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Claim No: HC-2014-000553  
(formerly HC03C01346) and others

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**REVENUE LIST**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 20/02/2019

**Before:**

**SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT**

**B E T W E E N**

**THE CLAIMANTS LISTED IN CLASS 8 OF  
THE GROUP REGISTER OF THE CFC & DIVIDEND GLO**

**Claimants**

**and**

**COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS**

**Defendants**

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Mr Graham Aaronson QC, Mr Daniel Margolin QC and Ms Katherine Blatchford (instructed by Joseph Hage Aaronson LLP) appeared for the claimants

Mr David Ewart QC and Ms Barbara Belgrano (instructed by the General Counsel and Solicitor to HM Revenue and Customs) appeared for the defendants

**Hearing dates: 11<sup>th</sup> and 12<sup>th</sup> June 2018, and 18<sup>th</sup> January 2019**

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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## **Index**

<b><u>Section</u></b>	<b><u>Paragraph</u></b>
Introduction	1
The four preliminary issues	9
The five disputed issues	17
The specific test claims	18
The most relevant statutory provisions	19
<i>Income and Corporation Taxes Act 1988</i>	20
<i>Schedule 18 to the Finance Act 1998</i>	25
<i>Statutory provisions relevant to the section 320 issue</i>	31
The EU law principle of effectiveness	34
The substantive law on the recovery of wrongly paid tax	37
<i>FII Group Litigation v. IRC (2006)</i>	38
<i>Haribo Lakritzen Hans Riegel BetriebsgmbH v. Finanzamt Linz (2011)</i>	39
<i>Test Claimants in the FII Group Litigation v. HMRC (2012)</i>	44
<i>The Prudential Assurance Co Ltd v. HMRC (2013)</i>	47
<i>The Prudential Assurance Co Ltd v. HMRC (2016)</i>	51
<i>Littlewoods Ltd and others v. HMRC (2017)</i>	53
<i>Prudential Assurance Company v. HMRC (2018)</i>	56
The lawfulness of amendments to limitation periods and providing for exclusive remedies	60
<i>Autologic Holdings plc v. IRC (2005)</i>	61
<i>Fleming (trading as Bodycraft) v. HMRC (2008)</i>	66
<i>Test Claimants in the FII Group Litigation v. HMRC (2012)</i>	68
<i>Leeds City Council v. Revenue and Customs Commissioners (2016)</i>	70
<i>Jazztel plc v. Revenue and Customs Commissioners (2017)</i>	72
The paragraph 51(6) issue	74
<i>The first sub-issue: Does Autologic mean that, even where there is an exclusive regime for the vindication of a statutory claim, common law</i>	77

<i>rights are not altogether excluded?</i>	
<i>The second sub-issue: Did Henderson J misunderstand Haribo in Portfolio Dividends HC 1, when he held that the effectiveness principle was not violated when a taxpayer had to state how much tax the foreign company had paid, but could not find out?</i>	81
<i>The third sub-issue: Is the relief allowed by section 790 prevented from being an effective remedy because it only applies to portfolio dividends as a result of Marleasing?</i>	83
<i>The fourth sub-issue: Is the relief allowed by section 790 prevented from being an effective remedy where the claimants can show that they did not actually know that they had such a remedy before their remedy had become statute barred?</i>	85
<i>The fifth sub-issue: Is the relief allowed by section 790 prevented from being an effective remedy because the taxpayers could not have been certain how much to claim under paragraph 54?</i>	98
<i>The sixth sub-issue: Are HMRC estopped from contending that section 790 provides a statutory remedy for the claimants in this case, when they had conceded the point in Portfolio Dividends HC 1 as recorded in paragraph 263 of the judgment?</i>	102
<i>The seventh sub-issue: Is the practice generally prevailing defence in paragraph 51A(8) to be read as excluded by the Marleasing principle so as to mean that the claimants here did have an effective claim under section 790?</i>	104
<i>The eighth sub-issue: Did the reduction of the limitation periods provided for by schedule 18 in some other way mean that the claimants had no effective remedy under section 790?</i>	108
<i>The ninth sub-issue: Can the allegedly obstructive conduct of HMRC in making it more difficult for the claimants to make their claims affect what would otherwise be the legal position?</i>	110
<i>Conclusion on the paragraph 51(6) issue</i>	116
The transitional period issue	120
The section 320 issue	122
The constructive discovery issue	125
The disputed issues	128
<i>The first disputed issue</i>	131
<i>The second disputed issue</i>	135
<i>The third disputed issue</i>	138

<i>The fourth disputed issue</i>	141
<i>The fifth disputed issue</i>	142
Summary of conclusions	145
<b>Schedule 1 – Agreed Statement of Facts</b>	<b>Page 67</b>

## **Sir Geoffrey Vos, Chancellor of the High Court:**

### Introduction

1. This is the latest in a line of cases begun in 2003 in which commercial taxpayers seek to recover from the Commissioners for Her Majesty's Revenue and Customs ("HMRC") overpaid corporation tax paid in respect of dividend income, together with interest. The claims are, as yet, far from concluded.
2. As the docketed judge (which I was at the time), I directed on 27<sup>th</sup> November 2017 that this particular trial should determine four agreed preliminary issues, relating essentially to limitation, on a test case basis, and should also decide whether it remained open to HMRC to argue five disputed issues at trial. Falk J is now the docketed judge for the remainder of this litigation.
3. These proceedings are part of the Controlled Foreign Company and Dividend Group Litigation ("CFC litigation") established by a group litigation order made by Chief Master Winegarten under CPR Part 19.12 on 30<sup>th</sup> July 2003 (the "CFC GLO"). The CFC litigation, and the related Franked Investment Income Group Litigation (the "FII litigation") formed by a group litigation order of 8<sup>th</sup> October 2003 (the "FII GLO"), concern the UK's former tax treatment of dividends received by UK-resident companies from non-UK-resident companies. The relevant tax rules were contained in (i) the system of advance corporation tax (the "ACT provisions"), which has been abolished for distributions made on or after 6<sup>th</sup> April 1999, and (ii) the taxation of dividend income from non-resident sources under section 18 and schedule D, case V of the Income and Corporation Taxes Act 1988 ("ICTA") (the "Case V provisions"), which have been repealed for dividend income received on or after 1<sup>st</sup> April 2009.
4. The 32 claimant groups in the CFC GLO are mostly investment funds, because claims were allocated to the CFC GLO (as opposed to the FII GLO) where they concerned tax paid (i) on dividends received from companies in which the claimant held less than 10% of the shares ("portfolio dividends"), or (ii) only under the Case V provisions and not the ACT provisions. The claimants in both the CFC and FII GLOs are UK-resident corporate groups that have paid tax on foreign dividend income pursuant to the ACT and Case V provisions. In the broadest of outline, they claim that these provisions were incompatible with European Union law. It is said that they infringed articles 49 and 63 of the Treaty on the Functioning of the European Union 2012/C326/01 ("TFEU") relating to freedom of establishment and free movement of capital, because they treated UK dividends differently from foreign dividends. The claimants seek repayment and interest on the grounds that the tax was paid under a mistake of law and under the unjust enrichment principle established in *Woolwich Equitable Building Society v. IRC* [1993] AC 70 ("*Woolwich*") and/or damages in respect of the overpaid tax arising from that incompatibility under the principles explained in *Francovich and Others* (joined cases C-6/90 and C-9/90) [1991] ECR I-5357.
5. The claims in the CFC GLO have been divided into classes 1-6 and 8 (there is no class 7) depending on their facts and the issues they raise, with some claims falling into multiple classes. Prudential Assurance Company Limited ("Prudential") has

been appointed as the test claimant for the portfolio dividend claims, and many issues common to all the classes have already been determined in that context. That case was, however, heard on appeal to the Supreme Court in February 2018. When I heard the first two days of argument in this trial on 11<sup>th</sup> and 12<sup>th</sup> June 2018, the Supreme Court's decision in *Prudential Assurance Company v. HMRC* [2018] UKSC 39 ("*Portfolio Dividends SC*"), was expected imminently. It was ultimately handed down on 25<sup>th</sup> July 2018. A further hearing in this trial was arranged for 18<sup>th</sup> January 2019, after the parties had considered the details of *Portfolio Dividends SC*, so that my decision could be properly informed by the Supreme Court's determinations. The parties were agreed that *Portfolio Dividends SC*, whilst a very significant decision, had only a modest impact on the issues that I have to decide at this trial. I will, however, mention it in a little more detail when I come to the issues to which it has any relevance.

