Neutral citation: [2024] UKUT 00152 (TCC)

Appeal number: UT/2022/000144

INCOME TAX – meaning of Article 12(5) of the UK-Ireland double tax convention – whether the FTT erred in law in considering whether persons concerned in assignment of a debt claim had main purpose of taking advantage of Article 12(1) of the UK-Ireland double tax convention – no– appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

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

-and-

BURLINGTON LOAN MANAGEMENT DAC — **Respondent**

TRIBUNAL: **MR JUSTICE RICHARDS**
JUDGE ANDREW SCOTT

Sitting in public at Rolls Building, Fetter Lane, London on 20 and 21 February 2024 with further written submissions on 14 March 2024

John Brinsmead-Stockham KC and Edward Hellier, instructed by the General Counsel and Solicitor for His Majesty's Revenue & Customs, for the Appellants

Sam Grodzinski KC, instructed by Simmons & Simmons LLP, for the Respondent

DECISION

Introduction

1. The Respondent company ("BLM") is resident in Ireland for the purposes of the UK-Republic of Ireland double taxation convention ("the UK-Ireland treaty" or "the treaty"). In 2018 it took an assignment (the "Assignment") of a debt claim (the "SAAD Claim") from SAAD Investments Company Limited ("SICL"), a company resident in the Cayman Islands. As a result of the Assignment, BLM became entitled to receive payments of yearly interest in the administration of Lehman Brothers International (Europe) ("LBIE"), which was a company resident in the United Kingdom.

2. As a result of ss. 368(2) and 369 of the Income Tax (Trading and Other Income) Act 2005, interest with a source in the United Kingdom is subject to income tax in the hands of a non-UK resident company. It was not in dispute that the interest in respect of the SAAD Claim had a UK source. A UK resident person (such as LBIE) paying yearly interest to a non-UK resident is subject to an obligation under s.874 of the Income Tax Act 2007 ("ITA 2007") to deduct an amount representing income tax on the interest at the basic rate of income tax (which was 20% at the relevant time). The income tax deducted then discharges in full the liability of the non-UK resident company to income tax on the interest: see ss.815, 816(1)(a) and 825(2)(a) of that Act. We refer to the amount withheld from the interest as "UK WHT".

3. The UK's domestic taxing provisions have effect subject to any applicable double tax convention which has been incorporated into UK law under s.2 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA"). If the UK is a party to a convention that allocates sole taxing rights to the other contracting party in respect of particular income, the effect of s.6 of TIOPA is that the domestic tax provisions charging the income to UK tax have no effect.

4. Article 10 of the UK-Cayman Islands double tax convention provides that "items of income not dealt with in the foregoing Paragraphs of this Arrangement arising in a Territory and paid to a resident of the other Territory may be taxed in the first-mentioned Territory." As interest is not dealt with in the preceding provisions of the treaty, the UK's domestic tax provisions described above apply. Relief from double taxation is afforded by Article 11 of that treaty: the Cayman Islands would give a credit for the UK tax against any Cayman Islands tax chargeable in respect of the same interest.

5. Consequently, if SICL had retained the SAAD Claim, the interest payable by LBIE in respect of that claim would have been subject to an obligation to deduct an amount representing income tax at a rate of 20%. The tax deducted would have satisfied SICL's liability to UK income tax. Any relief for double taxation available under the law of the Cayman Islands (as a credit against UK tax) would have eliminated any double taxation but, economically, SICL would have been subject to a tax cost of at least 20% of the interest.

6. By contrast, Article 12(1) of the UK-Ireland treaty provides that interest derived and beneficially owned by a resident of a Contracting State is taxable only in that State. Once the SAAD Claim was assigned to BLM, it was beneficially owned by it and, as an Irish resident, it follows that, if Article 12(1) of the treaty applied, the interest in respect of the SAAD Claim

was taxable only in Ireland. In that case, s.6 of TIOPA would have applied and the UK domestic taxing provisions would not have been engaged.

7. However, the application of Article 12 was subject to an anti-abuse measure (Article 12(5)). If Article 12(5) applied (so that Article 12(1) did not), both the UK and Ireland retained their taxing rights in respect of the SAAD Claim interest. The interest would then be taxable in the UK as described above and would also be subject to Irish corporation tax so far as it comprised part of the Irish company's taxable income. Under Article 21(1)(a) and (3) of the UK-Ireland treaty any UK income tax would be allowed as a credit against any Irish tax computed by reference to the same income.

8. At the relevant time, trading income was subject in Ireland to a corporation tax rate of 12.5% while a higher rate of 25% applied to income from an excepted trade (as defined in Part 2 of the Taxes Consolidation Act 1997) and to non-trading income (for example, rental and investment income). There was no evidence before the FTT as to how the SAAD Claim interest was actually taxed in Ireland in the hands of BLM. But it is clear that, as with the case of the application of the UK-Cayman Islands treaty to SICL, BLM would be subject to an absolute cost of at least 20% of the interest if Article 12(1) of the UK-Ireland treaty did not apply.

9. In its decision (the "Decision") reported at *Burlington Loan Management DAC v HMRC* [2022] UKFTT 290 TC, the First-tier Tribunal (Tax Chamber) (the "FTT") concluded that the Assignment did not engage Article 12(5) of the UK-Ireland treaty. The question raised in this appeal is whether we should interfere with that conclusion. References to numbers in square brackets are to paragraphs of the Decision unless the context indicates otherwise.

The relevant provisions of the UK-Ireland treaty

10. The FTT quoted Article 12 of the UK-Ireland treaty in full at [72] of the Decision the material parts of which are:

> (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
>
> …
>
> (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.

11. The original treaty having been amended in 1998, those were the provisions of the UK-Ireland treaty in force at the material time. Before that amendment, Article 12(5) contained an exception for "bona fide commercial" transactions and read as follows:

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

12. It was common ground that the process by which SICL transferred the SAAD Claim to BLM involved an "assignment of the debt-claim in respect of which the interest is paid" so that Article 12(5) was capable of application. The central question before the FTT was whether the main purpose, or one of the main purposes, of any person concerned with that assignment was to take advantage of Article 12(1) of the treaty by means of that assignment.

13. Before the FTT, there was some debate as to the proper approach to the construction of Article 12(5). However, the following conclusions of the FTT are now common ground:

> (1) Determining a person's main purpose involves a question of fact which is to be answered "upon consideration of all the relevant evidence… and the proper inferences to be drawn from that evidence" ([86(3)]) - see *IRC v Brebner* [1967] 2 AC 18).
>
> (2) Article 12(5) is concerned with the subjective purposes of the persons concerned.
>
> (3) Article 12(5) cannot be considered solely by reference to the stated subjective intentions of the relevant persons. Even if a witness correctly and honestly describes what was in their mind at the relevant time in terms that do not refer to the treaty, it remains possible that the person still has a main purpose of taking advantage of Article 12 (see [47] of the judgment of Newey LJ in *Travel Document Service and another v HMRC* [2018] STC 723).
>
> (4) Nor can Article 12(5) be addressed solely by reference to those persons' conscious motives. Subconscious motives are capable of amounting to "purposes" as well, particularly since some consequences of an action are so inevitably and inextricably involved in the action that, unless merely incidental, they must be taken to be a purpose of that action (see the judgment of Millett LJ in *Vodafone Cellular Ltd v Shaw* [1997] STC 734 at 742h).
>
> (5) The "inevitable and inextricable consequences" of the Assignment form part of the overall factual matrix to be considered when reaching a conclusion as to a person's subjective intentions. However, the mere fact that the Assignment had certain inevitable and inextricable consequences does not of itself mean that achieving those consequences was the purpose or a main purpose of that assignment.
>
> (6) The concept of a "main purpose" carries with it some connotation of importance. It does not just require the purpose to be "more than trivial" (see [48] of Newey LJ's judgment in *Travel Document Service*).
>
> (7) Something can be a "main purpose" if it is one of several main purposes.
>
> (8) SICL could be a "person concerned" with the assignment of the SAAD Claim even though it was not a resident of Ireland or the UK.
>
> (9) HMRC have the burden of proving that Article 12(5) applies.

