Case No: A3/2017/2372

Neutral Citation Number: [2018] EWCA Civ 2544
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(Tax and Chancery Chamber)
Judge Guy Brannan
UT/2016/0122

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2018

Before :

LORD JUSTICE LEWISON
LORD JUSTICE HENDERSON
and
LORD JUSTICE BAKER

- -

Between:

FOWLER	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Jonathan Schwarz (instructed by **Norton Rose Fulbright LLP**) for the **Appellant**
Akash Nawbatt QC and Colm Kelly (instructed by **HMRC**) for the **Respondent**

Hearing date : 23rd October 2018

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Judgment

Lord Justice Lewison:

1. Mr Fowler is a qualified diver and a resident of South Africa. In the tax years 2011/2012 and 2012/2013 he undertook diving engagements in the waters of the UK continental shelf. The governments of the UK and South Africa are parties to a Double Taxation Treaty which came into force on 17 December 2002. It is based on the OECD model form of double taxation treaty. The question raised on this appeal is which of them is entitled to levy tax on Mr Fowler's income derived from his diving activities during those two tax years. It is common ground that if Mr Fowler was self-employed, the answer is South Africa. But whether he was in fact self-employed is in dispute. In those circumstances the First Tier Tribunal directed the trial of a preliminary issue. At the risk of some over-simplification the issue was whether, on the assumption that Mr Fowler was an employee during those years, the effect of the UK's domestic taxation legislation meant that he was treated as if he were carrying on a trade with the consequence that the UK was not entitled to tax his income from those activities. Judge Brannan in the FTT answered that question in Mr Fowler's favour, but Marcus Smith J, sitting in the Upper Tribunal, reversed that decision. The decision of the Upper Tribunal is at [2017] UKUT 219 (TCC), [2017] STC 1385.

2. It is important to stress at the outset that the fundamental question on the appeal is *who* has the right to tax Mr Fowler's diving income: not *how* the Government with that right chooses to exercise it. The two questions are separate questions: *Smallwood v HMRC* [2010] EWCA Civ 778, (2010) 80 TC 536 at [28] to [29]. Who has the right to tax in turn depends on *what* is being taxed.

3. The principles applicable to the interpretation of international treaties are well-known. They are set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties; and have been amplified by such cases as *IRC v Commerzbank AG* [1990] STC 285 and *Anson v HMRC* [2015] UKSC 44, [2015] STC 1777.

4. The two competing articles of the treaty are article 7 and article 14. Article 7 applies to business profits. It provides:

> "(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment."

5. The treaty defines "enterprise of a Contracting State" as meaning an enterprise carried on by a resident of a Contracting State. The treaty provides that the term "enterprise" applies to "the carrying on of any business"; and defines "business" as including the performance of professional services and of other activities of an independent character. It is common ground that because Mr Fowler is a resident of South Africa and does not have a "permanent establishment" in the UK, this article would allocate the right to tax him to South Africa if he was in fact self-employed. Article 7 (6) provides:

> "Where profits include items of income or capital gains which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article."

6. Although the judge thought otherwise, in my judgment the effect of article 7 (6) is that articles applicable to specific categories of income have priority over article 7. That seems to me to be the natural meaning of the language. It was also the purpose of the authors of the OECD model treaty in including article 7 (6) (see commentary on article 7 para 74, which is a permissible aid to the interpretation of the treaty: *Smallwood* at [26] (5) approving *Commerzbank*; *Provost Car Inc v Canada* [2009] FCA 57, [2010] 2 FCR 65 at [11]). Accordingly, that makes it necessary to consider article 14. If article 14 applies, then article 7 does not.

7. Article 14 (1) applies to income from employment. It provides:

> "Subject to the provisions of Articles 15, 17 and 18 of this Convention, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State."

8. Mr Fowler's diving activities were exercised in the UK. If those activities generated remuneration "in respect of an employment" then the UK has the right to tax them.

9. I should also refer to article 2 of the treaty which provides:

> "This Convention shall apply to taxes on income and on capital gains imposed on behalf of a Contracting State … irrespective of the manner in which they are levied."