6. This hearing relates to the CFC GLO's class 8 claims, of which there are 15. Those claims were issued after 31<sup>st</sup> March 2010. They raise certain limitation issues which have not yet arisen in the other classes of claim.
7. The background to the CFC and FII GLOs and details of the test claimants are set out in the parties' Agreed Statement of Facts, which is reproduced in Schedule 1 to this judgment.
8. It has been agreed that I should assume for the purposes of this decision that the claimants are entitled under EU law to recover the overpaid tax they claim, subject to the procedural impediments represented by the agreed issues.

#### The four preliminary issues

9. The agreed preliminary issues are as follows:-
  - i) **The paragraph 51(6) issue:** Are the claimants' common law claims in unjust enrichment under *Woolwich* and mistake and in damages, including claims for compound interest, issued after March 2010, ousted by paragraph 51(6) of schedule 18 to the Finance Act 1998 ("paragraph 51(6)"), or that provision read with the statutory provisions relating to interest?
  - ii) **The transitional period issue:** If paragraph 51(6) does not oust the claimants' common law claims, are those claims, which were issued within the transitional period provided by section 231 of the Finance Act 2013 ("section 231"), ousted?
  - iii) **The section 320 issue:** Does section 320 of the Finance Act 2004 ("section 320") have effect in relation to claims for restitution of tax paid before and/or after its introduction and, if so, is the relevant date of introduction the date from which it took effect (8<sup>th</sup> September 2003) or the date of Royal Assent (22<sup>nd</sup> July 2004)?
  - iv) **The constructive discovery issue:** Is the date of constructive discovery of the mistake either 8<sup>th</sup> March 2001, 12<sup>th</sup> December 2006, 13<sup>th</sup> November 2012 or some other date?

10. The paragraph 51(6) issue took most of the available time in argument. That was because the bulk of the class 8 claims were issued in 2012 and 2014, as opposed to Prudential's claims that were all or mostly issued before 2010. That meant that the class 8 claims, but not Prudential's claims, were at first sight precluded by the express terms of paragraph 51(6), which came into force on 1<sup>st</sup> April 2010. Paragraph 51(6) provided that HMRC were "not liable to give relief in respect of" these cases except as specifically provided for by specified tax legislation. The class 8 claims, primarily in mistake, were of course all common law claims brought outside the provisions of tax legislation. They would, therefore, be ousted by paragraph 51(6) unless that provision is held to be incompatible with (primarily) the EU law principle of effectiveness.
11. Mr Graham Aaronson QC, leading counsel for the taxpayer claimants, submitted, in essence, that his clients had made statutory claims for the recovery of their overpaid tax and interest within the time limits in every conceivable form possible, yet according to HMRC those claims were insufficient. He said that the "alert and diligent claimants" are therefore being denied an effective remedy, which must be a breach of the EU law principle of effectiveness. He drew attention to the detailed exposition of the efforts made by the claimants to make these claims explained in the statement of Mr Michael Anderson dated 13<sup>th</sup> April 2018 (particularly paragraphs 48-60), and to HMRC's allegedly unhelpful responses also explained in that statement.
12. It is true, submitted Mr Aaronson, that EU case law allows a Member State to apply a time limit, even where taxpayers fail to make a claim in time because they were not aware of their substantive EU law rights under a treaty or EU legislation (see *Fantask A/S and Others v. Industriministeriet (Erhvervsministeriet)* (Case C-188/95) [1997] ECR-I-6783 ("*Fantask*"). The rationale for that line of cases, however, is that legal certainty demands that there must be closure for the state even if the evolution of the law was not predictable. HMRC are, submitted Mr Aaronson, seeking in this case to extend that principle by claiming that it applies to a claimant's lack of knowledge about how to make a claim. Mr Aaronson argued that taxpayers seeking to assert substantive EU law rights must not be impeded by unduly onerous procedures, so that finality (the rationale for the CJEU's case law) does not apply to taxpayers who are alert to the possibility of making claims, have done their best to assert their statutory rights, but have been simply unable to do so because no claim could be made and quantified as a procedural matter. In such circumstances, paragraph 51(6), which purports to oust otherwise available common law claims, would substantially undermine the taxpayer's right to make an effective claim, and must be in conflict with the EU law principle of effectiveness.
13. Mr David Ewart QC, leading counsel for HMRC, answered these submissions by pointing to the line of cases that demonstrate that a Member State may shorten time limits if it gives appropriate notice, even if that means that a claimant can never bring a claim because he did not know about it at the relevant time. The EU law principle of effectiveness must give the claimant the means to make a claim, but it does not require that the claimant must know that he has a claim before it can be taken away by an appropriately notified limitation period.
14. Mr Ewart's main point was that the taxpayers in these cases could have made claims for double taxation relief under sections 788 and 790 of ICTA, because, as a matter of

EU law, those provisions applied not only to dividends paid to shareholders holding more than 10% of a company (“subsidiary dividends”), but also to portfolio dividends. That was finally determined in *Test Claimants in the FII Group Litigation v. IRC* (Case C-446/04) [2012] 2 AC 436 (“*FII CJEU 1*”) in 2006. The principle that the quantum of such claims was at the foreign nominal rate was decided by *Test Claimants in the FII Group Litigation v. HMRC* (Case C-35/11) [2013] Ch 431 (“*FII CJEU 2*”) in 2012. Even the continuing uncertainty at the time of the initial argument as to what *Portfolio Dividends SC* might decide (about the foreign nominal rate being the correct quantum of these claimants’ claims) did not prevent them claiming under section 790. The claimants could have estimated the quantum of their claims. Mr Ewart argued that the requirement for a claim to be quantified in order to be valid under paragraph 54 of schedule 18 to the Finance Act 1998 (“paragraph 54”) did not mean that the quantum claimed had to be legally correct. Schedule 1A to the Taxes Management Act 1970 (“TMA”) then obliged HMRC to give effect to a claim outside the assessment, which it can only do if it is quantified.

15. Mr Ewart submitted that it is not appropriate to look at each claimant individually to see whether it can bring a claim. The question is whether there is an effective remedy under English law, and not what any particular claimant may or may not have known about the law or even the procedural route to making a valid claim. It is no answer to say that the information needed to make a valid claim was difficult to obtain. In order to invoke the EU law principle of effectiveness, the claim has to be practically impossible or excessively difficult. That was not this case.
16. I will return to the authorities that support these competing propositions. As can be seen, however, the proper resolution of this case requires a detailed examination of the nature and extent of the EU law principle of effectiveness, and of the authorities on the lawfulness of making changes to limitation provisions to exclude otherwise valid common law claims.

#### The five disputed issues

17. The five disputed issues that HMRC wished originally to be able to raise were as follows (the fourth disputed issue is said by HMRC to be academic after *Portfolio Dividends SC*):-
  - i) Whether the effective rate of corporation tax paid by UK companies was generally lower than the nominal rate of corporation tax paid by the claimants.
  - ii) Whether elections would have been made under section 438(6) of ICTA in respect of the relevant dividend income so as to treat the income as exempt.
  - iii) Whether some or all of the claimants’ High Court claims ought to be stayed or struck out applying the principles in *Autologic Holdings plc v. IRC* [2006] 1 AC 118 (“*Autologic*”).
  - iv) What the actual benefit to the defendants was in respect of the use of any corporation tax and ACT paid by mistake.
  - v) Whether the defendants were enriched by the amount of any ACT that was paid by the claimants, or whether the computation of any enrichment must take



into account credits received by the claimants' shareholders as a result of the payment of ACT.