14. Two aspects of the FTT's construction of Article 12(5) are disputed:

(1) The FTT found that the phrase "take advantage" in Article 12(5) has a "negative sense" in conveying the concept that entering into an assignment of a debt-claim with a main purpose of benefiting from Article 12(1) by means of that assignment amounts to an abuse of the Article. However, the FTT concluded that Article 12(5) is not confined to abusive transactions which involve artificial steps or arrangements. In its Respondent's Notice, BLM invites this Tribunal to conclude that the FTT was wrong and that Article 12(5) is limited to transactions that involve artificial steps or arrangements.

(2) At [149] and [150], the FTT found that a transferor of an interest-bearing debt has a main purpose of "taking advantage" of Article 12(1) of the treaty only if the transferor knows that the purchaser is entitled to the benefit of Article 12(1) specifically. It would not be enough for the transferor to know merely that the purchaser is entitled to some exemption from UK income tax on the interest even if, as matters transpire, the purchaser's exemption does stem from Article 12(1) of the treaty. HMRC challenge this conclusion of law.

The FTT's findings of primary fact

15. None of the findings of primary fact summarised in this section are challenged.

16. LBIE went into administration on 15 September 2008. A secondary market emerged in claims where a creditor had a "proved claim" entitling them to some payment as part of the administration ([18] to [20]). That secondary market included an auction process established by LBIE's administrators under which eligible creditors with claims having a value of less than £10 million could auction those claims to the highest bidder.

17. Unusually for an administration, LBIE's administrators were able to realise what the FTT termed the "Surplus" because LBIE's assets exceeded its proved claims. The Insolvency (England and Wales) Rules 2016 entitled holders of proved claims to interest ("Post-Administration Interest"). That led to the question whether s. 874 of ITA 2007 applied so that the Post-Administration Interest was payable under deduction of UK income tax by LBIE at the rate of 20%. By December 2017, the state of the law was as set out in a judgment of the Court of Appeal to the effect that the Post-Administration Interest was yearly interest, overturning the decision of Hildyard J in the High Court. However, there was an appeal to the Supreme Court which gave its judgment in 2019, after the Assignment had taken place.

18. BLM is a substantial investment company. Its investment manager was Davidson Kempner Capital Management, a New York based asset manager. As at the date of its 2017 financial statements, BLM held (directly or indirectly) about $6.9 billion of assets ([14] and [15]). It started acquiring proved claims in the LBIE administration in 2011 and came to own 443 such claims ([30] to [33]). BLM purchased some claims (including the SAAD Claim) after the vendors had received the principal amount. In such cases, BLM was purchasing the right to future payments which might arise such as the Post-Administration Interest.

19. SICL, the former owner of the SAAD Claim, had received the principal amount of the SAAD Claim on 7 September 2016. In February 2018, SICL, which was then in liquidation, instructed a third-party broker ("Jefferies") to market the SAAD Claim. BLM was the successful bidder.

20. The commercial terms of the transaction were agreed on 8 February 2018. Those commercial terms were set out in a written contract dated 12 February 2018 (referred to in that contract as the "Trade Date"). Completion took place in two stages on 9 March 2018. At the first stage, the liquidators of SICL assigned the SAAD Claim to Jefferies for a consideration of £82,400,000. At the second stage, Jefferies assigned the SAAD Claim to BLM for a consideration of £83,550,000. Once SICL transferred the SAAD Claim to Jefferies, it was preordained that Jefferies would assign it to BLM ([165(7)].

21. On 25 July 2018, the gross amount of the Post-Administration Interest payable in respect of the SAAD Claim was £90,736,521.36. LBIE's administrators paid 80% of this sum to BLM (£72,589,217.09) in cash on that date. They withheld 20% of the Post-Administration Interest (£18,147,304.27) under s.874 of ITA 2007 and paid it over to HMRC in September 2018 ([6]).

22. The economic effect of these transactions can be summarised as follows:

> (1) If SICL had retained the SAAD Claim, it would have received £72,589,217.09 on 25 July 2018 (which represented 80% of the Post-Administration Interest after UK withholding tax at the rate of 20%). The sum withheld by LBIE would have satisfied SICL's liability to UK income tax. Accordingly, SICL's post-tax receipt would have been £72,589,217.09.
>
> (2) By assigning the SAAD Claim, SICL obtained a consideration of £82,400,000 (90.81% of the Post-Administration Interest).
>
> (3) Jefferies made a profit of £1,150,000 on the transaction – 1.27% of the SAAD Claim interest.
>
> (4) BLM had paid £83,550,000 for the SAAD Claim (92.08% of the Post-Administration Interest). It received cash of £72,589,217.09 from LBIE's liquidators. However, if BLM was entitled to the benefit of Article 12(1) of the UK-Ireland treaty, it would be able to obtain a repayment from HMRC of the sum withheld (£18,147,304.27) and, if it obtained that repayment, would have made a profit of 7.92% of the Post-Administration Interest (ignoring, for these purposes, the time cost associated with having to wait for the repayment).

23. The Assignment also operated to insulate SICL from risks it would have suffered if it had continued to hold the SAAD Claim and transferred those risks to BLM. The risks in question were:

> (1) The "liquidation lacuna risk" – namely, the risk that the administration of LBIE would end with LBIE being placed into liquidation with the result that interest on the SAAD Claim would no longer be payable [164(1)(a)]. This risk was thought to be insignificant at the time (see for example [80(5)(a)]).
>
> (2) The "late termination risk" – namely, the risk that Post-Administration Interest was calculated, not from the date of commencement of LBIE's administration, but rather from the later date on which SICL had terminated the contract that gave rise to the SAAD Claim. At the time of the Assignment, the law was as stated in a judgment of the Court of Appeal and was favourable to the holder of the SAAD Claim. However, there was a pending application for permission to appeal to the Supreme Court.

24. The Assignment also meant that SICL no longer needed to consider the "withholding tax risk" – namely, the residual uncertainty as to whether Post-Administration Interest was subject to UK withholding tax at all (see paragraph 17 above). If the Supreme Court decided that the Post-Administration Interest was not subject to UK WHT, SICL might well consider that, with hindsight, it had sold the SAAD Claim too cheaply. However, it had no ongoing exposure to UK WHT on the Post-Administration Interest and, for its part, BLM thought that the incidence of UK WHT was not a risk at all since it expected to be able to reclaim any UK WHT by virtue of Article 12(1) of the treaty.

