Case No: A3/2010/0984

Neutral Citation Number: [2011] EWCA Civ 304
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(CHANCERY DIVISION)
PETER SMITH J
[2010] EWHC 609 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2011

Before :

LADY JUSTICE ARDEN
LORD JUSTICE PITCHFORD
and
LORD JUSTICE TOMLINSON

- -

Between :

BAYFINE UK	**Respondent**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**

- -
- -

Mr David Ewart QC & Mr Richard Vallat (instructed by **the General Counsel and Solicitor to HMRC**) for the **Appellant**
Jonathan Peacock QC & Mr Francis Fitzpatrick (instructed by **Slaughter and May**) for the **Respondent**

Hearing dates : 18-19 November 2010

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Judgment

Lady Justice Arden :

The nature of the issues on this appeal

1. This appeal is brought by Her Majesty's Revenue and Customs ("HMRC") and concerns double taxation relief pursuant to the US/UK Double Taxation Convention ("the Treaty"), alternatively unilateral relief from double taxation under section 790 of the Income and Taxes Act 1988 ("the 1988 Act"). The Treaty is set out in The Double Taxation Relief (Taxes on Income) (The United States of America) (Order) 1980 (SI 1980 No 568). By his Order dated 23 March 2010, Peter Smith J allowed the appeal of the respondent taxpayer, Bayfine UK Ltd ("BUK"), from the decision of the Special Commissioners (Dr John F. Avery Jones CBE and Mr Edward Sadler) dated 19 November 2008. So far as material the Special Commissioners decided that (i) the Treaty did not entitle BUK to claim relief for any US tax paid on its profit from the transactions summarised in paragraphs 2 and 3 of this judgment and that UK tax should be paid first and credit claimed in the US; (ii) unilateral relief under section 790 of the 1980 Act was not available to BUK, and (iii) if unilateral relief had been available, section 795A of the 1988 Act would not have operated to reduce it. Each of those matters decided by the Special Commissioners is in issue on this appeal. I have set out the matters in the order in which this Court decided to hear argument and not in the order in which they were argued below.

Background

2. The transactions in question were carried out by BUK and another member of the same group of companies. BUK is a subsidiary of a US company, Bayfine DE Inc ("BDE"), and Bayfine UK Products ("BUKP") is a subsidiary of Baycliff DE Inc ("Baycliff DE"). BUK and BUKP, which are unlimited companies, are both resident in the UK for tax purposes and BDE and Baycliff DE are resident in the US for tax purposes and have a common parent company in the US. All these companies form part of a US banking group.

3. In July 2008, BUK and BUKP entered into self-cancelling forward contracts with Bank of America. The contracts were designed so that, depending on certain events happening, either one or other of the companies would make a large gain, and the other would make a large loss, but it was not known at the outset which company would make the gain and which the loss. In the event, BUK made a profit and BUKP made a loss of the same amount. BUK's profit was taxed in the US in the hands of BDE under the "check the box regulations". These permitted the profit to be deemed to be BDE's profit if no election was made for BUK to be taxed separately. BUK then claimed double taxation relief for that tax pursuant to art 23 of the Treaty (set out below).

4. In this situation the taxpayer in respect of the same income is a different person in the US, where the taxpayer is BDE, from the taxpayer in the UK, where it is BUK. Both are residents of the jurisdictions in which they are liable to tax. It is, however, not uncommon for different persons to be liable to tax in different jurisdictions in respect of the same stream of income. It may, for instance, happen with the income of unlimited companies, trusts and partnerships. These bodies may be treated as "tax

transparent” in one jurisdiction but not in another so that in the former, tax is charged on the members of the entity rather than the entity itself. However the Treaty does not deal with the situation that has arisen in this case, in which there are two persons chargeable to tax in respect of the same income each being resident and subject to tax in a different Contracting State. The fact that the US taxes BDE and the UK taxes BUK on the same income gives rise to the risk of double taxation.

5. The transactions in question had no commercial purpose other than to produce a matching profit and loss. They were carried out for the purpose of taking advantage of the different treatment of the profit in US and UK tax law.

Decision of the Special Commissioners

6. I omit mention of the decision of the Special Commissioners on the application of certain anti-avoidance provisions with which we are not concerned. Having dealt with those provisions, the Special Commissioners rejected the claim for double taxation relief. As they saw it, the key issue was whether the US tax or the UK tax was the primary tax. They concluded that under the Treaty BUK’s profits were taxable in the UK (art 7 below), that the UK had exclusive taxing rights and that the US could only tax these profits under the saving clause in art 1(3). The primary right to tax was that of the UK. The income was deemed to have a UK source under art 23(3) and this meant that the UK did not have to give credit for the tax imposed on BDE even though it was resident in the US. By like reasoning BDE could obtain relief against the tax it had paid in the US for the tax paid on the same income in the UK.

7. The Special Commissioners held that the source of BUK’s profit was in the UK. It followed that, by virtue of section 790(4) of the 1988 Act, unilateral relief was not available. If they were wrong on this, and unilateral relief was available, they took the view that the steps which it was reasonable for the taxpayer to take to minimise the tax had to be limited to those steps which the taxpayer claiming it was in a position to take. Accordingly none of the steps proposed by HMRC fell within section 795A of the 1988 Act, and credit was thus not restricted.

Judgment of the judge

8. Peter Smith J dealt first with the question whether unilateral relief was available. He disagreed with the decision of the Special Commissioners as to the source of BUK’s profit and held that this was in the US. It followed that credit was available under section 790(4). This was not restricted by section 795A for a number of reasons. In particular, in the judge’s judgment, section 795A required regard to be had to steps which the taxpayer could reasonably take, including steps which the taxpayer could compel a third party to take, but excluding steps which were beyond the taxpayer’s control.

9. As to Treaty relief, the judge held that the exercise of the saving clause overrode the provisions of art 7 and that, applying art 23(3), the source of the profit was in the US, and that accordingly the UK had to give credit for the US tax under art 23(2). He accepted the submission of Mr Jonathan Peacock QC, for BUK, that where more than one state imposes tax on the same income the state of the source has the primary right

and the state of the residence must give credit for this tax. However, the judge went on to observe that the question of which state had to give credit was to be decided by reference to which state imposed tax first. The judge rejected that either State has the stronger right to impose tax.

