

Case No: CHRVF/1998/1137/A3
CHRVF/1998/1138/A3

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION**

Mr Justice Ferris

**Royal Courts of Justice
Strand
London WC2A 2LL**

B E F O R E:

**LORD JUSTICE PETER GIBSON
LORD JUSTICE BROOKE
AND
LORD JUSTICE ROBERT WALKER**

B E T W E E N:

CARR (HMIT)

Respondent

- and -

ARMPLEDGE LTD

Appellant

CARR (HMIT)

Respondent

- and -

FIELDEN & ASHWORTH LTD

Appellant

Mr Christopher McCall QC (instructed by The Solicitor of Inland Revenue for the Respondent)

Lord Goldsmith QC and Mr David Goy QC (instructed by Messrs Freshfields for the Appellants)

Peter Gibson LJ:

1. There are two appeals before us, each raising the same question relating to advance corporation tax ("ACT"): is a company, which has made a claim to carry back surplus ACT derived from one accounting period and has subsequently made a further claim to carry back

surplus ACT derived from the immediately preceding accounting period, entitled to effect being given to those claims in that order? The appeals are brought by Armpledge Ltd (“Armpledge”) and Fielden & Ashworth Ltd (“Fielden”) respectively from the order made by Ferris J. on 31 July 1998. Thereby the judge allowed the appeals of the Inspector of Taxes from the decision in principle on 25 March 1998 of the Special Commissioners who had answered that question in the affirmative. The judge answered that question in the negative. The decisions of the Special Commissioners and of the judge are reported together at [1998] STC 999.

The facts

2. The Special Commissioners, having stated that Armpledge and Fielden were members of the same group of companies the ultimate parent of which is BICC plc and that the issue was the same in both cases, confined their recitation of the agreed facts to those relating to Armpledge. Only a brief summary is appropriate. Armpledge’s accounting periods at all material times were calendar years. It made profits in each of the years 1987 to 1993 and a loss in 1994. It paid corporation tax on those profits. In 1993 and 1994 it paid dividends and accounted for ACT thereon, that ACT (£676,333 in 1993 and nearly £1.2 million in 1994) being the surplus ACT for the 1993 and 1994 accounting periods. By letter dated 11 May 1995 it claimed under s.239 (3) of the Income and Corporation Taxes Act 1988 (“the Taxes Act”) to have the surplus ACT for the 1994 accounting period treated as if it was ACT paid in respect of distributions made by it in specified amounts in four earlier accounting periods (1991, 1990, 1989 and 1988). One day later on 12 May 1995 it made a similar claim to have the surplus ACT for the 1993 accounting period treated as if it was ACT paid in respect of distributions made by it in specified amounts in the 1988 and 1987 accounting periods. It required that effect be given to the latter claim after the earlier claim.

3. On 20 August 1997 the Revenue sent Armpledge two notices of a decision on a claim. On the claim in respect of surplus ACT for the 1994 accounting period, it allowed relief in respect of specified sums for the 1989 and 1988 accounting periods, those sums totalling some 30% less than the total claimed by Armpledge. On the claim in respect of surplus ACT for the 1993 accounting period, it allowed relief in respect of specified sums for the 1991, 1990 and 1989 accounting periods in a total sum equal to the surplus ACT the subject of that claim but for different accounting periods. The Revenue thereby was refusing Armpledge’s request that effect be given to the claims in the order in which they were made but was insisting that effect be given to the claim for the 1994 accounting period after effect was given to the claim for the 1993 accounting period. In practical terms the difference between the parties is that had effect been given to Armpledge’s claims in the order in which they were made, Armpledge would be able to reclaim corporation tax in the sum of £361,603 paid for the 1987 accounting period, whereas if effect is given to the claim for the 1993 accounting period before that for the 1994 period, that tax could not be recovered.

The statutory provisions

4. The statutory scheme which operated at the material times (it has since been altered by the Finance Act 1998) was this. Every company is liable to corporation tax on its profits for each accounting period, that liability being commonly known as that for mainstream corporation tax (“MCT”). Accounting periods are usually of 12 months’ duration, but may, if the company chooses, be shorter. A company making a qualifying distribution of profits, such as by way of dividend, in any accounting period is required to make a payment of ACT in respect of that distribution (s.14 of the Taxes Act). Under s.239 (1) of the Taxes Act that ACT (subject to a limit specified in s.239 (2)) was set against its MCT liability on its profits for that accounting period. MCT liability against which ACT can be set is known as “capacity”. When the ACT exceeded the MCT for the relevant accounting period a surplus (known as

surplus ACT) arose. By s.239 (4):

“Where in the case of any accounting period of a company there is an amount of surplus advance corporation tax which has not been dealt with under subsection (3) above, that amount shall be treated for the purposes of this section (including any further application of this subsection) as if it were advance corporation tax paid in respect of distributions made by the company in the next accounting period.”