The specific test claims

18. The test claims for each of the above issues are as follows:-

- i) **The paragraph 51(6) issue:** the claims of Fidelity International Funds and others (HC12A04762) (the "Fidelity claim") in relation to restitution of tax paid under the Case V provisions, and the claims of Standard Life Investment Company and others (HC12A04786) (the "Standard Life claim") in relation to the ACT provisions.
- ii) **The transitional period issue:** the claims of JP Morgan Trustee and Depository Company Limited (HC14A00246) (the "Schroders claim").
- iii) **The section 320 issue:** the Fidelity claim.
- iv) **The constructive discovery issue:** the claims of Barclays Bank plc and others (HC14A00261) (the "Barclays claim").
- v) **The disputed issues:** the Standard Life claim for aspects concerning the ACT provisions, and all the test claims jointly (the Fidelity, Standard Life, Schroders and Barclays claims) for all other aspects.

The most relevant statutory provisions

19. It is important to start with an understanding of the taxation and limitation regime in force at the relevant time. The claims in the Prudential test case and the FII litigation were, as I have said, claims brought in or around 2003, whilst these cases were all brought some time after the amendments to schedule 18 to the Finance Act 1998 came into force on 1<sup>st</sup> April 2010. These amendments provided that HMRC was not liable to give relief in respect of overpaid tax outside the legislation, and reduced the limitation period from six to four years for claiming double taxation relief and for claims under paragraph 51 of schedule 18.

ICTA

20. Section 788 of ICTA allowed HMRC to give relief in respect of double taxation, as follows:-

**"Relief by agreement with other countries**

(1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been made with the government of any territory outside the United Kingdom with a view to affording relief from double taxation in relation to—

(a) income tax,

(b) corporation tax in respect of income or chargeable gains, and

(c) any taxes of a similar character to those taxes imposed by the laws of that territory,

and that it is expedient that those arrangements should have effect, then those arrangements shall have effect in accordance with subsection (3) below.

...

(3) Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide—

(a) for relief from income tax, or from corporation tax in respect of income or chargeable gains; or

...

(4) The provisions of Chapter II of this Part shall apply where arrangements which have effect by virtue of this section provide that tax payable under the laws of the territory concerned shall be allowed as a credit against tax payable in the United Kingdom.

...

(6) Except in the case of a claim for an allowance by way of credit in accordance with Chapter II of this Part, a claim for relief under subsection (3)(a) above shall be made to the Board.

(7) Where—

(a) under any arrangements which have effect by virtue of this section, relief may be given, either in the United Kingdom or in the territory with the government of which the arrangements are made, in respect of any income or chargeable gains, and

(b) it appears that the assessment to income tax or corporation tax made in respect of the income or chargeable gains is not made in respect of the full amount thereof, or is incorrect having regard to the credit, if any, which falls to be given under the arrangements,

any such assessments may be made as are necessary to ensure that the total amount of the income or chargeable gains is assessed, and the proper credit, if any, is given in respect thereof, and, where the income is, or the chargeable gains are, entrusted to any person in the United Kingdom for payment, any such assessment may be made on the recipient of the income or gains, and, in the case of an assessment in respect of income, may be assessed under Case VI of Schedule D.

...”

21. Section 790 then allowed HMRC to apply double taxation relief to dividends received from companies, in which the taxpayer held a minimum 10% shareholding, in countries where section 788 did not apply as there was no treaty in place, as follows:-

**“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 with the government of the territory in question containing the provisions specified in subsections (4) to (10) 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.

...

(6) Where a dividend paid by a company resident in the territory is paid to a company resident in the United Kingdom which either directly or indirectly controls, or is a subsidiary of a company which directly or indirectly controls—

(a) not less than 10 per cent. of the voting power in the company paying the dividend ...

any tax in respect of its profits paid under the law of the territory by the company paying the dividend shall be taken into account in considering whether any, and if so what, credit is to be allowed in respect of the dividend. ...”

22. Section 795 provided for the imputation system to apply to the double taxation relief in sections 788 and 790, by allowing the dividend to be treated as grossed up by the amount of the foreign tax and allowing tax relief in respect of that foreign tax, as follows:-

**“Computation of income subject to foreign tax**

(1) Where credit for foreign tax falls under any arrangements to be allowed in respect of any income and income tax is payable by reference to the amount received in the United Kingdom, the amount received shall be

treated for the purposes of income tax as increased by the amount of the foreign tax in respect of the income, including in the case of a dividend any underlying tax which under the arrangements is to be taken into account in considering whether any and if so what credit is to be allowed in respect of the dividend.

(2) Where credit for foreign tax falls under any arrangements to be allowed in respect of any income or gain and subsection (1) above does not apply, then, in computing the amount of the income or gain for the purposes of income tax or corporation tax—

(a) no deduction shall be made for foreign tax, whether in respect of the same or any other income or gain; and

(b) the amount of the income shall, in the case of a dividend, be treated as increased by any underlying tax which, under the arrangements, is to be taken into account in considering whether any and if so what credit is to be allowed in respect of the dividend. ...”

23. Section 806 provided for the time limits for making claims for double taxation relief under the previous provisions, as follows. The six-year time limit referred to in section 806 below was subsequently reduced to four years with effect from 1<sup>st</sup> April 2010:-

**“Time limit for claims etc**

(1) Subject to subsection (2) below ... any claim for an allowance under any arrangements by way of credit for foreign tax in respect of any income or chargeable gain shall be made not later than six years from the end of the chargeable period for which the income or the gain falls to be charged to income tax or corporation tax, or would fall to be so charged if any income tax or corporation tax were chargeable in respect of the income or gain.

(2) Where the amount of any credit given under the arrangements is rendered excessive or insufficient by reason of any adjustment of the amount of any tax payable either in the United Kingdom or under the laws of any other territory, nothing in the Tax Acts limiting the time for the making of assessments or claims for relief shall apply to any assessment or claim to which the adjustment gives rise, being an assessment or claim made not later than six years from the time when all such assessments, adjustments and other determinations have been made, whether in the United Kingdom or elsewhere, as are material in determining whether any and if so what credit falls to be given.”

24. Section 826 of ICTA provided for simple interest to be paid on overpaid tax under section 89 of the TMA, as follows:-

**“Interest on tax overpaid**

(1) In any case where—

- (a) a repayment falls to be made of corporation tax paid by a company for an accounting period which ends after the appointed day; or
- (b) a repayment of income tax falls to be made in respect of a payment received by a company in such an accounting period; or
- (c) a payment falls to be made to a company of the whole or part of the tax credit comprised in any franked investment income received by the company in such an accounting period,

then, from the material date until that repayment or payment is made, the repayment or payment shall carry interest at the rate which, under section 89 of [the TMA], is for the time being the prescribed rate for the purposes of this section. ...”

Schedule 18 to the Finance Act 1998

25. Paragraph 7 of schedule 18 provided for taxpayers to make a self-assessment tax return as follows:-

“(1) Every company tax return for an accounting period must include an assessment (a “self-assessment”) of the amount of tax which is payable by the company for that period—

- (a) on the basis of the information contained in the return, and
- (b) taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period. ...”

26. Paragraph 51 provided as follows with effect from 1<sup>st</sup> April 2010:-

“(1) This paragraph applies where—

- (a) a person has paid an amount by way of tax [defined in paragraph 1 as corporation tax and any amount assessable or chargeable as if it were corporation tax, which includes ACT per *NEC Semi-Conductors Ltd v. IRC* [2004] STC 489 at paragraph 43; [2006] STC 606 at paragraph 60; [2007] STC 1265 at paragraph 39] but believes that the tax was not due ...

(2) The person may make a claim to [HMRC] for repayment or discharge of the amount.

(3) Paragraph 51A makes provision about cases in which [HMRC] are not liable to give effect to a claim under this paragraph.

(4) The following make further provision about making and giving effect to claims under this paragraph—

- (a) paragraphs 51B to 51F and Part 7 of this Schedule, and

(b) Schedule 1A to the Taxes Management Act 1970 (which is applied by that Part).

...

(6) [HMRC] are not liable to give relief in respect of a case described in subparagraph (1)(a) or (b) except as provided—

(a) by this Schedule and Schedule 1A to the Taxes Management Act 1970 (following a claim under this paragraph), or

(b) by or under another provision of the Corporation Tax Acts. ...”.

