Article 12(1)? – he was very much focused on the answer to the question set out in paragraph 169(2) above – i.e. did BLM have a main purpose of enabling SICL to "take advantage" of Article 12(1)? He was certainly anxious to press the point that Ms Gibbons was acutely aware of SICL's UK withholding tax issue at the time when the assignments occurred and we surmise that this can only have been because he thought that the question set out in paragraph 169(2) above was relevant and should be answered in the affirmative. If that was the case, we do not think that the question is relevant, for the reason we have given in paragraph 170 above.

172. Before we set out our answers to each of the questions, we should say that, in the analysis which follows, nothing turns on our conclusion in paragraph 151 above to the effect that the burden of proof in this case is on the Respondents. This is because, as Mustill LJ noted in *Lotus*, at 644, the burden of proof "is material only to the question of which party succeeds if the tribunal is left in doubt" and, in this case, although the questions we need to answer are in some cases difficult, that difficulty does not stem from matters of evidential proof but instead from the proper way to apply the law. We have been left in no doubt as to the import of the evidence.

Question (1) – BLM - main purpose to "take advantage" of Article 12(1) itself

173. Starting with the question set out in paragraph 169(1) above, we consider that, taking into account all of the evidence, and viewed subjectively, BLM did not have, as one of its main purposes, "taking advantage" of Article 12(1) itself by means of the assignment of the SAAD Claim.

174. In addressing that question, we believe that it is important to distinguish a person's "purpose" in doing something – a reason for doing that thing – from that person's implicit understanding of the consequences of doing that thing. In this case, BLM was a long-established company which was resident in the ROI and which had received UK source interest many times before, including interest on other LBIE claims. So far as the guiding minds of BLM were concerned, it was an accepted fact that UK withholding tax was not a

permanent cost for BLM because of its tax residence in the ROI. (Ms Gibbons testified that she was aware of that fact although she wasn't sure that she knew exactly why it was the case. It was simply her implicit understanding of the situation that UK withholding tax would not be a permanent cost for BLM – see paragraph 80(6) above). Thus, inevitably, BLM's ability to receive UK source interest without UK withholding tax pursuant to Article 12(1) was one of its tax attributes which it took into account when considering the price which it was prepared to pay for the UK source debts that it acquired. It was an inevitable consequence of being resident in the ROI and therefore entitled to the benefit of Article 12(1). In that respect, BLM's exemption from UK withholding tax under Article 12(1) was no different from the tax benefits which it enjoyed in the ROI by virtue of its status as a "designated activity company" under the laws of the ROI. In other words, like those tax benefits, the UK withholding tax exemption which BLM enjoyed was merely part of the scenery – the "setting" in which BLM made its offer for the SAAD Claim.

175. However, the fact that BLM was aware that it was entitled to benefit from Article 12(1) in relation to the interest which was payable in respect of the SAAD Claim, and took that entitlement into account in calculating the price that it was prepared to offer for the SAAD Claim, did not mean that obtaining that benefit (or, more relevantly, "taking advantage" of Article 12(1)) was one of BLM's main purposes in acquiring the SAAD Claim, any more than obtaining the benefit of Article 12(1) (or "taking advantage" of Article 12(1)) was one of BLM's main purposes in acquiring any of the other LBIE claims which BLM had acquired in the course of LBIE's administration. In each of those cases, BLM took into account its entitlement to benefit from Article 12(1) as one of the factors which informed the value of the relevant claim so far as it was concerned and therefore the price that it was prepared to pay for the relevant claim.

176. In each of those cases, it would be quite wrong to conclude from the fact that BLM was aware of its ability to benefit from Article 12(1) that obtaining that benefit (or "taking advantage" of Article 12(1)) was one of BLM's main purposes in acquiring the relevant claim. 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 Ms Gibbons 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.

177. It seems to us that the reason why the Respondents have challenged BLM's acquisition of the SAAD Claim under Article 12(5) when they have not done so in relation to many of the other interest-bearing LBIE claims which BLM has acquired is solely a function of the fact that, in this case:

(1) both parties knew that SICL could not benefit from Article 12(1); and

(2) SICL received a price for the SAAD Claim which reflected the significant spread between the amount which it would have received in respect of the SAAD Claim had it retained the SAAD Claim and the amount which BLM received in respect of the SAAD Claim following the acquisition.