The FTT's factual findings as to the knowledge of BLM and SICL

25. The FTT made the following findings as to the state of BLM's knowledge:

> (1) BLM knew, at the time of the Assignment, that in the absence of a sale the value of the SAAD Claim to SICL was approximately 80% of the amount of Post-Administration Interest payable on it and that therefore SICL would be seeking to achieve the best price that it could in excess of that figure ([164(1)]). That was for the reasons set out above: the UK WHT would represent an absolute cost to SICL. The reason the FTT described the value as "approximately" 80% was because, in addition to the withholding tax risk, there was the liquidation lacuna risk and the late termination risk.
>
> (2) BLM knew, at the time of the Assignment, that the value of the SAAD Claim to it was approximately 100% of the amount of Post-Administration Interest. That was because BLM was aware that it could seek repayment from HMRC of the amount of any UK WHT deducted ([164(3)]. The word "approximately" was used because of the presence of the liquidation lacuna and late termination risks.
>
> (3) BLM knew that its exposure to the liquidation lacuna risk and late termination risk was no different in scale from SICL's exposure to those risks ([164(2)]).
>
> (4) BLM knew that there could be other potential bidders who could expect to reclaim the UK WHT or would not be subject to UK tax on the Post-Administration Interest and who would therefore value the SAAD Claim at approximately 100% of that interest. It therefore knew that it had to offer a realistic price ([164(3)].
>
> (5) At [164(4)], the FTT decided that BLM took into account the following factors in the following order when setting the price it was prepared to offer:
>
> > (a) first, and, in the FTT's view, most importantly, the quantum and timing of the expected cash flows from the SAAD Claim;
> >
> > (b) second, its need to obtain an annual return of 10% on assets that it purchased;
> >
> > (c) third, its appraisal of the risk of loss if the late termination risk materialised; and
> >
> > (d) finally, its appraisal of the price which SICL would be likely to accept bearing in mind that (i) if SICL had retained the SAAD Claim, it would obtain only 80% of the Post-Administration Interest because of

> the UK WHT risk (assuming that the Court of Appeal's decision on the application of UK WHT was not reversed by the Supreme Court), and (ii) BLM was not the only potential bidder for the SAAD Claim.

26. The FTT's reasoning at [164(4)] also made it clear that BLM realised that, even though SICL could only expect to retain 80% of the Post-Administration Interest if it did not sell the SAAD Claim, BLM nevertheless needed to offer a price that was more than 80% of that interest. That was because of the presence of other potential purchasers who would not be subject to the withholding tax and so could offer more than 80%: for example, companies benefiting from other treaties, UK resident companies with losses to offset against the income or exempt investors such as pension funds. It follows from this that the FTT's finding was that BLM determined its bid by assuming that SICL would transfer the SAAD Claim to someone for whom UK WHT would not be an absolute cost. Accordingly, BLM needed to pitch its offer attractively so that SICL did not ask Jefferies to market the SAAD Claim more widely.

27. A further consequence of the FTT's finding is that BLM would have realised that it could only make a profit on the transaction if it obtained the benefit of Article 12(1) of the UK-Ireland treaty.

28. The FTT made the following findings as to the state of SICL's knowledge:

> (1) SICL knew that the value of the SAAD Claim to it was approximately 80% of the Post-Administration Interest because UK WHT would represent an absolute cost to it ([165(1)].
>
> (2) SICL knew that there were people in the market for whom UK WHT would not be an absolute cost and who would therefore be able to offer a purchase price for the SAAD Claim greater than its value to SICL ([165(2)].
>
> (3) SICL was seeking to achieve the greatest possible price for the SAAD Claim bearing in mind the potential market [165(3)].
>
> (4) When the parties agreed the commercial terms of the Assignment on 8 February 2018, SICL did not know, and did not care about, the identity of the purchaser [165(4)]. On 8 February 2018, SICL could infer from the price it had been offered that the successful bidder must have been entitled to some kind of exemption from UK WHT but it did not know that the successful bidder would be entitled to the benefit of Article 12(1) of the UK-Ireland treaty ([188] and [192(2)]).
>
> (5) Once the commercial terms were agreed, SICL considered itself "morally bound" to proceed with the Assignment.
>
> (6) After agreeing the commercial terms, SICL took steps to ascertain the identity of the purchaser of the SAAD Claim. However, it did not do so with a view to ascertaining the location of BLM's tax residence since, wherever the purchaser was resident, SICL by then considered itself morally bound to assign the SAAD Claim.
>
> (7) On 12 February 2018, when it entered into a binding agreement to transfer the SAAD Claim, SICL knew that the purchaser was BLM and that BLM was resident in Ireland for the purposes of the treaty.

The FTT's conclusions

29. At [169], the FTT noted that, as there were two relevant parties (SICL and BLM), each could have had a main purpose of "taking advantage" of Article 12(1) of the treaty either for itself or by enabling its counterparty to do so. That meant that there were four permutations which the FTT addressed as Questions 1 to 4 at [173] to [203]. The focus of argument before us was on how the FTT had dealt with Questions 1 and 3. HMRC confirmed at the hearing that it was not, and never had been, part of their case that Questions 2 and 4 were applicable (either party having a main purpose of enabling the other to take advantage of the treaty).

30. The FTT dealt with Question 1 (whether BLM had a main purpose of "taking advantage" of Article 12(1) for itself) at [173] to [181].

31. At [174] and [175], the FTT said that it was necessary to distinguish a person's "purpose" for doing something from that person's understanding of the consequences of doing it. It characterised BLM's awareness that Article 12(1) would entitle it to receive Post-Administration Interest free of UK WHT as part of the "setting" in which BLM made its offer to acquire the SAAD Claim rather than an independent "purpose" of that acquisition.

32. At [176], the FTT reasoned as follows:

> 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.

33. At [177] to [180], the FTT considered what it was that HMRC found objectionable about BLM's acquisition of the SAAD Claim in circumstances where they had not sought to invoke Article 12(5) in connection with BLM's previous acquisitions of interest-bearing claims against LBIE. The FTT believed that HMRC attached significance to the fact that BLM had paid a purchase price of 92% of the amount of the Post-Administration Interest. The FTT understood HMRC's submission that this "nicely split" the difference between the 80% figure that SICL could expect after UK WHT and the 100% figure that BLM could expect following successful reliance on Article 12(1) with some "juice for Jefferies as the middle-man in between them".

34. At [179], the FTT set out its understanding that, if BLM had acquired the SAAD Claim for 80% of the amount of Post-Administration Interest rather than 92%, HMRC would not have alleged that BLM had a main purpose of "taking advantage" of Article 12(1). The FTT asked why, if that was right, the position should be any different simply because BLM agreed to pay a higher price.

35. Next, at [180], the FTT compared what it saw as HMRC's attitude to previous LBIE claims that BLM had purchased with their approach to the purchase of the SAAD Claim. It said that HMRC had "quite rightly accepted" that when it purchased those previous LBIE claims, BLM did not have a main purpose of "taking advantage" of Article 12(1). The FTT concluded that, having done so, HMRC "must logically accept that the same holds true when it comes to determining BLM's main purposes in acquiring the SAAD Claim".

36. The FTT's conclusion was, accordingly, that BLM did not have a main purpose of taking advantage of Article 12(1) for itself.

37. The FTT's analysis of Question 3, namely whether SICL had a main purpose of "taking advantage" of Article 12(1) itself, was at [186] to [201]. At [192], the FTT noted (i) its conclusion that SICL's only purpose in entering into the transaction was to sell the SAAD Claim for the best available price; (ii) on 8 February 2018, when the commercial terms were agreed, SICL knew only that the purchaser had some kind of entitlement to a withholding tax exemption but did not know that it was relying on Article 12(1) of the UK-Ireland treaty; and (iii) on 12 February 2018 (the Trade Date), SICL knew that the purchaser was BLM and would be relying on Article 12(1) of the treaty. The FTT considered whether these three propositions were sufficient to make "taking advantage" of Article 12(1) one of SICL's main purposes in entering into the Assignment.