Formulation of the issues

10. I formulate the three issues on this appeal as follows:

> Issue 1: Is HMRC bound to give relief to BUK under the provisions of the Treaty?
>
> Issue 2: If not, is HMRC bound to allow unilateral relief under section 790 of the 1988 Act?
>
> Issue 3: Was relief restricted by section 795A of the 1988 Act to the extent that BDE could take steps to reclaim UK tax paid in the US?

11. In brief, Mr David Ewart QC, for HMRC, contends that HMRC was not bound to give relief from double taxation under the Treaty and that BDE should seek relief in the US. In those circumstances there is no right to unilateral relief. If there were a right to unilateral relief, that relief would be restricted under section 795A because BDE, BUK's parent company, could seek relief in the US. Mr Peacock's case is that the UK must give credit under the Treaty for the US tax paid by BDE on the same income. If he is wrong on that, unilateral relief must be available as the source of the income was in the US, and it is not restricted by section 795A.

12. There were also a large number of issues raised by HMRC in its skeleton argument which were not in the event pursued or argued on this appeal.

Issue 1: Is HMRC bound to give relief to BUK under the provisions of the Treaty?

1.1 Interpretation of double taxation treaties

13. The Treaty is an international instrument. By virtue of section 788 of the 1988 Act, its provisions declared by statutory instrument have effect in substitution for the equivalent provisions of domestic law. Nonetheless, the fact that the Treaty is an international instrument made by the two Contracting States must be borne in mind in interpreting the provisions of the Treaty. In particular, the Treaty must be given a purposive interpretation.

14. On the principles applicable to the interpretation of a double taxation treaty, we were referred to the well-known principles laid down by the House of Lords in *Fothergill v Monarch Airlines* [1980] 1 AC 251, as summarised by Mummery J in *IRC v Commerzbank AG* [1990] STC 285 at 297-8 and approved by this Court in *Memec plc v IRC* [1998] STC 754. It is the first three principles with which we are particularly concerned:

> "(1) It is necessary to look first for a clear meaning of the words used in the relevant Article of the convention, bearing in mind that "consideration

of the purpose of an enactment is always a legitimate part of the process of interpretation": per Lord Wilberforce ([1981] AC 251 at 272) and Lord Scarman (at 294). A strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty: per Lord Fraser (at 285) and Lord Scarman (at 290). A literal interpretation may be obviously inconsistent with the purposes of the particular Article or of the treaty as a whole. If the provisions of a particular Article are ambiguous, it may be possible to resolve that ambiguity by giving a purposive construction to the convention looking at it as a whole by reference to its language as set out in the relevant United Kingdom legislative instrument: per Lord Diplock (at 279).

(2) The process of interpretation should take account of the fact that—

"The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament which deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd v. Babco Forwarding & Shipping (UK) Limited*, [1978] AC 141 at 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation': per Lord Diplock (at 281–282) and Lord Scarman (at 293)."

(3) Among those principles is the general principle of international law, now embodied in art 31(1) of the Vienna Convention on the Law of Treaties, that "a treaty should be interpreted in good faith and 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". A similar principle is expressed in slightly different terms in McNair's *The Law of Treaties* (1961) p 365, where it is stated that the task of applying or construing or interpreting a treaty is "the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances". It is also stated in that work (p 366) that references to the primary necessity of giving effect to "the plain terms" of a treaty or construing words according to their "general and ordinary meaning" or their "natural signification" are to be a starting point or prima facie guide and "cannot be allowed to obstruct the essential quest in the application of treaties, namely the search for the real intention of the contracting parties in using the language employed by them"."

15. Article 31(1) of the Vienna Convention provides:

"1. A treaty shall 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."

16. In this case, the preamble to the Treaty is very brief and states simply that the parties are:

> "Desiring to conclude a new Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains;"

17. These words, however, make it clear that the primary purposes of the Treaty are, on the one hand, to eliminate double taxation and, on the other hand, to prevent the avoidance of taxation. In seeking a purposive interpretation, both these principles have to be borne in mind. Moreover, the latter principle, in my judgment, means that the Treaty should be interpreted to avoid the grant of double relief as well as to confer relief against double taxation.

18. There is no court with jurisdiction to give authoritative rulings on the interpretation of the Treaty and thus the decisions of the UK and US courts are authoritative in their own jurisdictions respectively. We have not been referred to any US decision of the meaning of the Treaty by way of persuasive authority, and we are not therefore aware of any differing approach between our two systems on any point in issue on this appeal.

1.2: Relevant provisions of the Treaty

19. The Treaty does not contain a single rule for determining whether particular income is to be taxed in a particular state. The Treaty provides for different income to be dealt with in different ways. The Special Commissioners helpfully analysed the form of the Treaty in paragraph 57 of their decision as follows:

> "There are two main categories of income: (1) in some cases (art 7 business profits in the absence of a permanent establishment, art 8 shipping and air transport profits, art 11 interest, art 12 royalties, art 18 pensions, art 19 Government service, art 20 teachers, art 21 students and trainees, art 22 other income) income is taxable in one State only; and (2) in other cases (art 6 income from immovable property, art 7 business profits where there is a permanent establishment in the other State, art 10 dividends, art 14 independent personal services, art 15 dependent personal circumstances, art 17 artistes and athletes) income can be taxed in both States, in the case of dividends with a reduction in the source State's taxation, but the residence State has to give relief for the source State tax."

20. For the purposes of this appeal, the starting point in the Treaty is the rule that business profits are in general to be taxed in the state of residence. Thus art 7(1) provides:

> "The business profits of an enterprise of the Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State though a permanent establishment situated therein. …."

21. BUK did not have a permanent establishment in the US. The right to tax conferred by art 7 is, by virtue of the terms of that article (as quoted in the previous paragraph), an exclusive right to tax.