10. As noted, the treaty contains a number of definitions. However, "employment" is not a defined term. Article 3 (2) provides:

> "As regards the application of the provisions of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State."

11. So the first question is: what is the meaning of "employment" for the purposes of UK tax law? If UK tax law does not provide a complete answer then the second question is: what does "employment" mean under the general law of the UK?

12. For the purposes of UK taxation, section 4 of the Income Tax (Earnings and Pensions) Act 2003 ("the 2003 Act") contains a partial definition of "employment". It provides:

> "'In the employment income Parts "employment" includes in particular—
>
> (a) any employment under a contract of service,
>
> (b) any employment under a contract of apprenticeship, and
>
> (c) any employment in the service of the Crown."

13. Since this is not an exhaustive definition, but only an inclusive one, I consider that the meaning of the word "employment" has to be supplemented, where necessary, by the meaning of that word under the general law of England and Wales. This is expressly permitted by article 3 (2) of the treaty. Although the partial definition of "employment" in the tax legislation prevails over the meaning of that word under the general law of England and Wales, where the definition is incomplete it is permissible to resort to other laws of the contracting state. For the purposes of the preliminary issue we must, I think, assume that Mr Fowler carried out his diving activities under a contract of service. On that assumption, his activities fell within the express definition of "employment".

14. Section 6 (5) of the 2003 Act provides:

> "Employment income is not charged to tax under this Part if it is within the charge to tax under Part 2 of ITTOIA 2005 (trading income) by virtue of section 15 of that Act (divers and diving supervisors)."

15. The argument for Mr Fowler, which the FTT accepted but the UT rejected, is that the answer to the question who has the right to tax Mr Fowler's diving income is to be found in section 15 of the Income Tax (Trading and Other Income) Act 2005 ("the 2005 Act").

16. Section 15 provides:

> "(1) This section applies if—
>
> (a) a person performs the duties of employment as a diver or diving supervisor in the United Kingdom or in any area designated by Order in Council under section 1(7) of the Continental Shelf Act 1964 (c.29),
>
> (b) the duties consist wholly or mainly of seabed diving activities, and
>
> (c) any employment income from the employment would otherwise be chargeable to tax under Part 2 of ITEPA 2003.
>
> (2) The performance of the duties of employment is instead treated for income tax purposes as the carrying on of a trade in the United Kingdom.

> (3) For the purposes of this section the following are seabed diving activities—
>
> (a) taking part as a diver in diving operations concerned with the exploration or exploitation of the seabed, its subsoil and their natural resources, and
>
> (b) acting as a diving supervisor in relation to any such diving operations."

17. Judge Brannan put the point succinctly in the FTT at [95]:

> "The question that often arises in respect of deeming provisions is how far does the effect of the deemed treatment extend? Does it only extend to the immediate purpose addressed by the provision or does it go further? That, essentially, is the question in this case. Does s 15 ITTOIA simply have the effect that Mr Fowler must compute his income in accordance with the rules relating to trading income or does the treatment deemed by s 15 mean that his income falls within art 7 rather than art 14 of the Treaty?"

18. Mr Schwarz, on Mr Fowler's behalf, argues that because UK tax law treats Mr Fowler's earnings from his diving activities as the carrying on of a trade within the UK, that income falls within the scope of article 7 of the treaty. Thus South Africa, and not the UK, has the right to tax that income. The statutory instruction that the performance of so much of Mr Fowler's duties as fall within section 15 is to "be treated as" the carrying on of a trade is a more modern form of "deeming" provision. He points out that the "deeming" provision of section 15 (2) treats the activities covered by section 15 (1) as the carrying on of a trade in the United Kingdom "for income tax purposes". The reference to "income tax purposes" is widely expressed and is apt to include the operation of double tax treaties by virtue of section 6 of the Taxation (International and Other Provisions) Act 2010. It followed that for the purposes of the treaty Mr Fowler's income, in so far as it fell within section 15, was to be treated as the carrying on of an enterprise; and hence taxable under article 7.