(Mr Brinsmead-Stockham was keen to emphasise the fact that the figure of 92% nicely split the UK withholding tax cost between the two parties, with some juice for Jefferies as the middle-man in between them.)

178. We can see how the factors specified in paragraph 177 above might be adduced in support of the propositions that:

(1) it was one of BLM's main purposes to enable SICL to "take advantage" of Article 12(1); or

(2) it was one of SICL's main purposes to "take advantage" of Article 12(1) itself.

As it happens, we believe that neither of the above is in fact the case for the reasons which follow but, in our opinion, the factors specified in paragraph 177 above simply cannot be relevant to the question of whether "taking advantage" of Article 12(1) itself was one of BLM's main purposes.

179. This can most easily be demonstrated by positing a situation in which, instead of acquiring the SAAD Claim for 92% of the expected interest amount, BLM had instead acquired the SAAD Claim for 80% of the expected interest amount. Had that been the case, we suspect that the Respondents would not have alleged that "taking advantage" of Article 12(1) was one of BLM's main purposes in acquiring the SAAD Claim. If that is right, then how can the position be any different simply because BLM agreed to pay a higher price for the acquisition? The higher price which BLM was prepared to pay surely does not indicate that obtaining the benefit (or "taking advantage") of Article 12(1) was any more of a purpose for BLM than it would have been had BLM paid the lower price for the SAAD Claim.

180. In conclusion on this question, in our view, the Respondents have quite rightly accepted that, in making its acquisitions of the LBIE claims other than the SAAD Claim, BLM did not have "taking advantage" of Article 12(1) by means of the acquisitions as one of its main purposes. That was the case despite the fact that, by virtue of BLM's tax residence in the ROI, it was an inevitable consequence of the acquisitions that BLM would become entitled to the benefit of Article 12(1) in relation to the interest which was payable in respect of the relevant LBIE claims. Having done so, we think that the Respondents must logically accept that the same holds true when it comes to determining BLM's main purposes in acquiring the SAAD Claim. In each case, BLM took into account its ability to benefit from Article 12(1) in relation to the interest in respect of the relevant claim in calculating the value of the claim to it and the price that it was prepared to pay but it was in no way a main purpose of BLM to "take advantage" of that benefit.

181. It will be apparent from the conclusion we have reached in relation to this question that we do not regard any of the points of distinction between the SAAD Claim and the other claims in the LBIE administration which are described in the exchange recorded in paragraphs 158 to 161 above as having any bearing on the issue which we need to resolve in these proceedings. As Mr Grodzinski pointed out (see paragraph 160 above), there were sound reasons why the SAAD Claim was acquired when it was and in the manner it was and we can see nothing in those circumstances to suggest that the SAAD Claim should be regarded as exceptional in a way which is relevant to the matter which is at issue in these proceedings.

Question (2) - BLM – main purpose to enable to SICL to "take advantage" of Article 12(1)

182. We now turn to address the question of whether it might properly be said that BLM should fall within Article 12(5) in this case because it had, as one of its main purposes, enabling SICL to "take advantage" of Article 12(1). As we have already indicated, we do not think that this is a relevant question, based on the language of Article 12(5). However, in any event, we consider that, taking into account all of the evidence, and viewed subjectively, BLM did not have, as one of its main purposes, enabling SICL to "take advantage" of Article 12(1).