5. By s.239 (3) (so far as is material):

“Where in the case of any accounting period of a company there is an amount of surplus advance corporation tax, the company may within two years after the end of that period, claim to have the whole or any part of that amount treated for the purposes of this section (but not of any further application of this subsection) as if it were advance corporation tax paid in respect of distributions made by the company in any of its accounting periods beginning in the six years preceding that period (but so that the amount which is the subject of the claim is set, so far as possible, against the company’s liability for a more recent accounting period before a more remote one) and corporation tax shall, so far as may be required, be repaid accordingly.”

6. Thus the claim which the company may, but is not obliged to, make is subject to three express limitations:

- (i) the claim has to be made within two years after the end of the accounting period producing the surplus ACT;
- (ii) the carry-back has, so far as possible, to be set against MCT liability for a more recent accounting period before remoter periods;
- (iii) the carry-back is only permitted as regards accounting periods beginning in the six years preceding the accounting period in question.

7. The judge helpfully gave illustrations of the effect of s.239 (3) and (4). He posited a company with 10 successive accounting periods, each of a year, AP 1 (the earliest) to AP 10 (the latest). If the company made a distribution in AP8, the ACT payable on that distribution will be set against MCT for APS and any surplus remaining after that set-off will be carried forward and treated as ACT paid in respect of distributions in AP9, unless the company makes a claim under subs. (3). If it does make such claim, the surplus will first be treated as if it were ACT paid in respect of distributions in AP7 and set against MCT paid or payable in respect of profits for AP7. If there is still a surplus after that set-off it will be carried back to AP6, and the process repeated, if a surplus remains, for each of AP5 to AP2. However any surplus cannot be carried back to AP1 because that year is more than 6 years before AP8, but would automatically be carried forward to AP9 under s.239 (4).

8. The judge then gave some illustrative figures. If (i) Armpledge had surplus for AP9 of 100 and surplus for AP8 of 650, (ii) it had capacity for AP1 to AP7 of 100 in each year (save for 250 in AP3), and (iii) the surplus for AP8 is dealt with before that for AP9, the 650 surplus will be set off against the AP7 capacity of 100, then against the AP6 capacity and so on, and will be finally exhausted when the remaining surplus is set off against the surplus for AP3. If the surplus for AP9 is then dealt with, there is no capacity left for AP8 to AP3. Whilst there is capacity for AP2 and AP1, no set-off is possible because those years are more than 6

years before AP9. The AP9 surplus would therefore have to be carried forward to AP10 under s.239 (4).

9. If however the 100 surplus for AP9 is dealt with before that for AP8, the result will be different. The surplus for AP9 will be set against the capacity for AP7, the most recent year for which there is capacity, and will be exhausted. If the 650 surplus for AP8 is then dealt with, it will be set first against the capacity for AP6 and then, going backwards, it will finally be exhausted when set against the capacity for AP2. Thus, giving effect to the surplus for AP9 before that for APS, as the judge put it at p. 1008, “harnesses the ability of the surplus of AP8 to reach [MCT] capacity for AP2.” That is an ability which the surplus for AP9 would not itself have.

The decisions below

10. The Special Commissioners gave only brief reasons for their conclusion. Having set out the rival contentions (including the contention of the Crown that the first parenthesis in s.239 (3) required that effect be given to claims in chronological order), they said that they did not find the appeal easy to decide, but expressed the opinion that since the taxpayers infringed no express provisions of s.239 (3) they were entitled to succeed. They acknowledged that one might expect that claims would be made or given effect to in chronological order, but they did not find that the words in the first parenthesis in s.239 (3) compelled them to conclude that they should dismiss the appeals.