38. At [193], the FTT said that, if it did, this would be a "somewhat surprising conclusion" because:

> 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.

39. The FTT concluded that this could not be the correct effect of Article 12(5). At [195], the FTT said that such an interpretation would have an "enormous impact on the secondary debt market". At [196] to [200], the FTT explained, by reference to a report from the OECD Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies" ("the Conduit Report") why the Assignment was conceptually different from cases of "treaty shopping" dealt with in that report since, following the Assignment, SICL retained no ongoing economic interest in the SAAD Claim, having sold it outright. That introduced the

FTT's conclusion at [201] underpinning its determination that SICL did not have a main purpose of taking advantage of Article 12(1) for itself:

> [W]e 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.

The Grounds of Appeal and Respondent's Notice

40. The FTT gave HMRC permission to appeal. Although HMRC's Grounds of Appeal were not numbered in this way, we find it helpful to divide our analysis of HMRC's appeal into the following grounds:

> (1) Ground 1 – the FTT misconstrued Article 12(5) of the UK-Ireland treaty in the manner summarised in paragraph 14(2) above. As a result, it approached the analysis of SICL's purpose wrongly.
>
> (2) Ground 2 – the FTT made an overarching error that infected its analysis of both SICL's and BLM's purpose by failing to appreciate that the sole (or, at least, a main) economic basis for the Assignment was UK WHT arbitrage resulting from BLM's reliance on Article 12(1) of the UK-Ireland treaty.
>
> (3) Ground 3 – the FTT made specific errors in its determination of BLM's purpose.
>
> (4) Ground 4 – the FTT made specific errors in its determination of SICL's purpose.
>
> (5) Ground 5 – an *Edwards v Bairstow* "irrationality" or "perversity" challenge.

41. Ground 1 involves pure propositions of law. HMRC accept that Grounds 2 to 5 are challenges to evaluative factual conclusions that the FTT reached and that a high hurdle must be overcome for such a challenge to succeed.

42. By its Respondent's Notice, BLM seeks to revive the argument summarised in paragraph 14(1) above rejected by the FTT.

Ground 1: meaning of Article 12(5) of UK-Ireland treaty

43. The approach to the interpretation of the UK-Ireland treaty was common ground between the parties. The FTT noted at [83] that the principles enumerated in cases such as *Smallwood v The Commissioners for Her Majesty's Revenue and Customs* [2010] STC 2045 per Patten LJ at [26] to [29], *The Commissioners for Her Majesty's Revenue and Customs v Anson* [2015] STC 1777 per Lord Reed at [54] to [56] and [110] and [111] and *Fowler v The Commissioners for Her Majesty's Revenue and Customs* [2020] STC 1476 at [16] to [19] 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; 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)).

44. It was also common ground (see [111]) that, even where they post-dated Article 12(5) of the UK-Ireland treaty, OECD and UN materials could be taken into account in interpreting the treaty: see, for example, Robert Walker J in *Memec plc v Inland Revenue Commissioners* [1996] STC 1336 at 1349d.

45. Unlike the FTT (reflecting the submissions of the parties) who started with the ordinary meaning of the words used in Article 12(5) of the UK-Ireland treaty, we start our analysis by considering the object and purpose of the treaty having regard to the relevant OECD and other materials. That, of course, is not a substitute for considering the text of the provision or the various textual points that the parties make on it. However, it will enable us to put the text in context.

46. In this connection, we are reminded of the comments of Lady Rose in the Supreme Court in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] UKSC 18 at [102] to [107] where she deprecated the approach of starting with dictionary definitions before considering the context and purpose of the statutory scheme, noting that this accorded with an earlier judgment of the Supreme Court in *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546 where Lord Mance had said this at [10]:

> 'the notion of words having a natural meaning' is not always very helpful …, and certainly not as a starting point, before identifying the legislative purpose and scheme.

47. A provision similar to Article 12(5) of the UK-Ireland treaty is not included in the OECD model convention. But the commentary on the OECD model convention (the 2015 version – which was the one in force at the material time) does contain material that, in our view, should be taken into account in determining the object and purpose of Article 12(5) of the UK-Ireland treaty.

48. In the commentary on Article 1 of the OECD model convention, paragraphs 7 to 26 contain material under the heading "Improper use of the Convention". The commentary notes that:

> 7.1 Taxpayers may be tempted to abuse the tax laws of a State by exploiting the differences between various countries' laws. Such attempts may be countered by provisions or jurisprudential rules that are part of the domestic law of the State concerned. Such a State is then unlikely to agree to provisions of bilateral double taxation conventions that would have the effect of allowing abusive transactions that would otherwise be prevented by the provisions and rules of this kind contained in its domestic law. Also, it will not wish to apply its bilateral conventions in a way that would have that effect.
>
> 8. It is also important to note that the extension of double taxation conventions increases 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 taxation conventions.

> 9. This would be the case, for example, if a person (whether or not a resident of a Contracting State), acts through a legal entity created in a State essentially to obtain treaty benefits that would not be available directly. […]
>
> 9.1 This raises two fundamental questions that are discussed in the following paragraphs:
>
> — whether the benefits of tax conventions must be granted when transactions that constitute an abuse of the provisions of these conventions are entered into (see paragraphs 9.2 and following below);
>
> […]
>
> [*Rest of para. 9.1 and para. 9.2 not reproduced because they relate to how domestic law might prevent treaty abuse*]
>
> 9.3 Other States prefer to view some abuses as being abuses of the convention itself, as opposed to abuses of domestic law. These States, however, then consider that a proper construction of tax conventions allows them to disregard abusive transactions, such as those entered into with the view to obtaining unintended benefits under the provisions of these conventions. This interpretation results from the object and purpose of tax conventions as well as the obligation to interpret them in good faith (see Article 31 of the Vienna Convention on the Law of Treaties).
>
> 9.4 Under both approaches, therefore, it is agreed that States do not have to grant the benefits of a double taxation convention where arrangements that constitute an abuse of the provisions of the convention have been entered into.
>
> 9.5 It is important to note, however, that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions. (our emphasis)

49. The commentary then goes on to observe that where specific avoidance techniques have been identified or are especially problematic, it will often be useful to include provision directly addressing the concern. At paragraph 11, the commentary refers to a particularly prevalent form of "improper" use of the OECD model convention discussed in the Conduit Report. It notes that there has been a "growing tendency towards the use of conduit companies to obtain treaty benefits not intended by the Contracting States" and how "this has led to an increasing number of member countries to implement treaty provisions (both general and specific) to counter abuse". The commentary then discusses a wide number of examples of possible solutions open to member countries to deal with particular cases. Among the examples set out at paragraph 21.4 under the heading "Anti-abuse rules dealing with source taxation of specific types of income" is a form of provision that is, in all material respects, the same as Article 12(5) of the UK-Ireland treaty.

50. Paragraph 5 of the Conduit Report sets out four different examples of abuse. The first example describes how a person who is a resident of a non-treaty State (State X) beneficially owns interest which arises in another State (State B), which has a treaty with State A. The resident of State X sets up a company in State A and transfers the bond to the company. Interest is paid to the company free of withholding tax as a result of the treaty between State A and

State B. The company is subject to no or very low tax in State A. The interest received by the company is then transferred to a resident of State X as a loan.