183. It is of course essential in any sale transaction for the purchaser to have some idea of what the seller is going to be prepared to accept by way of a sale price. To suggest that a purchaser would not be interested in the seller's view of the value of the asset which is the subject of the sale is wholly unrealistic. If, as it appeared at times in giving her evidence, Ms Gibbons was saying that, in framing her offer for the SAAD Claim, she did not consider, and/or was simply not interested in, SICL's tax position as the seller in this case – see paragraph 80(10) above - we think that that is self-evidently incorrect. Not only is it impossible to conceive of a situation where a sophisticated purchaser (like Ms Gibbons) would offer to acquire an asset without trying to understand the seller's view of the value of the asset so as more accurately to frame any offer but the written evidence in this case shows that Ms Gibbons was in fact well aware that SICL had a UK withholding issue and that she recognised that that UK withholding tax issue would inform the SICL Liquidators' willingness to sell the SAAD Claim and the price at which the SICL Liquidators would be prepared to sell the SAAD Claim. That was why Ms Gibbons said in her email of 5 February 2018 that the SAAD Claim was being sold "for withholding tax reasons" and in her email of 22 February 2018 that BLM had been able to purchase the SAAD Claim at an attractive price because SICL "had a withholding tax issue" (see paragraphs 79(11), 79(21), 164(1) and 164(4)(d)(i) above).

184. However, Ms Gibbons' awareness that SICL had a UK withholding tax issue which would inform the SICL Liquidators' willingness to sell the SAAD Claim and the value at which the SICL Liquidators would be prepared to sell the SAAD Claim is not the same as her having a main purpose of solving SICL's UK withholding tax problem by buying the SAAD Claim. And, on reflection, we think that a more accurate way of construing Ms Gibbons' testimony - as summarised in paragraphs 80(11) and 80(12) above - is not that she did not take SICL's tax position into account in assessing the price which the SICL Liquidators were likely to be prepared to accept for the SAAD Claim but more that it was no part of her purpose in entering into the transaction to convey to SICL the economic benefit of BLM's ability to benefit from Article 12(1). That was an inevitable economic consequence of the transaction which occurred but *Blackrock* demonstrates that it would be quite wrong to regard that fact as being determinative. Instead, it is merely part of the overall factual matrix in which the main purposes of BLM are to be identified.

185. When all of the evidence in this case is considered, it is, in our opinion, apparent that, so far as BLM's subjective purposes are concerned, BLM was entering into the transaction solely for its own benefit - to secure a significant profit for itself from the difference between its purchase price and the amounts which it expected to receive in respect of the SAAD Claim in due course. Its focus was therefore on the cash flows to which the SAAD Claim was expected to give rise for BLM and on the amount that it would need to pay for the SAAD Claim in order to ensure that, in respect of the SAAD Claim:

(1) it obtained the desired IRR;

(2) it faced an acceptable downside exposure from the "late termination" risk should that risk materialise; and

(3) it staved off other potential bidders by offering a sensible price.

It was not any part of that purpose to enable SICL to "take advantage" of Article 12(1) even though it knew that one consequence of the transaction would be that SICL would benefit indirectly in economic terms from the availability to BLM of the exemption in Article 12(1). So far as BLM was concerned, the fact that SICL would benefit indirectly in economic terms from the availability to BLM of the exemption in Article 12(1) was no more than a

consequence of the deal that was done. It was in no respect a main purpose of BLM in implementing the deal that was done.

Question (3) - SICL – main purpose to "take advantage" of Article 12(1) itself

186. We also consider that, taking into account all of the evidence, and viewed subjectively, SICL did not have, as one of its main purposes, "taking advantage" of Article 12(1) itself by means of the assignment of the SAAD Claim although we confess that we have found this to be the most finely-balanced of the 4 questions we are required to address.

187. The evidence suggests that the sole purpose of the SICL Liquidators in the period leading up to the trade was to realise the SAAD Claim for the best possible price which they could obtain and that the SICL Liquidators had no interest in the means by which that price could be obtained. We have found as facts that:

(1) the SICL Liquidators agreed on the price in principle before they thought to enquire about the identity of the end-purchaser; and

(2) the SICL Liquidators enquired about the identity of the end-purchaser after that not because they had any interest in the tax attributes of the end-purchaser but solely out of a desire for good governance or to comply with regulatory requirements.

188. This means that, at the time when they reached agreement in principle to sell the SAAD Claim, the SICL Liquidators had no way of knowing that the reason why the end-purchaser was prepared to offer the price that it had offered was its ability to benefit from Article 12(1), as opposed to some other exemption from UK withholding tax.