19. Mr Schwarz placed particular emphasis on article 3 (2) of the treaty. However, what that article does is to import into article 14 the UK tax law definition of "employment" which is a word otherwise undefined by the treaty. For the purposes of UK tax law the definition of "employment" is to be found in section 4 of the 2003 Act. I cannot see anything in section 15 which changes the meaning of that defined term.

20. The general approach to deeming provisions, particularly in taxing statutes, is not in serious doubt. In *Marshall v Kerr* [1995] 1 AC 148, the House of Lords approved the following statement of principle by Peter Gibson J:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as

> such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

21. Lord Walker formulated the principles in much the same terms in *DCC Holdings (UK) Ltd v HMRC* [2010] UKSC 58, [2011] 1 WLR 44.

22. Mr Schwarz referred us to the South African case of *CARS v Tradehold Ltd* [2012] ZASCA 61. That case concerned the meaning of the word "alienation" in article 13 of the double tax treaty between South Africa and Luxembourg. The court held that the "neutral term" alienation was apt to include a deemed disposal of assets which was provided for by domestic South African legislation. Whether the decision was right or wrong does not concern us (although the result in that case seems to me to have rendered the domestic legislation ineffective). But I cannot extract from the case the general proposition that a word used in a double tax treaty to describe a particular source of income or gain necessarily encompasses a domestic deeming provision, particularly where the word in question is defined in domestic tax law (which "alienation" was not).

23. Section 15 of the 2005 Act is the successor to previous similar provisions which have their origin in section 29 of the Finance Act 1978. The taxation regime applicable to divers thus long predated the treaty. The relevant provision in force at the date of the treaty was section 314 (1) of the Income and Corporation Taxes Act 1988. That provided:

> "(1) Where the duties of any employment which are performed by a person in the United Kingdom or a designated area consist wholly or mainly—
>
> (a) of taking part, as a diver, in diving operations concerned with the exploration or exploitation of the seabed, its subsoil and their natural resources; or
>
> (b) of acting, in relation to any such diving operations, as a diving supervisor,
>
> the Income Tax Acts shall have effect as if the performance by that person of those duties constituted the carrying on by him of a trade within Case I of Schedule D; and accordingly Schedule E shall not apply to the emoluments from the employment so far as attributable to his performance of those duties."

24. That section is on its face far more limited in its scope than section 15. It applied principally to the choice between the various cases under which income tax was then

charged. Moreover, it expressly described the earnings in question as "emoluments from the employment": the traditional description of what is now called employment income. What was taxed under Case 1 of Schedule D remained "emoluments" despite the fact that they were taxed "as if" the performance of those duties constituted the carrying on of a trade. It did not, in my judgment, purport to alter the essential characteristics of that species of income, which remained "emoluments from the employment". Nor did it say that the designated activities were in fact a trade. The purpose of section 314 was, in my judgment, to give a diver carrying out the described duties a more favourable regime for computing his liability for income tax. That was, to repeat Judge Brannan's phrase, the "immediate purpose" of the section.

25. It is also pertinent to note that section 15 was enacted as part of the so-called "Tax Rewrite" whose purpose was not to change the law but to recast it in modern and simpler language. Explanatory notes were provided to give the context and purpose of the legislation. As such they are admissible aids to interpretation, although they cannot supplant the words of the Act itself: *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956. The general note to the 2005 Act explained:

> "5. The purpose of the [2005 Act] is to rewrite income tax legislation relating to trading, property and investment income so as to make it clearer and easier to use.
>
> 6. The Act does not generally change the underlying law when rewriting it. The only changes to the law which it does make are minor ones which are within the remit of the Tax Law Rewrite Project and the Parliamentary process for the Act.
>
> 7. In the main, such changes are intended to clarify existing provisions, make them consistent or bring the law into line with well established practice."

26. The note explaining what became section 15 stated:

> "This section deals with activities which are strictly the duties of an employment but which, if certain conditions are met, are taxed as if they were the carrying on of a trade. It is based on section 314 of ICTA."

27. It seems to me to be clear, particularly from the repetition of the point that the activities were to be "taxed as if" they were the carrying on of a trade, that there was no intention to change the law. However, if Mr Schwarz is right there has been a far-reaching and inadvertent change.