22. Art 23 of the Treaty, which is headed "Elimination of Double Taxation", contains provisions designed to operate where income is taxed in more than one State. Paragraphs (1) and (2) provide for one Contracting State to give credit in certain circumstances against tax which is imposed by the other Contracting State:

> "Article 23
> Elimination of Double Taxation
>
> (1) In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or national of the United States as a credit against the United States tax the appropriate amount of tax paid to the United Kingdom; and, in the case of a United States corporation owning at least 10 per cent of the voting stock of a corporation which is a resident of the United Kingdom from which it receives dividends in any taxable year, the United States shall allow credit for the appropriate amount of tax paid to the United Kingdom by that corporation with respect to the profits out of which such dividends are paid. Such appropriate amount shall be based upon the amount of tax paid to the United Kingdom, but the credit shall not exceed the limitations (for the purpose of limiting the credit to the United States tax on income from sources outside of the United States) provided by United States law for the taxable year. For the purposes of applying the United States credit in relation to tax paid to the United Kingdom:
>
> (a) the taxes referred to in paragraphs (2)(b) and (3) of Article 2 (Taxes covered) shall be considered to be income taxes;
>
> (b) the amount of 5 or 15 per cent, as the case may be, withheld under paragraph (2)(a)(i) or (ii) of Article 10 (Dividends) from the tax credit paid by the United Kingdom shall be treated as an income tax imposed on the recipient of the dividend; and
>
> (c) that amount of tax credit referred to in paragraph (2)(a)(i) of Article 10 (Dividends) which is not paid to the United States corporation but to which an individual resident in the United Kingdom would have been entitled had he received the dividend shall be treated as an income tax imposed on the corporation paying the dividend.
>
> (2) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (as it may be amended from time to time without changing the general principle hereof):
>
> (a) United States tax payable under the laws of the United States and in accordance with the present Convention, whether directly or by deduction, on profits or income from sources within the United States (excluding in the case of a dividend, tax payable in respect of the profits out of which the

dividend is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits or income by reference to which the United States tax is computed;

(b) in the case of a dividend paid by a United States corporation to a corporation which is resident in the United Kingdom and which controls directly or indirectly at least 10 per cent of the voting power in the United States corporation, the credit shall take into account (in addition to any United States tax creditable under (a) the United States tax payable by the corporation in respect of the profits out of which such dividend is paid."

23. It will be seen that under art 23(2)(a) regard has to be had to source, and the Special Commissioners considered that in practice the same applied under art 23(1). Art 23(3) contains its own rule as to how source to be determined, save where tax has been imposed on the basis of citizenship:

> "(3) For the purposes of the preceding paragraphs of this Article, income or profits derived by a resident of a Contracting State which may be taxed in the other Contracting State in accordance with this Convention shall be deemed to arise from sources within that other Contracting State, except that where the United States taxes on the basis of citizenship, the United Kingdom shall not be bound to give credit to a United States national who is resident in the United Kingdom on income from sources outside the United States as determined under the laws of the United Kingdom and the United States shall not be bound to give credit for United Kingdom tax on income received by such national from sources outside the United Kingdom, as determined under the laws of the United States."

24. Accordingly, the only situation under art 23 in which a domestic court has to determine the source of any income under its own domestic rules is when the exception in art 23(3) applies. The exception in art 23(3) does not apply in this case.

25. The profit on which BUK is taxed in the UK falls within art 7, but art 1(3) contains a saving clause which enables the US to depart from provisions of the Treaty and thus to be able to tax BDE on the same income:

> "(3) Notwithstanding any provision of this Convention except paragraph 4 of this Article, a Contracting State may tax its residents (as determined under Article 4 (Fiscal residence)) and its nationals as if this Convention had not come into effect."

26. It is not in doubt that the US would have to rely on this provision to tax the BUK profit in the hands of BDE since this was the opinion of the experts in this case. The Special Commissioners made findings of fact in accordance with their joint report.

27. On the face of it, where both Contracting States tax the same income, art 23 will impose an obligation on both of them to provide relief under art 23. However,

whether this is the true effect of art 23 depends on the meaning to be attributed to art 1(4), which (as in force at the relevant time) provides:

> "(4) Nothing in paragraph (3) of this Article shall affect the application by a Contracting State of:
>
> > (a) paragraph (4) of Article 4 (Fiscal residence), paragraph (2) of Article 8 (Shipping and air transport), and Articles 9 (Associated enterprises), 23 (Elimination of double taxation), 24 (Non-discrimination) and 25 (Mutual agreement procedure); and
> >
> > (b) Articles 19 (Government service), 20 (Teachers), 21 Students and trainees), and 27 (Effect on diplomatic and consular officials and domestic laws), with respect to individuals who are neither nationals of, nor have immigrant status in, that State."

28. The critical words are the opening words "Nothing in paragraph (3) shall affect the application by a Contracting State of" art 23.

1.3 The parties' submissions

29. Because the BUK profit is subject to tax in both jurisdictions, each party has sought to establish that a different Contracting State has a superior right to tax the income which takes precedence under the Treaty over any such right of the other Contracting State. Mr Ewart seeks to show that the Contracting State with the superior right is the UK while Mr Peacock seeks to show that the superior right is that of the US. Mr Ewart bases his submission on a textual examination of the Treaty. Mr Peacock bases his submissions on both a textual examination and on a concept which he deduces from the law of double taxation generally that overarching precedence is to be accorded to the State in which the income has its source, which he submits is the US.

30. Mr Ewart's submissions therefore focus on the meaning of the Treaty. He submits that the saving clause permits the US to tax where it would not normally be able to do so on the basis of citizenship but to do so it has to give credit for taxes paid outside the US. Otherwise it becomes a matter of the taxpayer's choice where tax is to be paid. The Special Commissioners were right to say that in the situation in the present case the UK had the primary taxing right.

31. Under the Treaty, clearly both the residence of the taxpayer and the source of the relevant profit are important matters, and one cannot simply say that the source state taxes and the residence state gives relief.

32. Mr Ewart submits that the meaning of art 1(4) is not obvious. It refers back to art 1(3), which confers power as against the other Contracting State to tax on some basis other than that of the Treaty. Art 1(4) then states that nothing in art 1(3) affects the application of specified articles of the Treaty, including art 23. Accordingly, on his submission art 23 must be applied as if the contracting state was not using its reserve power to tax.

33. The UK is the state entitled to tax the BUK profit by virtue of art 7. Thus tax imposed by the US on this profit is not imposed "in accordance with" the Treaty for the

purposes of art 23(2). Art 1(4) applies to both Contracting States, and not as Mr Peacock submits only to the Contracting State which is exercising the s 1(3) power. This follows from, for example, the reference to art 24 dealing with the mutual agreement procedure, which must be exercised bilaterally. The reference to "that State" at the end of 1(4)(b) cannot affect this interpretation.