11. The judge ([1998] STC at p.1010) thought the real question was not whether the taxpayer had infringed a provision of s.239(3) but whether the taxpayer was entitled to require the Revenue to give effect to its claim in respect of the surplus for 1994 before giving effect to its claim in respect of the surplus for 1993, and, if not so entitled, whether the Revenue was entitled to deal with the claims in the order of the years in respect of which the surpluses arose. The judge accepted that s.239(3) gave the taxpayer a choice whether or not to make a claim at all and in what amount. He said that the words in the second parenthesis in s.239(3) not only negated any choice on the part of the company as to the accounting periods in question but also imposed a strictly reverse chronological approach to the application of the subsection. He regarded those factors, whilst not conclusive, as pointing against the company having the right to do what Armpledge and Fielden did. He saw no reason for saying that the ability of the taxpayers to choose the time at which they made their claims within the two-year period extended to a right to stipulate the order in which the claims are given effect to. He rejected the Crown's argument based on the first parenthesis in s.239 (3). He considered a further argument of the Crown, based on the mechanics of operating s.239 (3), to the effect that it is essential to work out a claim in respect of an earlier accounting period before working out a claim in respect of a later accounting period, because if that was not done it would become necessary to adjust the previous workings so as to produce the same result as if it had been done. He concluded (at p.1013):

“I start from the absence of any express power for the taxpayer to stipulate the order in which the inspector deals with its claims, the clear requirement for a strictly reverse chronological sequence in the working out of a s.239(3) claim and the fact that the practical effect of what the taxpayer seeks to do is to avoid the six-year rule preventing a carry back of the surplus for AP9, as it would do if the claim for AF9 were dealt with in the chronological sequence of accounting years. The technical arguments based upon the mechanics of operating s.239(3) come on top of these factors and point in the same direction.”

The judge accordingly concluded that the appeal succeeded.

12. The judge thereby gave four reasons for his conclusion:

(1) the absence of an express power for the taxpayers to stipulate the order in which the Inspector of Taxes dealt with the claims;

(2) the clear requirement for a strictly reverse chronological sequence in the working out of a s.239 (3) claim;

(3) in practice the taxpayer was seeking to avoid the six-year rule;

(4) the mechanics of operating s.239(3).

The submissions of the parties

13. Lord Goldsmith QC and Mr. Goy QC for Armpledge and Fielden criticised the judge's reasoning. They submit that his approach was fundamentally flawed and that in the absence of clear statutory language denying the taxpayer the right to relief in the order in which claims are made, the judge reached the wrong conclusion. Mr. McCall Q.C. for the Crown submitted that the judge reached the right conclusion for the right reasons.

14. Before I consider those reasons I would make the following observations on s.239(3). First, it is plain that the ability to use ACT against MCT operates by way of a relief for the benefit of the taxpayer. Second, the taxpayer is given the power, but not the obligation, to make a claim under s.239 (3), subject to the three limitations to which I have already drawn attention in para. 6 above. Third, those restrictions do not include any restriction on the order in which claims are made; Mr. McCall expressly concedes that, subject to the two-year limit within which a claim must be made, the claims need not be made in the chronological order of the accounting periods for which the surplus ACT arose. Fourth, s.239 (3) relates simply to the conditions for making a single claim and to the consequences of that claim being made; where two claims have been made, it says nothing of the order in which effect is to be given to them other than what is implicit in the subsection. Fifth, the effect of the making of a claim is spelt out in the subsection; that effect is automatic, and is not dependent on the Inspector of Taxes or the Board of Inland Revenue exercising some power or discretion. Sixth, that effect is that the amount of surplus ACT, the subject of the claim, is treated as if it were ACT paid in respect of distributions made in accounting periods within the six-year period and in the reverse chronological order specified in the second parenthesis and that MCT of that amount shall be repaid. Seventh, the taxpayer can choose in respect of how much surplus ACT available the claim is to be made; it need not be all the surplus ACT of the accounting period. Eighth, the words in the first parenthesis, "but not of any further application of this subsection," make clear what might be thought implicit, that there can be no carry-back of the same surplus ACT which has been treated as set against MCT. Ninth, the operation of subs. (4) is also automatic: unless and until there is a claim under subs. (3) in respect of surplus ACT in an accounting period, that surplus ACT shall be treated for the purposes of s.239 as if it were ACT paid in respect of distributions made by the company in the next accounting period. In my opinion, Lord Goldsmith accurately described that treatment as defeasible by a claim being made under s.239 (3) within the two-year period. If such a claim is made, then effect must be given to it in accordance with subs. (3). I do not believe that any of these observations are controversial.

15. I return to the judge's reasons. On the first reason, the absence of an express provision in favour of the taxpayer, Lord Goldsmith submitted that the judge's approach was fundamentally wrong. Lord Goldsmith's proposition was that the taxpayer is entitled to take advantage of a relief to the extent and in the manner that he wanted subject only to any express or implied statutory prohibition, such implication only being made where it is

necessary and where the statute unambiguously so requires. We were referred to a number of authorities in support of this submission, including *Farmer v. Bankers Trust* [1990] STC 564, *Elliss v. BP Oil Northern Ireland Refinery Ltd* [1985] STC 722 and *Collard v. Mining & Industrial Holdings Ltd.* (1989) 62 TC 448. I did not understand Mr. McCall to dispute Lord Goldsmith's proposition. He accepted that it was for the Crown to show that by necessary implication effect had to be given to claims to carry back surplus ACT for accounting periods in the chronological order of those periods, it being conceded by him that there were no express words on which he could rely for that requirement.