28. I see the force of Mr Schwarz's argument, all the more so since it has commended itself to Henderson and Baker LJJ. There is no doubt that it has its own internal logic. However, in my judgment it confuses the two questions: *what* is taxed and *how* it is taxed. First, section 15 of the 2005 Act applies in a particular factual situation. That factual situation described in section 15 (1) (a) is that someone has performed "the duties *of employment* as a diver." It follows that unless Mr Fowler *was* performing the duties of employment, he is not entitled to the benefit of section 15 at all. For the

purposes of the preliminary issue we are asked to assume the existence of that factual situation. Where that factual situation exists section 15 (1) (c) recognises that *what* is to be taxed is "employment income". Second, section 15 (2) also describes *what* is treated as a trade as the "performance of duties of employment". It is important to appreciate that the scope of section 15 is limited to the performance of those particular duties in that particular location. It does not, for example, deem the employment itself to be the carrying on of a trade. Thus if Mr Fowler had carried out diving activities both in the locations covered by section 15 (1) (a) and also other locations; or if he had carried out some diving activities and other activities of a different nature, only part of his total remuneration under the contract of employment would be treated for the purposes of UK income tax as the carrying on of a trade. Third, this is reinforced by section 6 (5) of the 2003 Act which also recognises that *what* is taxed under section 15 of the 2005 Act is *employment* income. It is simply taxed under section 15 instead of being taxed under Part 2 of the 2003 Act. As *Marshall v Kerr* emphasises, a deeming provision should be construed consistently with its purpose. The purpose of section 15, and hence the purpose of the deeming provision is, in my judgment, merely to describe the *manner* in which Mr Fowler's employment income is to be taxed. It is for that purpose that we are required to pretend that Mr Fowler was carrying on a trade when in fact he was not. The manner in which employment income of the specified description (i.e. as if it were a trade) is taxed does not change its basic legal characteristics. Even if it is taxed under section 15 it is still employment income. The irrelevance of the manner in which tax is levied is confirmed by article 2 of the treaty. Fourth, Mr Schwarz's argument would require the definition of "enterprise" in article 3 (1) of the treaty to include not merely the "carrying on" of a business, but also the *deemed* carrying on of a business.

29. Mr Schwarz also submitted that even if Mr Fowler were an employee his earnings from his employment were not "salaries, wages [or] other similar remuneration." I confess that I did not follow this argument as a freestanding ground. If, as I consider, Mr Fowler's activities as a diver did amount to "employment" for the purposes of article 14 then anything he earned as a result of those activities would surely be, at the very least, remuneration similar to salary or wages.

30. Mr Schwarz criticised the judge for not having grappled with the meaning of "enterprise" or "business" in the treaty. However, in my judgment this is a criticism without substance. If the deeming provision had the effect for which Mr Schwarz contended, namely that Mr Fowler's diving activities were to be considered to be the carrying on of a trade for the purposes of the treaty, no one would suggest that the carrying on of a trade was outside the meaning of "business". The real question was always: how far does the deeming provision in section 15 (2) extend? For the reasons I have given I do not consider that it extends as far as Mr Schwarz submits.

31. To my mind, the answer is that if Mr Fowler was employed as a diver during the relevant tax years, the UK and not South Africa has the right to tax that income under article 14 of the treaty.

32. I would have dismissed the appeal. However, since my colleagues disagree with me, the appeal must be allowed; and the decision of the FTT restored.

Lord Justice Henderson:

33. Lewison LJ has provided a lucid explanation of the problem which arises in this case, and has given cogent reasons for reaching the conclusion that, assuming Mr Fowler to have been employed as a diver (under a contract of service) during the relevant tax years, it is the UK (and not South Africa) which has the right to tax the income derived by Mr Fowler from that employment, because the income falls within the employment income article of the treaty (article 14) and not the business profits article (article 7).

34. My initial inclination was to agree with Lewison LJ, for substantially the same reasons. On reflection, however, I have come to the opposite conclusion. My reasons for doing so are simple, and may be stated quite shortly.