34. On Mr Ewart's submission, the meaning of "source" can vary in different domestic laws. However, domestic law does not apply to "source" for the purpose of art 23 because art 23(3) provides a deemed source rule. That rule is a free-standing Treaty concept which applies for all the purposes of that article and not just where the domestic law of the two Contracting States take a different view. In short, art 23 contains its own comprehensive clause for defining "source".

35. Mr Peacock accepts that the purpose of the Treaty is to eliminate double taxation but he goes further and contends that under such a treaty the state of the source of any income has a primary right to impose tax and the state of residence has a secondary right. Accordingly, since there are two States which seek to tax the BUK profit in this case, the apparently exclusive right conferred on the UK by art 7 is in fact overridden by the US imposing taxation on BDE as permitted by the saving clause. Art 1(3) enables a Contracting State to override the right of the other State to impose tax. In those circumstances the effect of art 1(4) is to create a "mini-Convention", that is, a situation in which a limited set of provisions in the Treaty apply. Tax imposed pursuant to the saving clause is imposed "in accordance with" the Treaty for the purposes of art 23. In those circumstances the principle which applies is that the state of source taxes and the state of residence gives credit. Having conferred that freedom to tax on the US, the state of residence (UK) must give relief for that tax. There is no exclusive right to tax, and therefore a solution must be found in tax law generally.

36. To establish this proposition, Mr Peacock must establish that the source of the BUK profit was in the US. Mr Peacock submits that the question is one of fact and that the broad guiding principle is that the source is treated where the service was rendered or the profit-making activity was carried on. Thus in the case of a forward contract the court should attach great weight to the place where the contract was performed: cf per Lord Bridge in *IRC v Hang Seng Bank Ltd* [1991] 1 AC 306 at 323. In the case of investment income (which, as I understand it, would include investment income earned from short term contracts such as the forward contracts in this case), factors such as the identity of the debtor, the law governing the debt instrument, the location of the assets to which the investment relates and currency of payment may have greater weight than in trading asset cases: cf per Lord Hailsham LC in *National Bank of Greece SA v Westminster Bank Executor and Trustee Company* [1971] AC 945 at 954 to 955. In this case, contrary to the conclusion of the Special Commissioners, this was US source income. The counterparty to this was a US resident operating from the US and the forward contract was negotiated in part in the US. It was executed in the US, governed by US law and related to assets with a US situs and it was enforceable in the US. It also had to be settled in US dollars. All of those factors point to the US. The only factor that points the other way is that one of the contracting parties (BUK) was a UK resident. The fact that a party is a UK resident does not mean that its income has a UK source. Otherwise there would be no distinction between the source of a profit as a basis of taxation and residence.

37. On the basis that the source of the BUK profit is the United States of America, Mr Peacock moves his focus to art 23 in order to demonstrate that under that article it is the state of the source as so ascertained which governs the application of that article. To do this he has to disapply art 23(3) in the present case which, on Mr Ewart's submission, is a custom-made and comprehensive code on the meaning of source for the purposes of art 23. To meet this challenge, Mr Peacock submits that art 23 provides that the US gives credit for UK tax on UK source income. (Although art 23(1) does not refer to source, the Special Commissioners found that this was likely to be the principle on which tax law in the US operated (decision of the Special Commissioners, paragraph 49)). On that basis, the US is taxing BDE income which it sees as US source income as a matter of US law. They look at it from the US point of view and they are not applying the saving clause. The UK also does not consider that it is relying on the saving clause when it imposes tax, but the US would see it as doing so. Moreover, art 23(1) envisages that, where there is a UK source which the UK taxes, the US gives credit. Art 23(2) assumes that where there is a US source which the US taxes the UK gives credit. Art 23(3) then provides a deemed source rule for the purposes of both (1) and (2). Mr Peacock submits that this is liable to lead to a conundrum where both states tax unless art 23 is interpreted as applying only where the two Contracting States reach a different view as to the source of the income in question. Otherwise if the Court reads art 23(3) as applying to each Contracting State, the Court ends up with a never-ending circle. It is only if there is a difference of view between the Contracting States that it is necessary to resort to a deemed source rule. In this Treaty the deemed source rule in art 23(3) is thus a "tie-breaker" clause. In the alternative Mr Peacock submits art 23(3) applies if the person being taxed is the same person in both jurisdictions. On this basis art 23(3) would prevent juridical double taxation, and not economic double taxation, and would thus not apply in the present case. This reasoning enables Mr Peacock to submit that the source of the BUK profit was the US for the purposes of art 23(1), that the US would regard the UK as using the savings clause and thus that the US has no Treaty obligation to grant credit to BDE on the BUK profit. Moreover he submits that under international law the state of the source has a prior right to tax and since there cannot be double relief under art 23, the UK must give credit for the tax imposed by the US.

38. As a refuge of last resort, Mr Peacock relies on the judge's holding that the right to tax depends on the order in which tax is imposed, so that the Contracting State which is empowered to tax is the State which applies tax first.

39. Mr Peacock further submits that the effect of HMRC's submission is that the US has to give credit on US source income so that there is no US tax and the UK gives no credit for US tax on US source income. He submits that such a result is unlikely and that it is wrong.

1.4 Conclusions on Issue 1

40. What leaps off the page from the opening words of art 1(4) is that they are intended to achieve a particular outcome and are not descriptive of the manner in which that outcome is to be achieved. Under art 1(3), a Contracting State is entitled to depart from the Treaty but only on terms that the specified outcome is attained. That outcome is that there should be no interference with the operation of certain articles, including art 23. Since the focus is on *outcome*, and not on means of achieving that outcome, the expression must in my judgment be one which is capable of being

achieved by different means according to the outcome: indeed that might have been the reason for specifying the outcome rather than prescribing the means. One might say that this is a situation in which the end to be achieved may justify the means needed to attain that end. In the case of art 23, I take the end to be achieved is the attainment of the purposes of art 23, which are to be found in art 23 itself and in the preamble to the treaty. The purposes are, therefore, to eliminate double taxation and to prevent fiscal evasion, which would include the avoidance of taxation. That latter purpose includes not providing a taxpayer with relief in both Contracting States. The former purpose includes not subjecting him to double taxation by reason of the decision of one of the Contracting States unilaterally to impose taxation "as if the [Treaty] had not come into effect". In my judgment it is also significant that art 1(3) uses those words and not words such as "as if the [Treaty] did not apply". As Mr Peacock pointed out, a limited number of articles of the Treaty *do* apply: see art 1(4).