27. Paragraph 51A provided for exceptions to the claims that could be made against HMRC under paragraph 51 as follows. Section 231 of the Finance Act 2013, which took effect on 17<sup>th</sup> July 2013, introduced paragraphs 51A(9)-(10) after a 6-month transitional period, so that these paragraphs only apply to claims made after 17<sup>th</sup> January 2014:-

“(1) [HMRC] are not liable to give effect to a claim under paragraph 51 if or to the extent that the claim falls within a case described in this paragraph (see also paragraphs 51BA and 51C(5)).

(2) Case A is where the amount paid, or liable to be paid, is excessive by reason of—

(a) a mistake in a claim, election or a notice,

(b) a mistake consisting of making or giving, or failing to make or give, a claim, election or notice,

...

(3) Case B is where the claimant is or will be able to seek relief by taking other steps under the Corporation Tax Acts.

(4) Case C is where the claimant—

(a) could have sought relief by taking such steps within a period that has now expired, and

(b) knew, or ought reasonably to have known, before the end of that period that such relief was available.

...

(8) Case G is where—

...

(b) liability was calculated in accordance with the practice generally prevailing at the time [the “practice generally prevailing defence”].

(9) Case G does not apply where the amount paid, or liable to be paid, is tax which has been charged contrary to EU law.

(10) For the purposes of sub-paragraph (9), an amount of tax is charged contrary to EU law if, in the circumstances in question, the charge to tax is contrary to—

(a) the provisions relating to the free movement of goods, persons, services and capital in Titles II and IV of Part 3 of the Treaty on the Functioning of the European Union, or

(b) the provisions of any subsequent treaty replacing the provisions mentioned in paragraph (a).”

28. Paragraph 51B provided as follows with effect from 1<sup>st</sup> April 2010, reducing the limitation period for paragraph 51 claims from 6 to 4 years:-

“(1) A claim under paragraph 51 may not be made more than 4 years after the end of the relevant accounting period.

(2) In relation to a claim made in reliance on paragraph 51(1)(a), the relevant accounting period is—

(a) where the amount paid, or liable to be paid, is excessive by reason of a mistake in a company tax return or returns, the accounting period to which the return (or, if more than one, the first return) relates, and

(b) otherwise, the accounting period in respect of which the amount was paid.

(3) In relation to a claim made in reliance on paragraph 51(1)(b), the relevant accounting period is the accounting period to which the assessment, determination or direction relates.

(4) A claim under paragraph 51 may not be made by being included in a company tax return.”

29. Paragraph 54 was the provision that provided for any claim for relief to be quantified, as follows:-

“A claim under any provision of the Corporation Tax Acts for a relief, an allowance or a repayment of tax must be for an amount which is quantified at the time when the claim is made.”

30. Paragraph 56 provided for a supplementary claim to correct an original claim, as follows:-

“A company which has made a claim or election under any provision of the Corporation Tax Acts (by including it in a return or otherwise) and subsequently discovers that a mistake has been made in it may make a supplementary claim or election within the time allowed for making the original claim or election.”

Statutory provisions relevant to the section 320 issue

31. Section 32 of the Limitation Act 1980 provides that:-

“(1) ... where in the case of any action for which a period of limitation is prescribed by this Act ...

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the ... mistake ... or could with reasonable diligence have discovered it. ...”

32. Section 320 of the Finance Act 2004 was announced on 8<sup>th</sup> September 2003 by the Paymaster General and came into force on 22<sup>nd</sup> July 2004. It provided that:-

“(1) Section 32(1)(c) of the Limitation Act 1980 ... does not apply in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners of Inland Revenue. This subsection has effect in relation to actions brought on or after 8<sup>th</sup> September 2003.

...

(6) The provisions of this section apply to any action or claim for relief from the consequences of a mistake of law, whether expressed to be brought on the ground of mistake or on some other ground (such as unlawful demand or ultra vires act).

...

(7) This section shall be construed as one with the Limitation Act 1980 ...”.

33. Section 320 thus fixed the limitation period for common law claims for restitution of overpaid tax at 6 years (the limitation period for actions founded on simple contract, which applies by analogy), even in cases of mistake.

The EU law principle of effectiveness

34. The most appropriate starting point is the case of *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* (Case 199/82) [1983] ECR 3595 (“*San Giorgio*”). It held that, where a Member State has received taxes and duties in breach of EU law, it must repay them. Paragraph 12 of the CJEU’s judgment described the EU law principles of equivalence and effectiveness as follows:-

“In that connection it must be pointed out in the first place that entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable



thereto, the fact nevertheless remains, as the Court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges [the principle of equivalence] and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law [the principle of effectiveness]”.

35. A more recent statement of the principle of effectiveness is contained in the CJEU’s decision in *Test Claimants in the FII Group Litigation v. IRC* [2014] AC 1161 (Case C-362/12) (“*FII CJEU 3*”), at paragraph 32, as follows:-

“The detailed procedural rules governing actions for safeguarding a taxpayer’s rights under EU law ... must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) ...”.

36. The parties have referred to a number of cases that provide examples of the CJEU’s approach to the application of the principle of effectiveness. I shall deal with those at an appropriate stage, but for the moment, the classic expositions of the basic principle will suffice.

#### The substantive law on the recovery of wrongly paid tax

37. It is useful now to deal chronologically with the relevant cases on the recovery of wrongly paid tax. As *Prudential SC* has shown, this is a rapidly developing area of both EU and English law. I hope I will be forgiven for setting out some quite lengthy citations. I do so only because the parties have relied on the detail of these cases, and it would not do justice to their arguments to refer to snippets from complex judgments out of context. I freely accept that there is an overlap between the cases cited in this section and the following one; it is impossible to undertake a complete review of such a large volume of authority.

#### *FII CJEU 1* (2006)

38. This decision concerned the compatibility of the ACT and the Case V provisions with the articles of the TFEU on freedom of establishment and free movement of capital. It determined, in essence, that those provisions were not compatible with EU law insofar as they allowed double taxation relief on dividends only for shareholders with holdings of 10% or more in a foreign company. There were, however, three relevant holdings as follows:-

- i) In relation to the Case V provisions, the fact that nationally-sourced dividends were subject to an exemption system (i.e. exempt from corporation tax) and foreign-sourced dividends were subject to an imputation system (i.e. corporation tax was charged but credit was given by reference to the amount of corporation tax paid in the foreign country) did not contravene the principle of freedom of establishment, provided that (i) the tax rate applied to foreign-sourced dividends was not higher than the rate applied to nationally-sourced dividends and (ii) the tax credit was at least equal to the amount paid in the member state of the company making the distribution, up to the limit of the tax charged in the member state of the company receiving the dividends (paragraph 57).

- ii) In relation to companies receiving dividends from companies in which they held fewer than 10% of the voting rights, the UK legislation exempting nationally-sourced dividends from corporation tax, whilst giving foreign-sourced dividends tax relief only for withholding tax charged in the foreign state, was contrary to the principle of the free movement of capital (paragraphs 58-61).
- iii) Articles 43 and 56 of the TFEU precluded the UK legislation which allowed a resident company receiving dividends from another resident company to deduct the tax paid by the paying company from the amount which the recipient company paid by way of ACT, but permitted no such deduction in the case of a resident company receiving dividends from a non-resident company (paragraph 112).