35. In the first place, I agree with Lewison LJ (at [30] of his judgment) that the real question is: how far does the deeming provision in section 15(2) of the 2005 Act extend? On any view, the starting point of the analysis must be that, on the assumed facts for the purposes of the preliminary issue, Mr Fowler was in reality an employed person when he performed the relevant seabed diving activities, with the consequence that his earnings from that employment were employment income within the charge to tax under Part 2 of ITEPA 2003. In other words, Mr Fowler satisfied the conditions which have to be fulfilled if section 15 of the 2005 Act is to apply at all: see subsection (1). But subsection (2) then states, and this is of course the crucial deeming provision:

> "The performance of the duties of employment is instead treated for income tax purposes as the carrying on of a trade in the United Kingdom."

36. Lewison LJ has helpfully set out the principles which apply to the interpretation of deeming provisions, particularly in tax statutes: see his judgment at [20] and [21]. The well known statement of principle by Peter Gibson J, delivering the leading judgment in the Court of Appeal in Marshall v Kerr, has been followed and applied in many later cases. I emphasise in particular the final sentence of that statement, quoted at [20] above:

> "I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

37. The wording of that sentence reflects the often-cited observations of Lord Asquith of Bishopstone in East End Dwellings Co Ltd v Finsbury Borough Council [1952] AC 109 at 132-133, which ended with these memorable words:

> "The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

38. What, then, is the state of affairs which section 15(2) requires us to imagine? In my judgment there can be no room for doubt about the answer to this question. It is that the relevant duties of Mr Fowler's actual employment are instead to be treated for income tax purposes as the carrying on of a trade in the UK. Accordingly, in the imaginary world which we have to enter, the actual earnings of Mr Fowler from his employment must instead be regarded as profits (or, more accurately, as receipts which form part of a computation of trading income) of the trade which he is now deemed to have carried on. It follows that this deemed trade is the only source, for income tax purposes, from which taxable income can arise to Mr Fowler in respect of his relevant activities. This is confirmed by section 6(5) of the 2003 Act, which for convenience I will repeat:

> "Employment income is not charged to tax under this Part [*i.e. Part 1 of ITEPA 2003*] if it is within the charge to tax under Part 2 of ITTOIA 2005 (trading income) by virtue of section 15 of that Act (divers and diving supervisors)."

39. The unambiguous effect of the deeming in section 15(2) is therefore that the performance by Mr Fowler of the relevant diving activities is treated as the carrying on by him of a trade, giving rise to trading income charged to tax under Part 2 of the 2005 Act. This treatment entirely displaces the charge to tax on employment income, under Part 1 of the 2003 Act, which would have applied in the absence of section 15. Furthermore, to the extent that Mr Fowler's activities were comprised in the deemed trade, they could not simultaneously be regarded for any income tax purposes as performance by him of the duties of his actual employment. The charges to tax on employment income and trading income are mutually exclusive.

40. Lewison LJ's analysis seeks to draw a distinction between *what* is taxed and *how* it is taxed: see in particular paragraph [28] of his judgment. With great respect, however, I do not find this a helpful distinction in the present context, nor am I able to agree with his description (ibid) of what is taxed under section 15(2) as the "performance of duties of employment". On the contrary, the effect of the deeming in section 15(2) is to create a new and exclusive taxable subject matter, namely the trade which Mr Fowler is deemed to have carried on. It also follows, in my view, that performance by Mr Fowler of the relevant duties of his employment must now be regarded for all income tax purposes as the carrying on by him of activities of the deemed trade. Similarly, his earnings from his actual employment (or the relevant part of it) must now be regarded for all income tax purposes as receipts of the deemed trade, which go into a computation of his trading income derived from that trade. It is not just a question of how Mr Fowler's employment income is to be taxed. Rather, it is the substitution of one (notional) source of taxable income for another (actual, but disregarded) source.