189. At that point, the end-purchaser might have been:

(1) a UK resident who was exempt from UK tax altogether or who was able to receive the interest without UK withholding tax and who had significant losses against which to offset the interest; or

(2) a person resident in a jurisdiction other than the ROI with which the UK had concluded a treaty conferring on residents within the relevant jurisdiction a full exemption from UK withholding tax.

190. Thus, if the SICL Liquidators had entered into the trade at that point, we do not see how the SICL Liquidators could be said, on any analysis, to have had a main purpose of "taking advantage" of Article 12(1) in agreeing to sell the SAAD Claim (see paragraphs 149, 150 and 168(6) above).

191. Having said that, the SICL Liquidators did not formally enter into the trade until the following week, on 12 February 2018, and we have found as a fact that, in the intervening period, the SICL Liquidators were informed by Jefferies that SICL's end-purchaser was BLM. Thus, by the time that the SICL Liquidators formally agreed to sell the SAAD Claim, they knew that the end-purchaser was resident in the ROI and was therefore going to benefit from Article 12(1).

192. Can it properly be said that, because:

(1) the SICL Liquidators' only purpose in entering into the transaction was to realise the SAAD Claim for the best possible price;

(2) the SICL Liquidators knew at the time when they agreed in principle to the transaction that their end-purchaser must have an entitlement to an exemption of some sort from UK withholding tax; and

(3) by the time that they formally entered into the transaction, the SICL Liquidators knew that, in fact, the end-purchaser was relying on Article 12(1) for its exemption from UK withholding tax,

one of the SICL Liquidators' main purposes in entering into the transaction was to "take advantage" of Article 12(1) itself?

193. If it can, then that would be a somewhat surprising conclusion. It would effectively mean that, in any case where:

(1) there is a sale of a debt, the interest on which is subject to UK withholding tax, from a seller resident in a non-treaty jurisdiction to a purchaser resident in a treaty jurisdiction;

(2) the sale price is a market price reflecting the fact that there are parties in the market who are able to benefit from a domestic exemption from UK withholding tax or from being treaty resident and are thereby able to avoid suffering the UK withholding tax as a permanent cost; and

(3) the purchaser is one of those parties and the seller happens to be aware of the identity and tax residence of the purchaser,

the purchaser would fall within the scope of any anti-avoidance provision in a form similar to Article 12(5) which might be contained within the treaty on which the purchaser is relying. Mr Brinsmead-Stockham accepted that, whilst every case would inevitably turn on its precise facts, that would be the natural inference to be drawn from the Respondents' position in this case.

194. Indeed, the inference to be drawn from the Respondents' position in this case is even wider than that set out in paragraph 193 above, in that Mr Brinsmead-Stockham submitted at the hearing that a seller could be said to be "taking advantage" of a treaty provision as long as it knew that its purchaser was taking into account its exemption from UK withholding tax in framing its offer but was unaware that that exemption depended on the purchaser's ability to benefit from the particular treaty provision (see paragraph 120 above).

195. We agree with Mr Grodzinski that that cannot be the intended scope of Article 12(5) and its equivalent in other treaties. 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.

196. We think that the origin of the reason why this is not the case is to be found in Mr Brinsmead-Stockham's repeated assertions at the hearing to the effect that the transaction which is the subject of the appeal was no different from the cases of conduit companies or "treaty-shopping" which typically fall within Article 12(5). Mr Brinsmead-Stockham submitted that this was because, when viewed in economic terms, SICL was "taking advantage" of Article 12(1) through the price which it received for the SAAD Claim.

197. Although we do of course understand the economic basis for Mr Brinsmead-Stockham's submission, 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 (see, for example, Examples 1 to 3 in paragraph 5 of the Conduit Report). In that way, the resident of the non-treaty jurisdiction can be said to be "acting through" the person located in the treaty jurisdiction (see paragraph 7 of the Conduit Report). 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.