*Haribo Lakritzen Hans Riegel BetriebsgmbH v. Finanzamt Linz* (Joined Cases C-436/08 and C-437/08) [2011] STC 917 (“*Haribo*”)

39. *Haribo* concerned Austrian tax legislation on foreign dividends. The relevant questions that Advocate General Kokott and the CJEU were answering were as follows:-

“2. Is Community law infringed if **for foreign portfolio dividends from EU/EEA States** the imputation method is to be applied insofar as the requirements for the exemption method are not met, although both the proof of the requirements for the exemption method (comparable taxation, amount of the foreign tax rate, absence of personal or subject-based exemptions of the foreign corporation) and the data necessary for the crediting of foreign corporation tax cannot be provided by the shareholder, or can be provided only with great difficulty? [emphasis added]

3. Is Community law infringed if in the case of **earnings from non-member State holdings** the law neither contains an exemption from corporation tax nor makes provision for crediting of corporation tax paid, insofar as the size of the holding is under 10 per cent (25 per cent), whereas earnings from domestic holdings are exempt from tax irrespective of the size of the holding? [emphasis added]

4. If Question 3 is answered in the affirmative: Is Community law infringed if, in order to remove discrimination **against non-member State holdings**, a national authority applies the imputation method, whereby proof of the (corporation) tax already paid abroad can, on account of the small size of the holding, not be proved or be proved only with disproportionate effort, because according to a decision of the *Verwaltungsgerichtshof* [an Austrian appeal court] that result comes closest to the (hypothetical) will of the legislature, whereas in the case of simply not applying the discriminatory 10 per cent (25 percent) threshold for non-member State dividends a tax exemption would arise? [emphasis added]”.

40. Advocate General Kokott concluded on issue 2 that EU law was “not infringed if domestic corporations must, as a rule, pay corporation tax on portfolio dividends from other EU/EEA States because it is impossible or barely possible for them to provide

the information on foreign corporation tax previously paid which is required for exemption or at least for credit, whilst national portfolio dividends are always exempt”. In the course of reaching that conclusion, she said the following:-

“AG55. In the present cases, the problem actually resides purely in the realm of fact. Thus, Haribo claims that in the case of a portfolio holding in a foreign corporation through a domestic investment fund it is not even possible to ascertain the corporation from which the dividends originate.

AG56. In my opinion, these problems of proof cannot in themselves make it disproportionate to apply an only conditional exemption method with a possible switchover to the imputation method, as provided for in Austrian law for portfolio dividends **from other EU/EEA States** [emphasis added].

AG57. Such a provision does not require anything that is actually impossible. The necessary information is in fact available somewhere, namely from the respective companies which distributed the dividends and possibly also from the domestic investment funds through which the company shares eligible for dividends are held. If obtaining that information entails considerable, cost-intensive effort, the investor must consider which is more favourable for him: proving the previous foreign charge to tax or relinquishing the exemption or credit.

AG58. Even if such proof should ultimately not be possible because the shareholder is not in a position, de facto or de jure, to obtain that information, this must nevertheless be attributed to the shareholder’s sphere. It is in the interest of both the foreign companies and the domestic investment fund to organise the portfolio investment as attractively as possible. This includes providing the shareholder with the necessary information so that he can benefit from the possibility of preventing or mitigating economic double taxation in his State of residence. The inadequate flow of information to the investor is not a problem for which the Member State should have to answer.”

41. The CJEU approved Advocate General Kokott’s approach to question 2 as follows:-

“93. ... According to Haribo, the exemption and imputation methods are equivalent only in cases where proof of the corporation tax paid abroad can in fact be adduced or can be without disproportionate effort.

94. On the other hand, the Austrian, German, Italian, Netherlands and United Kingdom Governments and the Commission contend that the administrative burden imposed on the company receiving portfolio dividends is not excessive. The Austrian Government stresses in this regard that the notice of June 13, 2008 simplified significantly the evidence necessary in order to receive a credit for the foreign tax.

...

96. ... if ... because of an excessive administrative burden, it is in fact impossible for companies receiving portfolio dividends from companies

established in Member States other than the Republic of Austria and in non-member States party to the EEA Agreement to benefit from the imputation method ... the imputation method and the exemption method ... cannot be considered to lead to equivalent results.

97. However, inasmuch as a Member State is, in principle, free, to avoid the imposition of a series of charges to tax on portfolio dividends received by a resident company by opting for the exemption method when the dividends are paid by a resident company and for the imputation method when they are paid by a non-resident company established in another Member State or in a non-member State party to the EEA Agreement, additional administrative burdens which are imposed on the resident company, in particular the fact that the national tax authority demands information relating to the tax that has actually been charged on the profits of the company distributing dividends in the State in which the latter is resident, are an intrinsic part of the very operation of the imputation method and cannot be regarded as excessive (see, to this effect, [*FII CJEU I*] at [48] and [53]). In the absence of such information, the tax authorities of the Member State where the company receiving foreign-sourced dividends is established are not, in principle, in a position to determine the amount of corporation tax paid in the State of the company making the distribution that must be credited against the amount of tax payable by the recipient company.

98. Whilst the company receiving dividends does not itself have all the information relating to the corporation tax that has been charged on the dividends distributed by a company established in another Member State or in a non-member State party to the EEA Agreement, such information is known, in any event, to the latter company. Accordingly, any difficulty that the recipient company may have in providing the information required relating to the tax paid by the company distributing dividends is connected not to the inherent complexity of the information but to a possible lack of co-operation on the part of the company that has the information. As the Advocate General states in point 58 of her Opinion, the inadequate flow of information to the investor is not a problem for which the Member State concerned should have to answer.

99. Furthermore, as the Austrian Government observes, the notice of June 13, 2008 has simplified the evidence necessary in order to receive a credit for the foreign tax in that, when calculating the tax paid abroad, account is taken of the following formula. The profit of the company distributing dividends must be multiplied by the nominal rate of corporation tax applicable in the State where that company is established and by the holding of the recipient company in the capital of the company distributing dividends. Such a calculation requires only limited co-operation on the part of the company distributing dividends or of the investment fund when the holding concerned is possessed through such a fund.

...

104. In light of the foregoing, the answer to the second question referred therefore is that art. 63 TFEU must be interpreted as not precluding legislation of a Member State under which portfolio dividends which a resident company receives from another resident company are exempt from corporation tax whilst portfolio dividends which a resident company receives from a company established in another Member State or in a non-member State party to the EEA Agreement are subject to that tax, provided, however, that the tax paid in the State in which the last-mentioned company is resident is credited against the tax payable in the Member State of the recipient company and the administrative burdens imposed on the recipient company in order to qualify for such a credit are not excessive. Information demanded by the national tax authority from the company receiving dividends that relates to the tax that has actually been charged on the profits of the company distributing dividends in the State in which the latter is resident is an intrinsic part of the very operation of the imputation method and cannot be regarded as an excessive administrative burden.”

42. In relation to question 3, the CJEU held that:-

“138. ... art. 63 TFEU must be interpreted as precluding national legislation which, in order to prevent economic double taxation, exempts portfolio dividends received by a resident company and distributed by another resident company from corporation tax and which, for dividends distributed by a company established in a non-member State other than a State party to the EEA Agreement, provides neither for exemption of the dividends nor for a system under which a credit is granted for the tax that the company making the distribution pays in the State in which it is resident.”

43. In relation to question 4, the CJEU held that:-

“144. The allegedly excessive administrative burden that application of the imputation method involves has already been examined in [92]–[99] and [104] of the present judgment.

...

147. The answer to the fourth question referred therefore is that art. 63 TFEU does not preclude the practice of a national tax authority which, for dividends from certain non-member States, applies the imputation method where the holding of the recipient company in the capital of the company making the distribution is below a certain threshold and the exemption method above that threshold, whilst it systematically applies the exemption method for nationally-sourced dividends, provided, however, that the mechanisms in question designed to prevent or mitigate distributed profits being liable to a series of charges to tax lead to equivalent results. The fact that the national tax authority demands information from the company receiving dividends relating to the tax that has actually been charged on the profits of the company distributing them in the non-member State in which the latter is resident is an intrinsic part of the very operation of the

imputation method and does not affect, as such, the equivalence between the exemption and imputation methods.”

**FII CJEU 2 (2012)**

44. The background to the reference in *FII CJEU 2* was explained by the Court of Appeal in *Test Claimants in the FII Group Litigation v. HMRC* [2016] EWCA Civ 1180; [2017] STC 696 (“*FII CA 2*”) at paragraphs 53-55. The first question that was referred concerned the Case V provisions, and was framed by the CJEU in the following terms:-

“36. By its first question, the referring court asks, in essence, whether articles [49 and 63 of the TFEU] must be interpreted as precluding legislation of a member state which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends when, in that member state, the effective level of taxation of company profits is generally lower than the nominal rate of tax.”