16. With all respect to the judge, I think that his approach in looking for an express provision on which the taxpayer could rely was therefore wrong, the absence of such a provision not being a valid reason for his conclusion. Further, in dismissing the authorities as in effect of no assistance, the judge overlooked their significance in establishing the proposition which is now not in dispute. The *Collard* case shows how far it is necessary to go to imply words in a statute. In that case double tax relief was available but the quantum depended on whether or not the taxpayer applied a particular provision. It chose not to do so and it was held to be entitled to do that. It could choose how it wished to take the relief available. The Crown's construction involved implying words into the statute. The Court of Appeal had been impressed by an anomaly but found itself unable to supply what Lord Oliver (at p.491) in the House of Lords called the legislative gap. He agreed with this court on that and (at p.493) said that to make an implication in a taxing statute to impose a tax which the legislature had not sought to enact in express terms must be almost, if not completely, unheard of. Similarly, in my view, to imply a provision to deny to the taxpayer the right to a relief which the statutory provisions on their face would appear to allow may also be thought a rarity. However, I accept that if that is what the statutory scheme by necessary implication clearly demands, then effect must be given to it.

17. I would mention one further point on the judge's first reason. He referred to the taxpayer stipulating the order in which the Inspector deals with the claims. As I have already pointed out, the Inspector is given no power or discretion by s.239(3) prescribes what consequences flow from a claim being made. The stipulation made by Armpledge in the letter of 12 May 1995 that effect be given to the claim for the 1993 accounting period after effect was given to the claim for the 1994 accounting period was otiose. Either the first claim would have the effect laid down in s.239 (3) before the second claim was given effect, or, if the Crown is right, by necessary implication effect had to be given to the two claims in the chronological order of the accounting periods.

18. The judge's second reason related to the reverse chronological sequence in working out a s.239 (3) claim. That there is such a sequence is undeniable, but it does not justify the judge's conclusion. As I have pointed out and Mr. McCall accepted, s.239 (3) deals only with the effect of a single claim, and says nothing expressly as to how two claims are to be dealt with. The assumption appears to be that on the making of a claim, it is to have the consequences there provided, and it would follow that the making of a later claim would have consequences on the footing that effect had been given to the earlier claim. The taxpayers do not disobey the reverse chronological sequence provided for in s.239 (3).

19. The third reason of the judge relates to the avoidance of the six-year rule in practice. That is a somewhat tendentious way of describing what the taxpayers are doing. They do not in fact breach the rule, neither the claim for the 1994 accounting period nor that for the 1993 accounting period going back more than 6 years. It is of course true that but for the making of the claim for the 1994 accounting period claim before that for 1993, the 1987 MCT could not be recovered. But the mechanics of the claim involve no breach of the rule, and the taxpayer is ordinarily entitled to make use of a relief afforded to him in the most advantageous way which he chooses. This reason does not justify the judge's conclusion.

20. The judge's fourth reason, the technical arguments based upon the mechanics of operating s.239 (3), was founded on the consequences of s.239 (4), that is to say that the automatic carry forward under that subsection must be reversed when there is a s.239 (3) claim within the two-year period, and this, coupled with the requirement in the second parenthesis in subs. (3) to set the surplus ACT against MCT for a more recent accounting period before a more remote period, may require a revision of the effect of a claim for a later accounting period if taken before a claim for an earlier accounting period. It was argued for the Crown that this required doing what would have had to be done if the claims were made in the chronological order of the accounting periods, and that this showed that it was essential for the claims to be dealt with in that order. The judge considered two sets of circumstances on the footing that effect was given to claims in the order in which they were made but not in the chronological order of the accounting periods.