200. Putting it another way, as Mr Grodzinski pointed out, in this case, SICL's ability to avoid the UK withholding tax on the interest in respect of the SAAD Claim did not stem from the fact that it retained an economic interest in the interest and indirectly accessed Article 12(1) through BLM - thereby, "taking advantage" of Article 12(1) - but rather from the fact that it disposed of the SAAD Claim outright for a market price and therefore no longer had the right to receive the interest following that sale.

201. We should make it clear that we do not consider the reasoning set out in paragraphs 196 to 200 above to be the same as saying that Article 12(5) (and its equivalent in other treaties) should be construed as if they applied only to transactions involving artificial steps or arrangements. As we have indicated in paragraphs 135 to 148 above in relation to the meaning of the phrase "take advantage" in Article 12(5), we do not think that there is any basis for a gloss of that nature to be placed on the relevant language. However, we do think that, 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.

Question (4) – SICL – main purpose to enable BLM to "take advantage" of Article 12(1)

202. Finally, although we are not sure that Mr Brinsmead-Stockham's submissions sought an answer to this proposition, we should record our view that:

(1) taking into account all of the evidence, and viewed subjectively, SICL did not have, as one of its main purposes, enabling BLM to "take advantage" of Article 12(1); and

(2) in any event, as noted in paragraph 171 above, this is not a relevant question, based on the language of Article 12(5).

203. The reason for the conclusion set out in paragraph 202(1) above is similar to the reason for our conclusion in relation to Question (2) above. This is that, in entering into the transaction, SICL, like BLM, was acting solely in its own interests and did not have a main purpose of enabling another person to obtain benefits. It was not any part of the purposes of the SICL Liquidators to enable BLM to "take advantage" of Article 12(1) even though they knew that a consequence of the transaction was that BLM would be entitled to the exemption under Article 12(1) once it acquired the SAAD Claim. So far as the SICL Liquidators were concerned, BLM's entitlement to the exemption under Article 12(1) was relevant only insofar as it enabled the SICL Liquidators to maximise the proceeds which they obtained for the SAAD Claim because BLM took the exemption under Article 12(1) into account in calculating its offer price. As long as BLM factored that exemption into its offer price, the SICL Liquidators achieved their purpose and they did not care whether, in the event, BLM in fact was able to obtain the exemption. Thus, it was in no respect a main purpose of the SICL Liquidators in implementing the deal that was done to enable BLM to "take advantage" of Article 12(1).

DISPOSITION

204. The conclusions set out in paragraphs 168 to 203 above are sufficient to dispose of this appeal in favour of BLM.

205. For completeness, we should note that the matter which we have addressed in this decision is only one of three matters which were the subject of the appeals made by BLM. The other two matters related to:

(1) the Respondents' refusal to repay UK income tax withheld on payments of interest made by the LBIE Administrators in respect of the English Law Participation Claims – see paragraphs 67(2) and 68(2) above; and

(2) the Respondents' decision to impose a Penalty in respect of the "Mackay Shields claim" – see paragraph 65 above.

206. As we have noted in paragraph 71 above, the dispute in relation to the Penalty was resolved by way of a settlement executed by the parties under Section 54 of the TMA and therefore BLM's appeals in relation to the Penalty have been withdrawn.

207. As we have noted in paragraph 70 above, the Respondents are no longer pursuing their case in relation to the interest in respect of the English Law Participation Claims. The Respondents agree that BLM's appeal in relation to the interest in respect of the English Law Participation Claims should be allowed and they have paid to BLM the UK income tax previously withheld in respect of that interest. Since that part of the dispute was not resolved by way of a settlement executed by the parties under Section 54 of the TMA, the parties have asked us to record in this decision that BLM's appeal in relation to the interest in respect of the English Law Participation Claims is allowed.

ACKNOWLEDGEMENT

208. Finally, we would be remiss if we did not pay tribute in this decision to the good humour, clarity and intellectual rigour of the advocacy of both presenting counsel, Mr Brinsmead-Stockham and Mr Grodzinski, in making their submissions in this case and to Mr Magee for the thoroughness he displayed in his preparation of the Respondents' skeleton argument and in providing his assistance to Mr Brinsmead-Stockham. All three counsel have been of considerable assistance to us in reaching the conclusions set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

209. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 22 AUGUST 2022