41. The expression "in accordance with" this Treaty occurs only in arts 23 and 24 (which provides for non-discrimination). The saving clause in art 1(3) enables each Contracting State to impose tax on residents as if the Treaty had not come into effect. This article does not say that tax so imposed is not tax imposed in accordance with the Treaty. Indeed, if the saving clause power were utilised, and a Contracting State using it was asked "is this tax in accordance with the Treaty", in my judgment it could have answered "yes". Accordingly the imposition of taxation "in accordance with" art 23 must be capable of including the imposition of tax utilising the saving clause. Indeed if this were not so, art 23(3) would not have gone on to refer to taxation on the basis of citizenship, which can only arise if a Contracting State is using the saving clause.

42. The reference to a Contracting State is capable of applying to either the state exercising the power conferred by the saving clause or the state that might be called on to give credit under art 23 with a view to the elimination of double taxation. As indicated above, contrary to the submission of Mr Peacock, I do not consider that the general words "a Contracting State" are to be read down to mean only the state other than the state exercising the saving clause.

43. This leaves for consideration the opening words of art 1(4) which in my judgment are crucial to the determination of Issue 1. The wording is highly compressed and at first sight difficult to comprehend. I am conscious that the court must not project on to the wording any preconception as to what the parties to the Treaty should have provided but must try to put itself in the position of the Contracting States and work out what the wording of the preamble and the relevant provisions show was meant when they used the words they did in art 1(3). Those words have to be given a purposive meaning. The obvious intention is that whatever a Contracting State does under the saving clause should not affect the proper application of the articles specified in art1(4). Moreover, as I have said, those articles like any others in the Treaty have to be given a purposive interpretation.

44. The purposes of art 23 are to eliminate double taxation and avoid the evasion of tax. Those purposes would not be achieved if, where the US was imposing tax on the basis of the saving clause, double taxation occurs and each Contracting State has to give relief. That would, as I see it, be the result of treating the BUK profit as being within art 23(2). If it is within that provision, as BUK contends, then the United Kingdom has to give relief. In addition, under art 23(1), the US would also be bound to give

credit as is accepted by the experts. If art 23 applied with this effect it would not have eliminated double taxation: it would have given the taxpayer double relief. In my judgment art 23 does not apply in this situation because its application is not authorised by the opening words of art 1(4). The imposition of taxation under the saving clause would affect the intended application of art 23.

45. This gives a sensible result to the Treaty provisions. The Contracting States have agreed that either of them may impose tax as if the Treaty had not come into effect but if it does so the operation of the articles specified in art 1(4) is not to be affected. The substantial operation of art 23 will be changed if it has to be applied to the BUK profit.

46. Mr Peacock submits that art 1(4) is only given content if it operates, as he submits, to make the tax imposed on BDE tax imposed "in accordance with" the Treaty for the purposes of art 23 in all circumstances. I disagree. The mandate in art 1(4) to apply the specified articles must be to apply those articles according to their purpose. Moreover, the interpretation which I have preferred gives content to both art 1(3) and art 1(4) and enables them to operate together in harmony with each other and with the other provisions of the Treaty. Furthermore, this interpretation does not deprive the reference to art 23 in art 1(4) of significant content because the US will have obligations to implement art 23(1) even though art 23(2) cannot apply to the UK. There is nothing to prevent articles from being applied to the extent necessary to achieve their purposes even if they cannot be applied fully.

47. The Special Commissioners held at paragraph 49 of their decision:

> "49. …The effect of art 1(4) is to give the US resident (not it seems a national because of the words 'derived by a resident') taxed by the saving clause the benefit of the Treaty source rule, in the same way as for a US resident taxed in the normal way without the saving clause.
>
> 50. The implication of art 1(4) is that if the US taxes under the saving clause as if the Treaty had not come into effect, the specific exception for art 23, and the consequent change in the source of the income by the deemed source rule, means that the giving of credit by the state invoking the saving clause is in contemplation of the Treaty. The state invoking the saving clause on account of residence will be a second residence state and its taxing rights are subsidiary to the residence state applying the Treaty without the saving clause. .."

48. The Special Commissioners noted that the phrase "in accordance with this Convention" must cover tax imposed on the basis of citizenship because tax on that basis is excepted from art 23 and would not be within art 23 unless it was imposed "in accordance with this Convention". I agree with that conclusion.

49. In conclusion, the Special Commissioners held:

> "64. We consider that the way out of the circle in which both states tax on a residence basis and on a literal reading of the Treaty both give credit, is

to consider who has the stronger taxing right. Undoubtedly this is the UK. We are taxing a UK resident on (as we have found in relation to unilateral relief) UK source income, that is to say taxing on a residence plus source basis. The US is disregarding the UK taxpayer, but impliedly acknowledging that the UK has the better right to tax by saying that its taxation is by virtue of the saving clause. (If the experts had said that the US taxed because the US was taxing a US corporation (defined to be a resident under the Treaty) on US domestic source income and art 7 (or 22) prevented the UK from taxing, so that we were dealing with a case of two equally competing claims to tax both on a source plus residence basis, the result might be different, and we say nothing about it.) Accordingly, the first taxing right is with the UK. There is no credit to be given because at that stage there is no US tax because the saving clause only comes into operation if the Treaty (excluding the saving clause) prevents the US from taxing.

65. The fact that art 1(4) provides that art 23 is applicable even though the saving clause allows taxation as if the Treaty had not come into effect, demonstrates the secondary nature of taxation by virtue of the saving clause either as a secondary residence state, or, if it taxation on the basis of citizenship, that is secondary to taxation on the basis of residence. For the purpose of credit by the US the deemed source rule moves the source to the UK. For this limited purpose the UK has become the source state, although strictly it is the source plus residence state, and the US is now the residence, but not the source, state. The US should therefore give credit for the UK tax, as the experts agree it will once the tax has been paid in the UK. Since art 1(4) refers expressly to art 23 the order of credit must be that if the US taxes by virtue of the saving clause it gives credit for the UK tax. It cannot be said that now that the US has taxed under the saving clause one can go back to the beginning and argue that the UK should give credit first."