21. The first involved annual accounting periods with the illustrative figures to which I have already referred. At the first stage, if AP8 and AP9 have ended without claims being made under s.239 (3), s.239 (4) would operate to carry forward the 650 surplus for AP8 to add to the 100 surplus for AP9 and the combined surplus of 750 to AP10. The second stage is that between the making of a s.239 (3) claim for the AP9 surplus and the making of a like claim for the AP8 surplus. If the 100 surplus for AP9 is by reason of the claim relating to it carried back, it would be set against the AP7 capacity of 100 which is thereby extinguished. The third stage is that which exists after the AP8 surplus is made the subject of a subsequent claim. That claim would defeat the carry forward of the 650 to AP9 and AP10. The surplus of AP9 is therefore 100, not 750, and that has been carried back to set against AP7. The judge (at p.1012) described this revision as a comparatively modest one, at least in a case where the limits of the company's claim under s.239 (3) for AP9 are clear, and he said that if this represented the only unusual consequence of giving effect to the taxpayers' argument, it would carry little weight. At p.1013, he accepted that the adjustments made in this, the usual case, were of no significance. I respectfully agree. That conclusion of the judge is not challenged by the Crown on this appeal.

22. The second set of circumstances was described by the judge as somewhat unusual but by no means fanciful. Mr. McCall posited two 12-month accounting periods (AP8 and AP9), in respect of which surplus arose, but between them another but shorter accounting period (AP8a) in which there was capacity of 100. At the first stage the 650 surplus in AP8 would be carried forward to AP8a under s.239 (4) and set against the capacity of 100 which is exhausted. The balance of 550 would be defeasibly carried forward to be added to the capacity of 100 in AP9. At the second stage if the 100 surplus for AP9 is carried back it would be set against the AP7 capacity of 100 to extinguish it. At the third stage, however, a more extensive reworking is required. The carry-forward of the AP8 surplus would be defeated, restoring the 100 capacity of AP8a, and the AP9 surplus would be taken from being set against the AP7 capacity and would be set against the AP8a capacity. The AP8 surplus would therefore be set first against the restored AP7 capacity and then used in earlier accounting periods in reverse chronological order. The result in that case on those figures would be the same as if the claim for AP8 had been dealt with before that for AP9. (Unfortunately an error appears at the top of p.1013 of the judge's judgment which appears to have him state that the net effect will be the same as if the claim for AP8 had been dealt with after that for AP9, not before it.) The judge appears to attach some weight to the example in that set of circumstances as providing a reason for his conclusion.

23. On this I am not able to agree with the judge. It is an unusual example and it is not difficult to produce different consequences with a different set of figures. Suppose, for example, that the surplus in AP9 was 200, not 100. On the taxpayers' argument the making of the claim in respect of that surplus before that for AP8 would produce the result that the 200

would be set first against the AP7 capacity of 100 and then against the AP6 capacity of 100. On the making of the subsequent claim in respect of the AP8 surplus, at the second stage the AP9 surplus of 200 would be set against the restored AP8a capacity and the AP7 capacity. The AP8 surplus at this stage would be set against the capacity for AP6 to AP2. If the two claims had been made in the chronological order of the accounting periods, the AP8 surplus would be set against the capacity for AP7 to AP3, while the AP9 surplus could only be set against the AP8a capacity. It therefore cannot be said that the making of claims in other than the chronological order of the accounting periods will nevertheless require giving effect to the claims in exactly the same way as if they were made in chronological order.

24. Further, the reworking required in the examples given is the necessary consequence of obedience to the statutory provisions. Effect must be given to the statutory requirements but need go no further.

25. I would add that in any event I am unable to say that, by reason of the way effect must be given to the statutory provisions in a set of circumstances acknowledged to be unusual, the statutory scheme is so clear that by necessary implication effect must be given to all claims in the chronological order of the accounting periods. On the contrary, I would say that the effect of s.239 (3) and (4) is tolerably clear. Once it is conceded, as it must be, that claims may be made out of chronological order, then the consequences of the claims being made other than in chronological sequence must follow automatically in accordance with those subsections. I would therefore answer the question posed at the start of this judgment by saying that each taxpayer company is entitled to effect being given to its claims in the order in which they are made.

26. I take some encouragement in this view from the fact that the statutory provisions go back to 1972 (see s.85 Finance Act 1972), that the authors of two textbooks (Bramwell: Taxation of Companies 6th ed. (1994) para. 12 - 16 and Butterworth's UK Tax Guide 1995 - 96 p.1242) take the same view, and that this appears to be the first case in which the Revenue has asserted the interpretation which found favour with the judge, despite having its primary argument based on the first parenthesis in s.239 (3) rejected.

27. For these reasons, which owe much to Lord Goldsmith's lucid arguments, I would respectfully disagree with the judge's reasoning and conclusion. I would allow the appeal, set aside the judge's order and restore the decision in principle of the Special Commissioners.

Brooke LJ:

28. I agree.

Robert Walker LJ:

29. I also agree.