51. As noted in paragraph 6 of the Conduit Report, the conduit company "takes advantage" of the treaty provisions but the economic benefit goes to a person (resident in State X) not entitled to use the treaty. The problem is created exclusively by the treaty itself: the domestic tax laws of the source country (in which the advantage arises) are adequate as the State generally taxes all non-residents (including the conduit company). Paragraph 7 of the Conduit Report explains why this is unsatisfactory:

> (1) treaty benefits are economically extended to persons resident in a third State in a way unintended by the contracting States;
>
> (2) income may be wholly exempted from taxation or subject to inadequate taxation; and
>
> (3) the State of residence of the ultimate beneficiary has little incentive to enter into a treaty with the source State as it can indirectly receive the treaty benefits without the need to provide reciprocal benefits.

52. In our view, the UN report on the model double taxation convention between developed and developing countries is consistent with the commentary on the OECD model convention and the Conduit Report but adds little to the detailed commentary that we have set out above.

53. BLM relied upon some non-statutory Parliamentary materials. There was a dispute as to whether those materials were admissible. We express no view on that issue and nothing that follows should be taken as suggesting that we consider that the materials are admissible. Nevertheless, we have considered the materials to which BLM referred, concluding that they do not take the analysis any further.

54. On 2 December 1998, in the Standing Committee debate on the 1998 Order (which, among other things, altered the UK-Ireland treaty to include Article 12(5) in its present form), Ms Dawn Primarolo (the then Financial Secretary to the Treasury ("the FST")) noted in her opening statement that:

> The third protocol [which amended Article 12(5)] introduces tighter anti-avoidance provisions, aimed at countering arrangements intended to take advantage of the convention. Such an arrangement could consist of routing interest from the UK through Ireland to a third country to take advantage of the relief from UK tax under the convention.

55. The first sentence says nothing more than is said in a number of places in the commentary on the OECD model convention. The second sentence is couched in terms of an example ("such an arrangement could") and mentions the paradigm example of a conduit company in the same manner as the OECD materials.

56. The FST concluded the debate by answering a question posed by the Opposition spokesman (Mr Nick Gibb) as to the intention in changing the wording of Article 12(5) of the treaty. She responded to this query at the very end of the debate in this way:

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

57. That simply indicates that Article 12(5) is an anti-abuse measure. The reference to preventing "artificial arrangements" is in our view just a different way of saying what the FST said at the beginning of the debate.

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

The Respondent's Notice

59. The OECD materials referred to above make it clear that the artificial use of a conduit company is a prime example of the improper use of the UK-Ireland treaty at which Article 12(5) is targeted. However, even on a purposive interpretation of Article 12(5), that article cannot be interpreted as confined to cases which involve only "artificial" steps or arrangements. Article 12(5) makes no reference to concepts such as "artificiality". If the contracting States had intended to catch only those matters, they could very easily have made express provision in those terms. Indeed, as HMRC submitted, the previous version of the UK-Ireland treaty with its exclusion for bona fide commercial arrangements served to limit the nature of the arrangements to which Article 12(5) applied. The absence of a similar exclusion in the revised treaty reinforces our conclusion.

60. Accordingly, we reject BLM's Respondent's Notice that the FTT erred in failing to limit the application of Article 12(5) to the creation or assignment of debt claims involving only "artificial" steps or arrangements.

HMRC's Ground 1

61. We consider that the core purpose of Article 12 of the UK-Ireland treaty is simply to determine which of the two treaty States (the UK and Ireland) should have taxing rights over interest with a source in one of the States where it is beneficially owned by a resident of the other. The UK-Ireland treaty has expressly provided that, as between the UK and Ireland, unless Article 12(5) applies, it is the residence State alone that has taxing rights in relation to interest arising in the source State so long as the person in the residence State beneficially owns the interest. HMRC submitted before us that the purpose of Article 12(1) of the UK-Ireland treaty is to facilitate and encourage lending between the UK and Ireland by seeking to eliminate the risk of double taxation on such loans. We are prepared to accept that this is a purpose of Article 12, but do not consider that it is the only purpose. In any event, this appeal concerns the means by which the contracting States have sought to achieve the overall objective of Article 12. They have done so by giving the residence State the sole taxing rights over interest unless Article 12(5) applies.

62. The situation provided for in the UK-Ireland treaty can be contrasted with that provided for in the UK's treaty with the Cayman Island where, as explained above, there is no equivalent provision to Article 12 of the UK-Ireland treaty. The UK-Cayman Islands treaty does not

allocate taxing rights as between the UK and Cayman Islands. Relief from double taxation is instead afforded by Article 11 of that treaty: the Cayman Islands would credit the UK tax paid against any Cayman Island tax.

63. If Article 12(5) of the UK-Ireland treaty is applicable in relation to the Assignment, the position would be, in substance, as it is under the UK-Cayman Islands treaty: the UK's domestic taxing rights would apply and any double taxation of the interest would be relieved through the application of Article 21 of the UK-Ireland treaty.

64. In determining whether there has been abuse of the UK-Ireland treaty in the case of the assignment of the SAAD Claim, the question has to be answered by reference to both contracting States. It is, as BLM submits, wrong in principle to answer the question as if Article 12 proceeds from a starting point that interest on the SAAD Claim "should" be subject to UK WHT since that was the pre-existing position while SICL held it. Article 12(5) is not to be read as if it were a provision contained in a UK statute (concerned only with UK taxation) and as providing for a UK tax advantage to be eliminated if a party had a main purpose of avoiding UK taxation.

65. In our view, the correct starting point is the proposition that, unless there is an abusive arrangement falling within Article 12(5), BLM, a resident of Ireland and beneficial owner of the SAAD Claim, is to be taxed only in Ireland on the Post-Administration Interest. The question, therefore, is whether there is something abusive, in the particular circumstances of this case, for Ireland alone to tax interest beneficially owned by a company resident in its territory.

66. We now turn to HMRC's specific criticism of the FTT's self-direction as to the meaning of Article 12(5) in considering whether SICL (as the seller of the SAAD Claim) had a main purpose of taking advantage of Article 12(1) of the treaty. HMRC's interpretation of Article 12(5) was put in these terms in their skeleton argument:

> […] the correct analysis, on a purposive construction of Article 12(5), is that it is sufficient for Article 12(5) to apply that: (i) SICL knew that BLM was exempt from UK WHT; (ii) it was a "main purpose" of SICL in being involved in the assignment of the SAAD claim to benefit from BLM's exemption from UK WHT; and (iii) the exemption in question was in fact afforded by Article 12(1), even in circumstances where SICL had not "specifically identified" Article 12(1) as the relevant provision.

67. We accept that a tribunal of fact considering Article 12(5) may well consider it relevant to determine the extent of a person's knowledge of the treaty, including whether a party has taken steps to disguise their knowledge or avoid obtaining specific knowledge of its provisions. But those matters would simply form part of the factual enquiry to determine whether a person concerned in the creation or assignment of a debt claim has a main purpose of improperly taking advantage of the Article 12(1) of the UK-Ireland treaty. We respectfully consider that the FTT went too far in saying, at [150], that a necessary condition for Article 12(5) to apply was that SICL knew that the purchaser of the SAAD Claim would be relying on Article 12(1) specifically. We consider that to be an unjustified gloss on the actual words chosen by the contracting States in concluding the treaty.

68. However, we cannot accept HMRC's submission either. Their submission seeks always to apply Article 12(5) of the UK-Ireland treaty in a case where the person assigning the interest on a debt claim (in this case, SICL) knew that the purchaser would not suffer UK WHT and consequently sought to obtain an economic advantage for itself by sharing in the saving of UK WHT in circumstances where the purchaser had an exemption from UK WHT. The only thing that mattered was that the exemption was actually attributable to the UK-Ireland treaty even if the seller did not know the basis of the purchaser's exemption.