45. The CJEU’s answer to that question was that:-

“60. As to the proportionality of the restriction, whilst application of the imputation method to foreign-sourced dividends and of the exemption method to nationally-sourced dividends may be justified in order to avoid economic double taxation of distributed profits, it is not, however, necessary, in order to maintain the cohesion of the tax system in question, that account be taken, on the one hand, of the effective level of taxation to which the distributed profits have been subject to calculate the tax advantage when applying the imputation method and, on the other, of only the nominal rate of tax chargeable on the distributed profits when applying the exemption method.

61. The tax exemption to which a resident company receiving nationally-sourced dividends is entitled is granted irrespective of the effective level of taxation to which the profits out of which the dividends have been paid were subject. That exemption, in so far as it is intended to avoid economic double taxation of distributed profits, is thus based on the assumption that those profits were taxed at the nominal rate of tax in the hands of the company paying dividends. It thus resembles grant of a tax credit calculated by reference to that nominal rate of tax.

62. For the purpose of ensuring the cohesion of the tax system in question, national rules which took account in particular, also under the imputation method, of the nominal rate of tax to which the profits underlying the dividends paid have been subject would be appropriate for preventing the economic double taxation of the distributed profits and for ensuring the internal cohesion of the tax system while being less prejudicial to freedom of establishment and the free movement of capital.

63. It is to be observed in this connection that in [*Haribo*], para 99, the court, after pointing out that the member states are, in principle, allowed to prevent the imposition of a series of charges to tax on dividends received by a

resident company by applying the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends, noted that the national rules in question took account, for the purpose of calculating the amount of the tax credit under the imputation method, of the nominal rate of tax applicable in the state where the company paying dividends was established.

64. It is true that calculation, when applying the imputation method, of a tax credit on the basis of the nominal rate of tax to which the profits underlying the dividends paid have been subject may still lead to a less favourable tax treatment of foreign-sourced dividends, as a result in particular of the existence in the member states of different rules relating to determination of the basis of assessment for corporation tax. However, it must be held that, when unfavourable treatment of that kind arises, it results from the exercise in parallel by different member states of their fiscal sovereignty, which is compatible with the Treaty ...

65. In light of the foregoing, the answer to the first question is that articles [49 and 63 of the TFEU] must be interpreted as precluding legislation of a member state which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends if it is established, first, that the tax credit to which the company receiving the dividends is entitled under the imputation method is equivalent to the amount of tax actually paid on the profits underlying the distributed dividends and, second, that the effective level of taxation of company profits in the member state concerned is generally lower than the prescribed nominal rate of tax.”

46. The remaining questions that were referred mainly concerned the ACT provisions. The CJEU’s conclusions were as follows:-

“82. ... the answer to the second question is that the answers given by the court to the second and fourth questions asked in the case which gave rise to the judgment in [*FII CJEU I*] also apply where: (i) the foreign corporation tax to which the profits underlying the distributed dividends have been subject was not or was not wholly paid by the non-resident company paying those dividends to the resident company, but was paid by a company resident in a member state that is a direct or indirect subsidiary of the first company; (ii) ACT has not been paid by the resident company which receives the dividends from a non-resident company, but was paid by its resident parent company under a group income election.”

“87. The answer to the third question ... is that European Union law must be interpreted as meaning that a parent company resident in a member state, which in the context of a group taxation scheme, such as the group income election at issue in the main proceedings, has, in breach of the rules of European Union law, been compelled to pay ACT on the part of the profits from foreign-sourced dividends, may bring an action for repayment of that unduly levied tax in so far as it exceeds the additional corporation tax which the member state in question was entitled to levy in order to make up for the

lower nominal rate of tax to which the profits underlying the foreign-sourced dividends were subject compared with the nominal rate of tax applicable to the profits of the resident parent company.”

“104. ... the answer to the fourth question is that European Union law must be interpreted as meaning that a company that is resident in a member state and has a shareholding in a company resident in a third country giving it definite influence over the decisions of the latter company and enabling it to determine its activities may rely upon article 63FEU in order to call into question the consistency with that provision of legislation of that member state which relates to the tax treatment of dividends originating in the third country and does not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends.”

“111. The answer to the fifth question ... is that the reply given by the court to the third question asked in the case which gave rise to the judgment in [*FII CJEU I*] does not apply where the subsidiaries established in other member states to which ACT could not be surrendered are not subject to tax in the member state of the parent company.”

*The Prudential Assurance Co Ltd v. HMRC* [2013] EWHC 3249 (Ch); [2014] STC 1236  
(“Portfolio Dividends HC I”)

47. This was the first substantive decision of Henderson J in the Prudential test case (his previous judgment having adjourned the trial to await further developments in the FII litigation). At paragraphs 38-54, he undertook a detailed analysis of the CJEU’s decision in *Haribo*, of which the following passages are particularly relevant for present purposes:-

“52. The crucial point which in my judgment emerges from the Court’s discussion of Question 2 is its apparently unqualified endorsement of the principle that it is an intrinsic part of the operation of an imputation system to require the taxpayer to provide details of the foreign tax actually charged on the distributed profits, even in the case of portfolio dividends. This principle therefore cannot in itself be regarded as imposing an excessive administrative burden on taxpayers. It follows, in my view, that any difficulty, or even practical impossibility, for a taxpayer in providing such information cannot be taken into account in determining whether an excessive administrative burden has been imposed on him. The justification for this austere doctrine is that the relevant information must be known to the company making the distribution; and any inadequacy in the provision of information to the investor “is not a problem for which the Member State concerned should have to answer” (paragraph 98). Furthermore, the Court reached this conclusion in the light of evidence before the referring tribunal that in practice it was usually impossible for investors to furnish the information required by the Austrian tax authorities, apparently even after the simplifications introduced in 2008.



53. It should be noted that the discussion by the [CJEU] of Question 2 was concerned only with portfolio dividends from other EU/EEA States. The reason for this was that the legislation provided neither exemption nor a tax credit for dividends from third countries. In its answer to Question 3, the [CJEU] held that this treatment infringed Article 63; while in its answer to question 4 it ruled, in effect, that the infringement could be remedied by adoption of an imputation system, subject to the same conditions as applied in relation to portfolio dividends from EU or EEA States. In particular, the Court made it clear that the same principles relating to the allegedly excessive administrative burden that this would place on taxpayers would apply: see paragraphs 144 and 147 of the judgment.”

48. At paragraph 80, Henderson J set out the agreed issues relating to the Case V provisions, as follows:-

“1. In light of [the reasoned order and the decisions in [*FII CJEU 1*] and [*FII CJEU 2*] is it possible to give the domestic legislation a conforming construction? Specifically, should the legislation be interpreted so as to entitle the Claimant to a tax credit to set against D V tax charged on Portfolio Dividends and, if so, what is the appropriate amount of the tax credit?

2. Alternatively, should the domestic legislation be disapplied and, if so, how should that disapplication be given effect?”

49. His reasoning in relation to these issues was as follows:-

“84. It has already been established by the reasoned order that the Case V charge on portfolio dividends infringed the Article 63 rights of the test claimants in all cases where the dividend was paid by a company resident in the EU or EEA. Thus the basic question which I am now considering is how, as a matter of domestic English law, that infringement of EU law is to be remedied ...

85. In order to answer this question, it is first necessary to understand in precisely what relevant respects the UK legislation infringed Article 63. This enquiry has both a negative and a positive aspect. Negatively, what were the defects in the legislation? Positively, what would have been required to eliminate them? On the negative side, it is abundantly clear from the authorities which I have reviewed that the infringement lay, at least, in the failure of the UK system to provide a tax credit for the actual underlying tax paid on the distributed profits in the source state ...

86. According to [HMRC], that is the only defect in the UK legislation which needs to be remedied. The claimants disagree, however, and submit that it is apparent from the fuller and more sophisticated analysis of the problem by the Grand Chamber of the [CJEU] in [*FII CJEU 2*] that there was a further defect in the domestic system. The nature of this defect is revealed, they say, by the focus in [*FII CJEU 2*] on nominal (as well as effective) rates of tax ... Where domestic dividends are relieved from economic double taxation by exemption, the application of an imputation

system to foreign dividends requires account to be taken of the nominal rate of tax to which the underlying profits have been subject in the source state

...