50. In my judgment, the approach of the Special Commissioners was correct in its thrust but for my part I do not consider that it is necessary to talk in terms of primary or secondary taxing rights though this may be the result. The right approach in my judgment is to focus carefully on the drafting of the Treaty and to apply it as it would appear it was intended to apply. The technique is simply that of a purposive interpretation to the Treaty.

51. I further agree with the Special Commissioners that it cannot have been the intention of the Treaty that there should be an iterative process of giving credit involving a series of applications to each Contracting State. The obligation to give credit occurs once and is then exhausted.

52. Thus, the position is never arrived at in which both Contracting States have to give relief so as to relieve the income in respect of which tax is being levied on any charged tax in either state. Moreover, it is clear from the structure of art 1(4) that it is the tax levied in the state exercising the saving clause power that has to give way.

53. I have yet to articulate my response to Mr Peacock's detailed submissions on art 23. He submits that art 23(3) appears only to apply if the person being taxed is the same person in both jurisdictions. In other words, art 23 is to prevent juridical and not economic taxation. In my judgment, there is no indication in art 23(3) that it is to be read as restricted in this way or as applying only if there is a conflict between two states as to the source of any income. The Special Commissioners also rejected that argument. If art 23(3) is restricted to juridical double taxation, art 23 would in some situations move from eliminating double taxation to giving double relief and that cannot be correct on a purposive interpretation of this Treaty. Mr Peacock submits that there is no principled answer to such a case, but the fact that his interpretation does not provide a satisfactory answer in such a situation is an indication that it cannot be the right answer.

54. As to source, if domestic law principles had applied to art 23 in the circumstances of this case, I would have preferred the submissions of Mr Peacock to the conclusion of the Special Commissioners that the source of the BUK profit was not in the state of residence but in the US, where the profit was substantially generated. The submission of HMRC on source largely depended on its argument in connection with the anti-avoidance provisions on which they failed before the Special Commissioners and with which we are not concerned. Mr Ewart made a submission on the basis that the BUK profit was income "arising" in the United Kingdom, to which I refer under Issue 2 below. Even if "source" in art 23 is to be read in that narrower sense, I do not consider that it would make any difference to my conclusion on this point.

55. By virtue of art 23(3), the source of the BUK profit for the purposes of art 23(2) is in the US. However, for the reasons given, this does not mean that the UK must give credit against US tax paid on that profit. In those circumstances, the UK has no obligation under art 23 to give relief against US tax. The US authorities on the other hand are obliged to give relief.

56. The experts' joint report supports the conclusion that credit would be available in the US:

> "2. <u>Source of Income and Availability of an FTC [Federal Tax Credit]</u>
>
> The Experts are in agreement that under the rules of the Code, the BUK Contract Income would likely have a U.S. source. The Experts are also in agreement that if the BUK Contract Income may be taxed in the United Kingdom under the Treaty and is, in fact, so taxed (i.e., no double tax relief is granted in the U.K.), then this rule of the Code would be overridden by paragraph 3 of Article 23 of the Treaty, with the result that the BUK Contract Income would have been treated as foreign source income for FTC purposes and that therefore an FTC would have been available (under the Part I Assumption where the application of various anti-abuse doctrines is not likely). The Experts also agree that the impact of paragraph 3 of Article 23 of the Treaty on whether the United Kingdom is required to grant double tax relief is a matter of U.K. interpretation."

57. The judge accepted the submission of Mr Peacock that, where more than one state imposes tax on the same income, the state of the source has the primary right and the state of the residence must give credit for this tax. Mr Peacock repeated his submission to that effect in this Court. This entails that there is some overriding source rule in the Treaty. However, there is no express rule to this effect in the Treaty so that it would have to be found by implication from the express provisions. The Treaty contains a variety of different rules dealing with different situations. Insofar as such a rule can be implied into art 23, it can have no wider operation than art 23 itself so that, if a state is exercising its powers under the saving clause, one is inevitably thrown back on the wording of art 1(4) which governs the applicability of art 23. Moreover art 23 has its own deemed source rule in art 23(3) so that it is that rule which determines the source of any income for all the purposes of art 23.

58. The remaining question is whether the taxpayer can alter the effect of art 23 by making a claim in the UK for credit for tax paid in the US and not making a claim for credit against tax paid in the US for tax paid in the UK. If this were so, it would mean that the effect of art 23 depended on taxpayer choice in any individual case. In my judgment, there is no warrant in art 23 for this approach and the provisions of art 23 must therefore be interpreted and applied in the manner explained above.

59. Accordingly I would allow the appeal of HMRC on this issue.

Issue 2: If not, is HMRC bound to allow unilateral relief under section 790 of the 1988 Act?

60. Section 790 of the 1988 Act provides in material part as follows:

> "790 Unilateral relief
>
> (1) To the extent appearing from the following provisions of this section, relief from income tax and corporation tax in respect of income and chargeable gains shall be given in respect of tax payable under the law of any territory outside the United Kingdom by allowing that tax as a credit against income tax or corporation tax, notwithstanding that there are not for the time being in force any arrangements under section 788 providing for such relief.
>
> (2) Relief under subsection (1) above is referred to in this Part as "unilateral relief".
>
> (3) Unilateral relief shall be such relief as would fall to be given under Chapter II of this Part if arrangements in relation to the territory in question containing the provisions specified in subsections (4) to (10C) below were in force by virtue of section 788, but subject to any particular provision made with respect to unilateral relief in that Chapter; and any expression in that Chapter which imports a reference to relief under arrangements for the time being having effect by virtue of that section shall be deemed to import also a reference to unilateral relief.
>
> (4) Credit for tax paid under the law of the territory outside the United Kingdom and computed by reference to income arising or any chargeable

gain accruing in that territory shall be allowed against any United Kingdom income tax or corporation tax computed by reference to that income or gain (profits from, or remuneration for, personal or professional services performed in that territory being deemed for this purpose to be income arising in that territory).