69. In our view, it is a question for the FTT to determine the subjective purposes of both the seller and the purchaser and, in so doing, to consider all the circumstances of the case. But the question before the FTT is, as we have explained above, directed at determining whether there has, by means of the particular transaction concerned, been an abuse of the UK-Ireland treaty.

70. HMRC's submission, although expressed as a purposive construction of Article 12(5), in effect turns the provision into something fundamentally different: the provision would be read as if it were directed at the avoidance of UK WHT by the seller and was applicable whether or not the seller actually knew the basis on which the purchaser did not suffer a UK tax charge. In our judgment, even read purposively, that is not what Article 12(5) says. Nor do we consider that HMRC's submission is consistent with the purpose and object of Article 12 of the UK-Ireland treaty as we have explained it.

Grounds 2 to 4: introduction

71. Under these grounds HMRC do not challenge any of the primary findings of fact by the FTT. Rather, HMRC are challenging the way in which the FTT went about the evaluative exercise required to determine, as a subjective matter, the purpose of BLM and SICL in entering into the Assignment.

72. It is important to be clear therefore as to the circumstances in which evaluative judgments may be interfered with by appellate courts. The Supreme Court has recently set out in *Lifestyle Equities CV and another v Amazon UK Services Ltd and others* [2024] UKSC 8 the appropriate guidance which we consider should be set out in full:

> 46. […] A finding that an activity is or is not targeted at consumers in the UK necessarily involves an evaluation by the judge of a range of different facts and matters. It requires, in other words, a multifactorial assessment of the documents, the evidence and the submissions made by the parties. The evaluation is also one which, when made in that way, the trial judge is peculiarly well placed to carry out.
>
> 47. Conversely, an appeal court is inevitably at a disadvantage, as Lord Hoffmann explained in *Biogen Inc v Medeva plc* [1997] RPC 1 at 4, and so, where the application of a legal standard such as negligence or obviousness involves no question of principle, but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.
>
> 48. We consider that the position was well summarised by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29; [2014] ETMR 26 in these terms at para 114:
>
> > "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless

compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] R.P.C. 1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and, most recently and comprehensively, *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:

> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] BCC 1031, at paras 72–76. There, in a judgment to which all members of the court (McCombe LJ, Leggatt LJ and Rose LJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

50. On the other hand, it is equally clear that, for the decision to be "wrong" under CPR 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation.

73. As is clear from [49] of its judgment, the Supreme Court expressly affirmed the conclusions reached by the Court of Appeal in *In re Sprintroom Ltd*. That case has in fact previously been relied on by the Court of Appeal in two recent tax appeals: see *Cheshire Cavity Storage 1 Ltd v Revenue and Customs Comrs* [2022] EWCA Civ 305 at [85] and *Urenco Chemplants Ltd and another v Revenue and Customs Commissioners* [2022] EWCA Civ 1587 at [78].

Ground 2: the FTT overlooked the UK WHT arbitrage

74. Under this Ground HMRC submitted that the FTT failed to take account of the fact that the sole (and, in any event, a main) economic basis for the actual transaction entered into was, as they put it in their skeleton argument, "the UK WHT arbitrage resulting from BLM's reliance on Article 12(1)". Accordingly, the FTT was wrong to have concluded that BLM's ability to rely on Article 12(1) was, as per [174], "merely part of the scenery – the "setting" in which BLM made its offer for the SAAD Claim". Rather, the 20% difference in value of the SAAD Claim in the hands of SICL and BLM provided the fundamental economic basis for the Assignment. HMRC argue that avoiding the liquidation lacuna and late termination risks could not provide any non-tax rationale for the Assignment. The Assignment did not remove either risk: it just changed the party who was subject to the risks. In any event, the liquidation lacuna risk was not factored into the pricing model adopted by BLM and the contingency giving rise to the late termination risk was considered by BLM to be highly likely not to occur.

75. In HMRC's submission, the pricing of the transaction clearly demonstrated the sharing of the UK WHT among the parties. The failure of the FTT to understand the economic basis for the Assignment led it to focus, wrongly, on the existence of a market price for the SAAD Claim in a hypothetical market. It should have focused instead on the actual transaction and, if it had done so, it would have been bound to have concluded that UK WHT was the sole (or, in any event, main) reason for the Assignment taking place. By the time of the Trade Date (when the Assignment was entered into) both BLM and SICL knew about their own and their counterparty's positions in relation to UK WHT. Any commerciality in the actual transaction derived wholly from the fact that there had been UK WHT avoidance. The economic effect of the transaction was similar to a conduit arrangement: interest was being routed from the UK into the Cayman Islands via Ireland and escaping UK tax.

76. HMRC argued that the case was similar to that of *Fisher v HMRC* [2021] STC 2072 (a case dealing with the application of the UK's anti-avoidance provisions involving the transfer of assets abroad) where the Court of Appeal had found that the transaction concerned was intended to avoid betting duty with a view to securing that the company survived: the survival of the company was clearly a non-tax purpose but it could not be dissociated from the means taken to achieve that purpose. Accordingly, the transaction had a main purpose of avoiding tax. The same analysis, in HMRC's view, applied here. Obviously, a commercial company entered into the transaction to make a profit but the transaction was entered into only because of UK WHT. Once that was properly taken into account, it followed that the Assignment was a clear abuse of Article 12(1) of the UK-Ireland treaty.

77. The argument that the FTT failed to "take into account" the existence of the "arbitrage" runs into the difficulty that, throughout the Decision, the FTT showed a clear awareness of the economic effect to which HMRC refer: see for example [177]. HMRC seek to escape from this difficulty by arguing that, even if the FTT was aware of the arbitrage, it failed to feature sufficiently prominently in its reasoning and so undermined the "cogency" of its evaluative

conclusion. However, for reasons that we explain, in our judgment that simply represents a disagreement with the FTT's evaluative conclusion and does not establish an error of law.

78. It was, in our view, appropriate for the FTT to have had regard to the fact that there were potential purchasers of the SAAD Claim for whom UK WHT would not have been an issue and for whom the UK-Ireland treaty would not have been relevant. The existence of other potential purchasers with different tax attributes who were prepared to pay a price higher than 80% of the interest on the SAAD Claim for reasons wholly unconnected to the UK-Ireland treaty was plainly of relevance to both SICL and BLM. The weight to be given to that factor was a matter for the FTT.

79. In determining whether SICL had a main purpose of improperly taking advantage of the UK-Ireland treaty, the fact that both SICL and BLM were transacting at arm's length with a view to getting the best price was, in our judgment, relevant to the assessment of the purpose that SICL had in entering into the Assignment. The weight to be given to that factor was for the FTT to determine. We do not accept that the FTT proceeded on the basis that the fact the SAAD Claim was sold by way of an arm's length price was a complete answer to the application of Article 12(5). The FTT conducted a thorough assessment of all the circumstances leading up to the Assignment and, if it had considered that an arm's length deal was in itself enough to secure that Article 12(5) did not apply, its judgment would have been very differently structured and would have been considerably shorter.

80. Nor do we consider that the Court of Appeal's judgment in *Fisher* is of any assistance in the determination of this appeal. It was accepted by both parties that the decision was not binding on this Tribunal because the Court of Appeal's decision had been subsequently reversed by the Supreme Court on different grounds. Nonetheless, the Court of Appeal's reasoning could be regarded as persuasive.