87. According to the claimants, the right way in which to take account of the nominal rate of tax in the source state would be to grant a tax credit for such nominal rate of tax, in addition to a credit for the actual underlying tax paid in respect of the dividend, up to a ceiling (in each case) of the full amount of the actual charge to corporation tax under Case V. The credits for the nominal rate of tax and the actual underlying tax are cumulative, but in combination they cannot do more than extinguish the Case V charge (as reduced by any withholding tax for which relief is already provided either under double taxation arrangements or under section 790). Thus there is no question of any windfall for the claimants, because any excess of the credits over the actual charge would not generate any right to payment of the excess from HMRC. And if the end result in virtually every case will be to extinguish the charge, that is neither surprising nor a cause for concern. On the contrary, it will merely illustrate how the exemption and imputation methods of relieving economic double taxation are operating in an equivalent manner, that being the fundamental principle which underpins the [CJEU's] jurisprudence in this area.

...

92. It seems to me, in broad agreement with the submissions of the claimants, that ... The request for clarification in the second FII reference has produced a fuller and more nuanced analysis by the Court of the problems associated with the Case V charge on foreign dividends. A crucial part of this analysis is the theoretical assumption that the exemption from tax of a dividend is to be regarded as equivalent to the grant of a tax credit at the nominal rate, and the concomitant principle that a state of residence which grants exemption to domestic dividends must, at least, grant credit for the nominal rate of tax paid in the source state, although it remains free to charge a higher nominal rate itself (and thus to top up the charge by the difference between the domestic and foreign nominal rates). This analysis, in my judgment, flows from and forms part of the Court's general elucidation of the overriding need to treat foreign and domestic dividends equivalently, and is as applicable to portfolio dividends as it is to non-portfolio dividends.

...

95. At first sight, it may be thought that the claimants' analysis of the invalidity under EU law of the Case V charge is unduly complex, and also likely to produce too much in the way of credit. One may feel intuitively that credit for underlying tax actually paid and credit at the nominal foreign rate ought to be alternatives, and something must have gone wrong if they are treated as cumulative. But the two types of credit are conceptually quite distinct; and the apparently excessive result of aggregating them can be simply remedied by treating them as alternatives, with credit to be granted for whichever amount is the higher (up to the limit of the Case V charge

reduced by withholding tax). In the great majority of cases credit at the nominal foreign rate will be higher than a credit for the underlying tax actually paid, but Mr Aaronson was able to satisfy me that this will not invariably be the case, particularly bearing in mind the widely varying systems of corporate taxation throughout the EU.

96. I therefore conclude that the UK legislation would have been compliant with EU law if it had provided for the grant of such a “dual” credit for portfolio dividends ...

100. Having now identified the respects in which the UK legislation infringed Article 63, and how it could have been rendered compliant, the next question is whether this result can be achieved by a process of conforming construction of the UK legislation, or whether the Case V charge must be disapplied ...

101. There is no dispute about the principles which should be applied in considering whether a conforming interpretation of legislation which infringes EU law is possible ...

102. The principle of conforming construction is often referred to as the Marleasing principle, named after the [CJEU] case in which it was first clearly enunciated (Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 [*“Marleasing”*]). In FII (SC) Lord Sumption at paragraph [176] described the principle, as it has been applied in England, as “authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom”. He added that, however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, “a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision”.

103. Applying these principles, I consider that it falls well within the scope of conforming interpretation to construe section 790 of ICTA 1988 as providing for the grant of a tax credit for foreign dividends to the extent necessary to secure compliance with EU law. Since section 790 already provides for the grant of tax credits, in the case of both portfolio and non-portfolio dividends, the grant of a further tax credit for portfolio dividends would not in my judgment go against the grain of the UK tax legislation. Nor would it require the court to make policy decisions for which it is not equipped, because the sole purpose of the tax credit would be to secure compliance with the judgments of the [CJEU] in which the UK tax system has been held to infringe Article 63.

104. In reaching this conclusion, I am accepting [HMRC’s] submission that a conforming interpretation is possible, and that it is therefore unnecessary for the Case V charge on portfolio dividends to be disapplied in cases where it infringes Article 63. [HMRC’s] submission was, of course, advanced on

the basis that the additional credit would be confined to the actual underlying tax paid on the distributed profits in the source country. However, I can see no reason why the same principles should not apply if the credit is of the more complex dual nature which I have held to be appropriate. The underlying purpose is still exactly the same, and the machinery of the grant of a credit still goes with the grain of the legislation.

...

117. Where, then, does this leave the claim for a credit for the underlying tax actually paid? The rival submissions are starkly opposed. Relying on Haribo, [HMRC] submit that the provision of such information is “an intrinsic part of the very operation of the imputation method and cannot be regarded as excessive” ... The information was known to the companies which paid the dividends, and it is not the UK’s responsibility if portfolio shareholders were provided with inadequate information by the company to claim the credit ... Furthermore, Haribo is a strong case, because the Court reached these conclusions despite evidence from the referring tribunal that the Austrian tax authority’s requirements were in practice virtually impossible to satisfy. The practical difficulties were squarely before the Court, and were included in the formulation of the second and fourth questions ... Indeed, the Court’s answer to the second question could hardly have been more explicit ...

...

118. If Haribo was the last word of the [CJEU] jurisprudence on this topic, I do not think the claimants could seriously dispute the principles upon which [HMRC] rely or their application to the present case. But, say the claimants, the subsequent decision of the [CJEU] in [Case C-310/09, *Ministre du Budget, des Comptes publics et de la Fonction publique v. Accor SA* [2012] STC 438 (“Accor”)] makes all the difference. They rely on the Court’s discussion of administrative burdens under the rubric of effectiveness in paragraphs 99 to 101 of the judgment, and on the Court’s statement in the answer to the third question in paragraph 102 that:

“Production of that evidence may however be required only if it does not prove virtually impossible or excessively difficult to furnish proof of payment of the tax by the subsidiaries established in the other Member States ...”

The claimants point out that there was no discussion of effectiveness in Haribo, where the issue was rather whether the administrative burden imposed on the company receiving portfolio dividends was excessive and thus nullified the relief from economic double taxation prima facie provided by the imputation system. If this is right, the claimants go on to submit that the appropriate way to provide them with an effective remedy would be either to disapply the Case V charge or to grant a credit based on the nominal rate of tax.

119. I do not find this an easy question, but on balance I prefer the submissions of [HMRC] on this part of the case. My reasons are briefly as follows.

120. First, the decision in *Haribo* is directly in point (it concerned portfolio dividends) and unequivocal in its reasoning, which was based firmly on the intrinsic nature of an imputation system and the proposition that the necessary information is in principle capable of ascertainment from the company paying the dividend, coupled with the proposition that the tax authorities of the recipient State are under no obligation to try to obtain the information themselves. The Court clearly faced, and was unmoved by, the plight of companies which in practice found themselves unable to obtain the information, and thus ended up without any relief at all.

121. Secondly, the Court in *Accor* was dealing not with portfolio dividends, but with dividends paid by subsidiaries. Moreover, there was no evidence that *Accor* would encounter any particular difficulty in providing information about the tax actually paid by its own subsidiaries established in other Member States. The focus was rather on the absence of any such requirement for dividends which *Accor* received from its French subsidiaries, and the question whether EU law required the grant of a tax credit for the foreign dividends at the same rate as that enjoyed by the French dividends. In this context, the key conclusion was that the tax credit for foreign dividends did not have to equate with the 50% credit for French dividends, and it was therefore necessary for information to be provided about the nature and rate of tax actually charged on the foreign profits (paragraph 92 of the judgment). It is only at this point that the Court discussed the administrative burdens of providing the information, holding that they could not be regarded as excessive or as infringing the principles of equivalence and effectiveness. In relation to equivalence, the Court relied on *Haribo* and (in paragraph 96 of the judgment) actually cited the statement in paragraph 98 of *Haribo* that “the inadequate flow of information to the parent company is not a problem for which the Member State concerned should have to answer”. The discussion of effectiveness is comparatively brief, and there is no indication that it was intended to qualify, or still less negate, the principle derived from *Haribo* which the Court had just applied. In my judgment the discussion of effectiveness must be read as being subject to the principles established in *Haribo*, and was not intended to detract from them. So understood, there is no conflict between the two decisions, and there is still scope for operation of the principle of effectiveness in the taxpayer's favour. Mr Ewart instanced possible restrictions on the provision of information in the source State, for example based on secrecy laws or legislation about the period for which documents need to be retained. If information were to be required which would breach such restrictions in the source State, the principle of effectiveness would be infringed. That is very different, however, from saying that the principle is also infringed by the virtual impossibility or excessive difficulty of obtaining information which the paying company would in principle be able to supply.