(5) Subsection (4) above shall have effect subject to the following modifications, that is to say—

(a) where the territory is the Isle of Man or any of the Channel Islands, the limitation to income or gains arising in the territory shall not apply;

(b) where arrangements in relation to the territory are for the time being in force by virtue of section 788, credit for tax paid under the law of the territory shall not be allowed by virtue of subsection (4) above in the case of any income or gains if any credit for that tax is allowable under those arrangements in respect of that income or those gains; and.."

61. Section 793A of the 1988 Act, which was inserted by amendment into the 1988 Act and which does not apply to the Treaty as it only applies to arrangements made after 20 March 2000, provides:

"793A No double relief etc

(1) Where relief in respect of an amount of tax that would otherwise be payable under the law of a territory outside the United Kingdom may be allowed—

(a) under arrangements made in relation to that territory, or

(b) under the law of that territory in consequence of any such arrangements,

credit may not be allowed in respect of that tax, whether the relief has been used or not.

(2) Where, under arrangements having effect by virtue of section 788, credit may be allowed in respect of an amount of tax, credit by way of unilateral relief may not be allowed in respect of that tax.

(3) Where arrangements made in relation to a territory outside the United Kingdom contain express provision to the effect that relief by way of credit shall not be given under the arrangements in cases or circumstances specified or described in the arrangements, then neither shall credit by way of unilateral relief be allowed in those cases or circumstances."

62. Mr Ewart submits that, if Treaty relief is not available to BUK in the UK, unilateral relief cannot improve its position. He submits that it would be absurd if, despite the Treaty giving the UK primary taxing rights, and the US giving credit for the tax paid, the UK nonetheless gave unilateral relief for US tax paid. In any event, he submits that it is common ground that unilateral relief is only available if the relevant income has a US source. HMRC contends that the BUK profit must be seen as having a UK source. The effect of section 790(4) is that the foreign tax must be paid in accordance with the foreign law, including any applicable treaty, and if so credit would be available in the US for the UK tax. Accordingly, he submits that credit could not be claimed in the UK under section 790. If the position were otherwise, there would be an entitlement to credit in both jurisdictions. Section 790(4) was not intended to apply where there is a treaty provision one way or the other. It is only where there is a complete void in the treaty that unilateral relief will apply.

63. Mr Ewart sought to drive a wedge between the source of the BUK profit and the place where the income arose as section 790(4) deals with income "arising", rather than income having its source outside the United Kingdom. Mr Ewart recognised that the line was a fine one. He refers to the test enunciated by Atkin LJ in *FL Schmidt & Co v Greenwood* [1921] 3 KB 193 and 203-4, and quoted by Scott J in *Yates v GCA International* [1991] STC 157 at 171: "Where do the operations take place from which the profits in substance arise?" He argues that on the basis of this test the profit was profit arising in the United Kingdom. However, in my judgment this argument is unpersuasive, even on the test enunciated by Atkin LJ, when all the factors on which Mr Peacock relies are taken into account. Thus, I consider that the BUK profit was income "arising" outside the United Kingdom for the purposes of section 790 of the 1988 Act.

64. Mr Peacock submits that if the taxpayer falls through a crack in a treaty and so cannot obtain relief under the treaty, he can claim unilateral relief. All the taxpayer has to show under s 790 is that there is a stream of income which is subject to UK tax and that the same stream of income is also subject to foreign tax. In addition, in this case, the income arose in the US so section 790(4) applies.

65. Mr Peacock submits that the provisions of section 793A can be used as an aid to the interpretation of section 790 even though section 793A was the result of a later amendment made by the Finance Act 2000. He adopts a point made by Lord Justice Tomlinson in argument. He made the point that section 790(5)(b) shows that, if there is a treaty in force and credit is allowed under that, then the taxpayer is not within the s 790 regime, and so it follows that, if there is a treaty in force but the taxpayer is not within its provisions, then by definition section 790 applies. Mr Peacock submits that section 790 was intended to deal with both the situation where there was no double tax treaty and the situation where there was such a treaty but it did not confer relief. Mr Peacock further submits that section 793A(3) serves to emphasise the point.

66. Mr Ewart's response is that it would be odd if a provision such as section 790(5)(b) which is intended to clear up a doubt on one point has the effect that reliefs which are disallowed by a treaty can be claimed under section 790. Mr Ewart submits that it is implicit in section 790 that where the treaty deals with the issue, one way or the other, then there is no room for the application of section 790. That must be so as a matter of common sense because otherwise section 790 is recreating the problems of double relief for which BUK contends and which ex hypothesi it has been decided do not

arise under the Treaty. It cannot have been the intention of s 790 to deal with such a situation and therefore the section cannot have been intended to apply where the treaty excludes such relief. Section 790(5)(b) is there to prevent double relief being claimed. The taxpayer cannot use s 790 to override a treaty.

67. The judge dealt with this issue before he examined treaty relief and this meant that he did not have the advantage of considering the application of section 790 of the 1988 Act in the light of the reasons for holding that relief was not available in the United Kingdom. In the light of the conclusions that I have reached under Issue 1, BDE is entitled to claim credit in the US for the UK tax paid. It is only to the extent that it cannot do so that BUK can claim relief under section 790. If credit were not available in the US, then I would accept the force of the point made by Lord Justice Tomlinson and hold that section 790 applies not only to the situation where there is no treaty provision but also to the situation where the provision in the Treaty is for some reason inadequate or deficient to give a the taxpayer relief from double taxation. I see no reason why Parliament would not have wished to achieve this result, and, moreover, the subsequent insertion of section 793A makes it clear that unilateral relief applies not just to voids in treaties but also to situations where there is a provision but it does not apply in a particular situation. As it is, however, I accept Mr Ewart's submissions as to the meaning of section 790 set out in paragraph 66 of this judgment. In particular, I do not consider that section 790 can be used to override a treaty which by virtue of section 788 has effect in domestic law. The words "providing for such relief" in section 790(1) can properly be interpreted as meaning "making provision with respect to such relief" in order to give effect to the obvious purpose of section 790 of giving relief where it is otherwise not available under the treaty. It is unnecessary to have recourse to section 793A(2) to reach this conclusion, and thus the subsequent enactment of that provision does not undermine this conclusion.

Issue 3: Was BDE bound to take steps to reclaim UK tax paid and was BUK bound to pay that tax by virtue of section 795A of the 1988 Act?