81. *Fisher* concerned a provision of UK statute law in a very different context; and the relevant statutory provisions were explicitly concerned with the question of whether particular transaction concerned had been entered into with a view to avoiding UK tax. As we have explained above, the case before us is a different one: namely, whether BLM, an Irish resident company, has abusively taken advantage of the UK-Ireland treaty. In our view, HMRC's reliance on *Fisher* demonstrates the fallacy of their case. They are starting from the premise that, if UK WHT is being avoided, that alone is sufficient to constitute an abuse of the UK-Ireland treaty so long as the mechanism for the avoidance of the UK WHT was the treaty. But, as we have explained above in our discussion of Ground 1, that is the wrong premise and, accordingly, the presence of any UK WHT arbitrage does not conclusively mean that Article 12(5) is satisfied.

82. Implicit in HMRC's Ground 2 is the proposition that, if the FTT had focused properly on the "arbitrage" that HMRC considered to form the entire rationale for the Assignment, they would necessarily have concluded that either SICL's or BLM's purpose was to "take advantage" of Article 12 of the treaty. However, in our judgment, Article 12(5) did not just invite an analysis of the economic effect of the arrangements (although, of course, that economic effect was an indicator of purpose). The FTT was right to focus on the question raised by Article 12(5), namely whether SICL's or BLM's subjective purpose in entering into the Assignment constituted an abuse of the UK-Ireland. There were a number of indications of

those purposes. A flaw in HMRC's Ground 2 is that it seeks to treat the averred existence of "arbitrage" as decisive on its own rather than as an element for the FTT to weigh in the balance.

83. Accordingly, we dismiss Ground 2 of HMRC's appeal.

Ground 3: specific errors of law in determining BLM's purpose

84. HMRC also submitted that there are specific errors of law concerning the way in which the FTT determined BLM's purpose in entering into the Assignment.

85. First, HMRC say that the FTT was wrong to conclude at [176] that its finding that the "sole" purpose of BLM in acquiring the SAAD Claim was to realise a profit was an answer to HMRC's case. The FTT failed to recognise that the profit was entirely dependent on BLM taking advantage of the treaty. There was no separate commercial purpose.

86. This seems to us to be just another way of making the points relied on by HMRC under Ground 2. It was evident that the FTT knew that the only way in which BLM could make a profit was if Article 12(1) applied. The FTT's evaluative judgment was that Article 12(1) of the treaty was the setting in which the Assignment took place. BLM was not seeking to abuse the UK-Ireland treaty. On the contrary, it expected that, as the beneficial owner of the interest, the treaty would apply to it in the normal way so that the interest fell to be taxed in Ireland rather than the UK.

87. Second, HMRC say that the FTT at [177(2)] misunderstood the reason why HMRC was seeking to rely on Article 12(5):

> 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.

88. HMRC say that they were not concerned with the "significance" or otherwise of the spread. However, we do not consider that [177(2)] shows any misunderstanding. The Decision, read as a whole, shows that the FTT clearly understood HMRC's case. In [177(2)], the FTT was simply recognising that SICL was sharing in the saving of UK WHT.

89. HMRC also say that the FTT wrongly inferred at [179] that HMRC would not have sought to apply Article 12(5) if BLM had acquired the SAAD Claim for 80% of the interest rather than 92%:

> 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.

90. HMRC say that they would have challenged such a case as much as the actual transaction. In their view, the only difference would have been the amounts of income (and profits) realised

by BLM and SICL. In the assumed case, BLM would simply have obtained all of the UK WHT saving.

91. In our view, the FTT was at [179] simply making the point that, in a case in which BLM acquired the SAAD Claim for no more than 80% of the interest, it could be assumed that SICL was not concerned with UK WHT and that there would therefore be no sharing of UK WHT between the parties. In the case of this assumed transaction, SICL would merely be eliminating the late termination and liquidation lacuna risks and putting itself in exactly the same position it would have been in if it had received the Post-Administration Interest under deduction of UK WHT. From BLM's perspective, it would have made a greater profit than it did as a result of the actual transaction. In both transactions (the actual and the assumed), BLM would make a profit, and we understand the FTT's point to be that the making of a smaller profit (the actual transaction) could not be more objectionable than the making of a bigger profit (the assumed transaction).

92. Perhaps the FTT's point was imperfectly expressed. We consider that it would have been better if the FTT had not engaged in speculation about what HMRC might, or might not, have done in relation to an assumed transaction. That is particularly so when the assumed transaction was, on the facts found by the FTT, most unlikely to have taken place. Nonetheless, the core point made by the FTT does not seem to involve any error of law. The FTT was simply testing the logic of HMRC's case as they saw it.

93. In any event, we do not consider that the FTT's having regard to the assumed transaction in the way in which it did affected in a material way its evaluative finding. Despite the way in which it expressed itself at [178] (which might appear to suggest that the reasoning for its view that BLM did not have a main purpose would be found only in [179] to [181]), we regard the core of the FTT's reasoning to be found at [173] to [176], namely that the availability of Article 12(1) was merely part of the scenery.

94. HMRC's third criticism of the Decision was that the FTT incorrectly placed "significant" reliance on the fact that HMRC had not sought to apply Article 12(5) in relation to any of BLM's earlier purchases of LBIE claims. At [180] the FTT said that HMRC had "quite rightly" accepted that the other LBIE claims were not subject to Article 12(5) and that, having done so, HMRC must "logically accept" that the same must hold true for the SAAD Claim.

95. We agree with HMRC that the FTT was not in a position to come to any formal findings in relation to any of the earlier LBIE claims. Although there was some evidence in relation to those claims before the FTT, the FTT was not being asked to come to any decision in relation to any of them. Still less could it have come to a view on whether HMRC was right not to pursue any challenge in relation to any of the earlier LBIE claims.

96. We also agree with HMRC that, in any event, the tax treatment of the earlier LBIE claims could not, in and by itself, determine the outcome of this appeal.

97. However, it was open to the FTT to regard the prior transactions as relevant in the sense that they were part of the factual matrix in which the Assignment occurred (see [161]). The FTT's point at [180], understood in the context of the Decision as a whole, was that BLM had acquired a great many other LBIE claims clearly expecting to benefit from Article 12(1) in

circumstances where, as a matter of fact, they did then benefit from that provision. The FTT made at the end of [180] the same point about BLM taking account of Article 12(1) as part of the scenery as it had in relation to 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.

98. The FTT recognised at [181] that there were differences between the earlier LBIE claims and the SAAD Claim. However, it concluded that those differences did not mark out the SAAD Claim as exceptional:

> 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.

99. We consider that the FTT was entitled to come to the view that it expressed at [181]. So far as BLM was concerned, UK tax was never an issue that concerned it. On the contrary, it was precisely because it considered that it could rely on its treaty rights that it could offer the price that it did for the Assignment. It is true that it was aware that SICL had a UK tax concern and that was why it wanted to assign the SAAD Claim but the FTT's point was simply that, from BLM's perspective, it regarded its beneficial ownership of the interest in respect of the SAAD Claim in the same way as it regarded its beneficial ownership of all the other interest in respect of all the other debt claims in the LBIE administration. That was a relevant matter. Its weight was for the FTT to determine.

100. The FTT's core conclusion was that for BLM the existence of the UK-Ireland treaty was simply the setting in which the Assignment took place. The FTT could not find anything abusive in BLM, as an Irish resident company which beneficially owned the interest, taking the benefit of Article 12(1) of the UK-Ireland treaty. It was Ireland who had full taxing rights over the interest beneficially owned by BLM. BLM assumed that those taxing rights would be engaged. Accordingly, it approached the purchase of the SAAD Claim on that basis. That was a determination that was open to the FTT and cannot, in our view, be said to have been reached on a flawed basis.