41. If my analysis is right this far, the remaining issues seem to me to fall into place without difficulty. The words "for income tax purposes" in section 15(2) are clearly wide enough to embrace the purposes of double taxation arrangements given effect in domestic law by section 6 of the Taxation (International and Other Provisions) Act

2010, so far as those arrangements provide "for relief from income tax" or "for taxing income of non-UK resident persons that arises from sources in the United Kingdom": see subsection (2)(a) and (b). Under the treaty, the article which applies to the taxation of business profits is article 7. I can see no reason why the wording of that article should not apply to the profits of the deemed trade carried on by Mr Fowler. The fact that it was a deemed trade cannot matter, because in the deemed world introduced by section 15(2) Mr Fowler was clearly carrying on a business, and thus "an enterprise of a Contracting State" within the meaning of article 7(1). Nor can it be argued that the application of article 7 is displaced by article 14, because in the deemed world Mr Fowler was not in receipt of any "salaries, wages and other similar remuneration derived…in respect of an employment". As I have pointed out, the charges to UK income tax on employment income and trading income are mutually exclusive.

42. My approach does not depend to any significant extent on the provisions of article 3(2), upon which Mr Schwarz for Mr Fowler placed considerable reliance. In broad terms, however, I would accept his submission that the purpose of article 3(2) is to anchor the provisions of the treaty, based as they are on the OECD model, to the domestic tax law of the Contracting State which is applying the treaty.

43. I should also make it clear that my conclusion would have been the same if the deeming provision which we had to construe was section 314(1) of the Income and Corporation Taxes Act 1988, which was the predecessor of section 15(2) in force when the treaty was concluded in 2002. The drafting technique employed in that section is different from that of the "Tax Rewrite" project, but in my view the substance is the same. The Income Tax Acts are directed to have effect "as if" the performance by the relevant person of the specified duties of his employment "constituted the carrying on by him of a trade within Case I of Schedule D". The effect of this language was to create a deemed trade, which could not exist simultaneously with the taxpayer's actual employment. Accordingly, as under section 15(2) of the 2005 Act, a new source of taxable income was created, which supplanted his actual employment for all income tax purposes.

44. For these reasons, I would allow the appeal and restore the decision of the FTT.

Lord Justice Baker:

45. I have had the advantage of reading in draft the judgments of Lewison and Henderson LJJ. Having done so, I am convinced by the reasoning of Henderson LJ. The crucial question is the extent of the deeming provision in s.15(2) of the Income Tax (Trading and Other Income) Act 2005 and on this issue I prefer the analysis put forward by Henderson LJ.

46. S.15(2) of the 2005 Act requires that the performance of the duties of employment be treated as the carrying on of a trade in the UK "for income tax purposes". In my judgement, that means "for all income tax purposes under UK law", including the treatment of the remuneration received by the taxpayer. This is, in the parlance of *Marshall v Kerr*, an inevitable consequence flowing from the deemed state of affairs. I agree with Lewison LJ that the deeming provision in s.15(2) only arises if a person performs "the duties of employment as a diver". Once it does arise, however, the performance of the duties is treated as carrying on a trade for all income tax purposes. I respectfully disagree with Lewison LJ's observation that, even if it is taxed under

s.15, the remuneration remains employment income. In my judgement, the earnings from the appellant's employment are to be regarded as profits of the trade which he is deemed to be carrying on. By virtue of s.6(5) of the Income Tax (Earnings and Pensions) Act 2003, such earnings fall within the charge to tax relating to trading income under Part 2 of the 2005 Act and are not taxed as employment income under Part 2.

47. Article 7 of the Double Taxation Treaty between the UK and South Africa applies to business profits whereas article 14 applies to income from employment. Article 7(6) provides that specific items of income which are dealt with separately in other articles of the treaty fall outside the provisions of article 7. As Lewison LJ says (at paragraph 6 above), this means that, where article 14 applies, article 7 does not. The term "employment" is not defined in the treaty and, under article 3(2), is ascribed the meaning that it has under UK tax law. Under that law, in respect of his seabed diving activities as defined in s.15 of the 2005 Act, Mr Fowler is deemed not to be in employment but rather carrying on a trade. Insofar as his income falls within s.15, it follows that it is not remuneration in respect of an employment under UK law and as a result article 14 of the treaty does not apply. Mr Fowler's income from his seabed diving activities therefore falls within article 7.

48. For those reasons, and for those set out in more detail by Henderson LJ, I too would allow the appeal and restore the decision of the FTT.