68. On the way I have answered Issue 2, Issue 3 does not arise. If, however, I am wrong on the answer I have given to Issue 2, then by virtue of section 795A of the 1988 Act unilateral relief will be restricted in very broad terms to the amount of foreign tax that would have been payable if reasonable steps had been taken. The question is whether there are any steps which ought to have been taken.

69. Section 795A provides:

> "795A Limits on credit: minimisation of the foreign tax
>
> (1) The amount of credit for foreign tax which, under any arrangements, is to be allowed against tax in respect of any income or chargeable gain shall not exceed the credit which would be allowed had all reasonable steps been taken—
>
> (a) under the law of the territory concerned, and
>
> (b) under any arrangements made in relation to that territory,

to minimise the amount of tax payable in that territory.

(2) The steps mentioned in subsection (1) above include —

(a) claiming, or otherwise securing the benefit of, reliefs, deductions, reductions or allowances; and

(b) making elections for tax purposes.

(3) For the purposes of subsection (1) above, any question as to the steps which it would have been reasonable for a person to take shall be determined on the basis of what the person might reasonably be expected to have done in the absence of relief under this Part against tax in the United Kingdom."

70. By virtue of section 795A(3), section 795A has to be applied on the basis of a "no UK credit world".

71. In this case the Special Commissioners considered that section 795A applied only to steps taken by the taxpayer. However, in the later case of *Hill Samuel Investments Ltd v HMRC* [2009] STC (SCD) 315, they made it clear that the steps included those which the taxpayer was able to influence and that the person taking the steps need not be the taxpayer.

72. The only step which HMRC contend on this appeal ought reasonably to have been taken was for BDE, its parent, to pay the UK tax and then claim credit for this tax against the tax payable in the US. Mr Ewart points out that section 795A does not state which party has to make the claim and submits that in cases of double taxation it is not uncommon for the taxpayer to be a different person in another jurisdiction. The group of which BUK was a member was a sophisticated banking group that would easily be able to obtain any necessary professional advice and assistance. Moreover, section 795A(1) specifically envisages making a claim under a double taxation treaty. The judge was on Mr Ewart's submission wrong to hold that reasonable mitigation could not require a taxpayer to pay the tax in one Contracting State before claiming a credit in the other Contracting State: the steps can take place after the date on which credit in the UK is claimed.

73. Mr Peacock supports the reasoning of the Special Commissioners and the judge on this Issue. He submits that what are reasonable steps will depend on the nature and circumstances of the taxpayer. In this case, in the no UK credit world there would have been no US tax to seek any credit against because the experts were agreed that, in the absence of credit in the UK, the US authorities (the IRS) would have taken the view that the transactions were for the purposes of tax avoidance and disregarded them completely. It would be a matter for Special Commissioners whether there would be any US tax relief available and if there was no such finding then (with reluctance) Mr Peacock's submission was that the matter would have to be remitted to them. At the very least the argument that the US must grant a credit is hardly likely to be accepted by the IRS and would be likely to lead to litigation, which was said in Parliament not to be a reasonable step.

74. Mr Peacock submits that the Court should only look at the situation when the taxpayer comes to claim the tax credit. Moreover the better view on his submission is that the taxpayer should pay tax in the first Contracting State and should thereafter seek a credit in the other Contracting State.

75. In any event, it is common ground that later legislation can be used as an aid to resolve ambiguity in earlier legislation: see *IRC v Hang Sen Bank Ltd* at pages 323 to 324. Mr Peacock relies on the Finance Act 2005 which inserted sections 804ZA and schedule 28 AB into the 1988 Act and these provide for consideration to be given to steps that other connected parties could have taken. Mr Ewart responds that the court should not simply assume that a matter was dealt with in earlier legislation because of some subsequent alteration in the law.

Conclusions on Issue 3

76. It will be recalled that on the conclusion that I have reached on Issue 2 this Issue does not arise. Moreover the only argument advanced by HMRC before us is that it would have been reasonable for BUK to ensure that its parent company made a claim for tax relief in the US. I agree with the Special Commissioners and the judge that this section does not apply to steps which would have to be taken by a third party over whom the taxpayer has no control. This is the case even where the third party is a member of the same group and has the same economic interest in this step being taken. To hold otherwise could lead to valuable relief being removed from a taxpayer without any lack of care or diligence on his part.

77. However I do not agree with all the points that Mr Peacock has taken under this head. In particular, there is no reason why credit should be limited to credit available at the time the application for relief is made and the Court can thus take into account credit that may be claimed after paying the tax in the UK. In addition, to say, as the judge did, that tax should always be paid in the first state does not in my judgment constitute a principled basis on which to decide these questions. It may be wholly fortuitous in which state tax is paid first.

Disposal of the Issues

78. Accordingly I would answer the Issues as follows:

> Issue 1: Is HMRC bound to give relief to BUK under the provisions of the Treaty?
>
> I would answer this Issue: No.
>
> Issue 2: If not, is HMRC bound to allow unilateral relief under section 790 of the 1988 Act?
>
> I would answer this Issue: No.
>
> Issue 3: Was relief restricted by section 795A of the 1988 Act to the extent that BDE could take steps to reclaim UK tax paid in the US?
>
> In my judgment, in the light of my answer to Issue 2, this does not arise, but if it does I would answer this Issue: No.

79. In the circumstances I would allow the appeal on the first two Issues, and dismiss the appeal with respect to Issue 3.

Lord Justice Pitchford:

80. I am grateful for my Lady's analysis upon each of the issues raised in this appeal. I agree with her conclusions for the reasons she has explained.

Lord Justice Tomlinson:

81. I too agree that the appeal should be disposed of in the manner which Arden LJ proposes. I am in respectful agreement with her reasons. As she has recorded I was at the hearing puzzled as to the effect of s.790(5)(b), particularly in the light of the subsequently added, although here inapplicable, s.793A. However I agree with her that the point does not here arise, because the starting point of the debate is not that tax has been paid in the US without the allowance of any relief against double taxation but rather that adherence to the treaty arrangements requires that any tax payable in the US must take into account the availability of credit for the UK tax payable on the same income. Indeed, as the experts were agreed, such credit will be given in the US once the UK tax has been paid. As Arden LJ has pointed out, any other approach will simply lead to double relief and an endless iterative process, neither of which can have been intended.