101. None of the points raised in Ground 3 undermine the cogency of the FTT's conclusions and we dismiss Ground 3 of HMRC's appeal.

Ground 4: specific errors of law in determining SICL's purpose

102. HMRC submitted that there were two specific errors of law in the FTT's findings concerning SICL's purpose.

103.The first error that HMRC assert was in relation to the proper analysis of Article 12(5) of the treaty and the extent to which SICL needed to have specifically identified Article 12(1) as the provision which it was seeking to take advantage of.

104.We accepted as part of our consideration of Ground 1 that, as a matter of the proper interpretation of Article 12(5) of the UK-Ireland treaty, there was no need for SICL to have been specifically aware of the relevant provision of the treaty. We do not consider, however, that this error of law on the part of the FTT affected its evaluative judgment to a material extent. Once they made their finding as to the law at [150], the FTT did not subsequently refer to the issue of specific identification at any stage of their detailed evaluation of SICL's subjective purpose. That was because the FTT found that, as at the date the commercial deal was agreed (8 February 2018), SICL did not know anything about the identity of the purchaser. As such, it was not then relevant for the FTT to go further and consider the extent of SICL's knowledge of the provisions of a treaty of which SICL was, so the FTT had found, unaware as at that date.

105.The second error, HMRC argued, was that, if specific identification of the treaty was required, the FTT had in fact correctly held that SICL had the requisite knowledge as at the Trade Date (12 February 2018). As part of this submission, HMRC also criticised the FTT for failing to have proper regard to events taking place after 8 February 2018 in determining the purpose SICL had when entering into the Assignment at the later date of 12 February 2018.

106.HMRC accept that SICL's subjective intentions did not change from 8 February 2018 until the Trade Date. They nonetheless argue that, despite SICL's finding out wholly for non-tax reasons (see [165(5)]) the identity of the purchaser and hence being able to infer the basis on which UK WHT was not an issue for BLM, the knowledge of SICL as at the Trade Date was decisive. That submission was advanced primarily on their interpretation of Article 12(5) of the UK-Ireland treaty, which we have rejected.

107. However, HMRC also submitted that, even if SICL's conscious purposes did not change when it found out on the Trade Date that BLM was benefiting from Article 12(1) of the UK-Ireland treaty, its subconscious purposes did. We reject that submission. It represents, in our view, a disagreement with the FTT's factual evaluation.

108.HMRC were free to submit to the FTT that SICL's subjective purpose was altered when it found out that BLM was a resident in Ireland (following enquiries that SICL made for non-tax reasons). It was free to submit that this gave SICL a "subconscious motive" for being party to the Assignment by analogy with the cases of *Vodafone Cellular Ltd and others v Shaw (Inspector of Taxes)* [1997] STC 734, *Mallalieu v Drummond (Inspector of Taxes)* [1983] STC 665 and *MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1989] STC 898. However, the FTT was not bound to accept those submissions or find that there were two separate purposes, a conscious one and a subconscious one. The FTT had found that SICL did not care about (or even know about) Article 12(1) on 8 February 2018 and it did not care about it on 12 February 2018 either (when it did acquire the knowledge). The FTT was, in our view, entitled to conclude that SICL's object or purpose in entering into the Assignment did not change from 8 February to 12 February 2018.

109.In addition, HMRC had four other criticisms of the way in which the FTT assessed SICL's purpose in entering into the Assignment.

110.First, HMRC criticised the FTT's analysis that SICL had the "sole purpose" of realising the SAAD Claim for the "best possible price" so as to realise a profit. The profit was, in HMRC's view, solely attributable to the UK WHT arbitrage and both BLM and SICL knew that as at the Trade Date. We have considered this point in our rejection of Ground 2 of the appeal and have explained why, in the case of a treaty between the UK and Ireland which allocated sole taxing rights to Ireland in respect of interest beneficially owned by one of its residents, we consider HMRC's focus on UK WHT to be misplaced.

111.Second, HMRC say that the FTT was wrong at [193(3)] to be concerned with the fact that the application of Article 12(5) would turn on whether the seller happens to be aware of the identity and tax residence of the purchaser. HMRC say that there is nothing unusual in an anti-avoidance provision turning on the knowledge of the parties to the transaction. We do not doubt that. But that was not the point that the FTT was making. At [193] the FTT was considering circumstances where a seller wanted to assign a debt for the highest price in circumstances where a market existed in which UK WHT would not represent a cost for those purchasers for a variety of reasons. In those circumstances, the FTT struggled to see why it would then be an abuse of the UK-Ireland treaty if the seller "happens to be aware" of the identity and tax residence of the purchaser, particularly as the interest would be taxable (but in Ireland rather than the UK). The FTT was entitled to reflect on these matters when reaching its multi-factorial evaluation. We do not consider that in so doing it employed flawed reasoning entitling us to interfere with the Decision.

112.Third, HMRC objected to what the FTT said at [195] about the impact of HMRC's case on the secondary debt market, noting that there was no evidence to support that finding and there could be no possible objection to two contracting States reaching an agreement designed to deal with WHT arbitrage (whether UK WHT or Irish WHT).

113. We do not regard what the FTT said at [195] as making a factual finding about how the "secondary debt market" operates. The FTT was merely commenting on potential anomalies that might arise if HMRC's analysis was correct. The FTT was, in our view, expressing a view that Article 12(5) does not apply in a case like the one before us. It was, in truth, just a different way of making the point it had already made at [193]. Again, we do not think that this can be regarded as a flaw in the FTT's reasoning. Even if it could be so regarded, it was not, in our view, material to the conclusion reached by the FTT.

114.The fourth objection by HMRC was that there was no basis in the wording or purpose of Article 12(5) for regarding it as "aimed at" transactions involving conduits or treaty shopping ([197]) and that "something more" than the facts of the present case was required ([201]). HMRC also objected to the suggestion, at [200], that the "something more" might consist of circumstances where SICL had retained an economic interest in the interest and had indirectly accessed Article 12(1) through BLM, contending that this was inconsistent with the FTT's earlier conclusion that there was no need for artificial steps or arrangements to exist before Article 12(5) was engaged.

115.We have dealt with these points in our discussion of Ground 1. As we explain above, it is clear from the OECD material that Article 12(5) was intended to catch transactions of the kind the FTT referred. Transactions involving conduit companies were a paradigm example and were mentioned specifically in OECD material. However, at [201], the FTT reiterated its earlier

conclusion that Article 12(5) was not limited to artificial arrangements. It was not, therefore, saying that only "conduit arrangements" would be capable of engaging Article 12(5). Read as a whole, at [197] to [200], the FTT was reprising conclusions it had expressed earlier in the Decision and explaining why it did not consider the Assignment to be analogous to the arrangements described in the Conduit Report. We do not consider that discussion to involve any error of law.

116. Accordingly, we dismiss Ground 4 of HMRC's appeal.

Ground 5: no reasonable tribunal could have made the decision (*Edwards v Bairstow*)

117. Finally, HMRC make an *Edwards v Bairstow* challenge that, looking at the Decision in the round, no reasonable tribunal could have reached the view that the FTT did in the light of the primary facts found.

118. We do not consider that the FTT fell into error in making the evaluative findings that it did. The conclusions reached are well within the range of views that a reasonable tribunal could come to.

119. Accordingly, we dismiss Ground 5 of HMRC's appeal.

Disposition

120. For the reasons given above, the appeal is dismissed.

MR JUSTICE RICHARDS
JUDGE ANDREW SCOTT

RELEASE DATE: 31st May 2024