122. Thirdly, where the problem is caused by the failure of foreign companies to provide adequate information to their investors, and where according to the [CJEU] the Member State cannot be held responsible for that failure, it simply makes no sense, in my judgment, to say that the Member State has nevertheless failed to provide the recipient with an effective remedy by requiring the information to be supplied. Consistently with the former principle, the lack of an effective remedy must be laid at the door of the company which has failed to provide the investor with the information it needs. That was the position in Haribo, and in my view it remains the position after Accor .

123. For these reasons, I conclude that:

- (a) the test claimants have failed on the facts to prove their entitlement to a tax credit for the underlying tax actually paid;
- (b) this failure involves no breach by the United Kingdom of the principle of effectiveness; and
- (c) there is therefore no reason either to disapply the requirement of proof, or to grant a tax credit at the nominal rate as a proxy.

In practice, however, these conclusions make little (if any) difference if I am right in my earlier conclusion that [FII CJEU 2] required the UK to grant a credit at the nominal rate of corporation tax paid by the distributing company, quite separately from the credit for underlying tax actually paid. The only circumstances in which it might make a difference are the rare cases where the tax actually paid in a particular year exceeds tax at the nominal rate (for example as a result of balancing charges to match an earlier relief) ...”.

50. Finally, the claimants relied on the following paragraph of Henderson J’s judgment, which is found at the end of the section entitled “Claims under the Tax Acts and the *Autologic* principle”:-

“263. A second agreed issue under this heading asked whether the statutory claims procedure for unilateral relief under section 790 excludes the claimant’s common law claims. I need say no more about this, because Mr Ewart expressly confirmed that the issue is no longer pursued by [HMRC] and has been abandoned ...”.

*The Prudential Assurance Co Ltd v. HMRC* [2016] EWCA Civ 376; [2017] 1 WLR 4031  
(“*Portfolio Dividends CA*”)

51. This was an appeal from Henderson J’s decision in *Portfolio Dividends HC 1* and his consequential decision on relief in *The Prudential Assurance Co Ltd v. HMRC* [2015] EWHC 118 (Ch); [2015] STC 1119 (“*Portfolio Dividends HC 2*”). The first decision was affirmed and the second was reversed in part.
52. One of the issues arising from the first decision was “whether EU law requires, as the judge held, a tax credit for the higher of tax actually paid and the foreign nominal rate

of tax of the dividend-paying company capped at the UK corporation tax rate, or, as HMRC claim, a credit for the actual tax rate paid capped at the UK corporation tax rate” (paragraph 47). The court decided that issue in favour of the claimants, holding that:-

“66. ... articles [49 and 63 of the TFEU] must, in the light of the decision in [FII CJEU 2], be taken to preclude UK legislation which allows a dual system of exemption and imputation if the tax credit under the latter method is only equivalent to the amount of tax actually paid on the profits. The contention that the credit should be at the actual rate (if that rate is less than the nominal rate) cannot stand with the CJEU’s decision.

...

76. Whether the credit should be at the nominal or the actual rate of tax does not depend on whether the dividends are or are not portfolio dividends ...

...

79. In the light of these conclusions it is not necessary to decide whether, if the credit was to be applied at the actual rate, Prudential, which cannot prove the tax actually charged, would, having regard to the principle of effectiveness, be entitled, as it submitted, to treat the nominal tax rate of the jurisdiction of the non-resident dividend-paying company or evidence of the underlying tax paid in the consolidated accounts of that company as a proxy for the tax actually paid.

80. HMRC wished to pursue an additional argument that in the case of an insurance company, which is subject to special rules of taxation, the effective rate of tax payable in the UK was no lower than the policy holders' rate of tax as applied to insurance companies. This argument had not been pleaded or canvassed at trial; and Prudential submitted that, if it had been, evidence would have been adduced to support its case. Indeed Prudential applied to adduce in evidence on appeal an expert's report in the event that HMRC were given permission to raise this point. We ruled that HMRC were not entitled to raise this point for the first time on appeal, since it was obvious that the course of evidence would have been different below had the point been raised in due time.”

*Littlewoods Ltd and others v. HMRC* [2017] UKSC 70 (“*Littlewoods SC*”)

53. The appeal in *Littlewoods SC* concerned claims for compound interest on tax that had been paid under a mistake of law. Section 78(1) of the VAT Act 1994 provided in that regard that “if and to the extent that [HMRC] would not be liable to do so apart from this section, they shall pay interest to [the claimant] ... for the applicable period, but subject to the following provisions of this section”. Those provisions referenced section 80 of the Act, which provided for payment of simple interest alone.
54. The first issue was whether *Littlewoods*’ common law claims for compound interest were excluded by sections 78 and 80. In their judgment (with which Lords Carnwath,

Neuberger and Clarke agreed), Lords Reed and Hodge said the following in relation to this issue:-

“27. Littlewoods’ cross-appeal centres on the words in section 78(1) ... “if and to the extent that they would not be liable to do so apart from this section”... They argue that those words should be given their ordinary meaning. So construed, section 78 yields to any other liability to pay interest ...

28. This argument has been consistently rejected by the courts, but for a variety of different reasons ...

29. In the present case, Vos J considered that sections 78 and 80 had to be regarded as creating an integrated regime for repayments of overstated and overpaid VAT, which should be read as a whole ... If... the critical words in section 78(1) covered common law restitution claims, then the right to interest under section 78 would be disapplied in every case where repayments were due under section 80. In those circumstances, to construe the critical words as including common law restitutionary claims would make a nonsense of the provision: para 60.

30. The Court of Appeal focused on the fact that the critical words in section 78(1) concern liabilities to pay “interest”. In their view, it was a strained use of language to describe a liability to make restitution for the time value of money as a liability to pay interest, even if the relief was calculated by reference to interest rates: para 45. There are two difficulties with this reasoning. The first is that it is difficult to see any substantial distinction between a liability to pay for the time value of money and a liability to pay interest: interest is a measure of the time value (or use value) of money. The second is that, if Littlewoods' claim does not concern a liability to pay interest, it is difficult to see how it can be affected by section 78, which is solely concerned with interest.

31. Despite the attractive way in which Littlewoods’ argument was presented, we agree ... that it should be rejected ...

...

34. In section 78, Parliament has ... created a specific right to interest for taxpayers who have overpaid VAT, but has done so subject to limitations, including those set out in subsections (1), (3) and (11) . Those limitations are a special feature of the statutory regime and would have no equivalent in a common law claim. They would therefore be defeated if it were possible for the taxpayer to bring a common law claim. Parliament cannot have intended the special regime in section 78 to be capable of circumvention in that way. Unlike section 80, however, section 78 contains no provision expressly excluding alternative remedies. That does not prevent the exclusion of alternative remedies by implication. As Littlewoods point out, however, the critical words in subsection (1) acknowledge that there are other rights to interest which must be given priority. Read literally, those words would apply to common law rights to interest; but that reading, as we have



explained, would render the limitations in subsections (1), (3) and (11) effectively pointless. How, then, are those words to be construed in the context of the provision as a whole? ...

37. In this context, the aspect of the decision in [*Sempra Metals Ltd v. Inland Revenue Comrs (formerly Metalgesellschaft Ltd)* [2007] UKHL 34; [2008] 1 AC 561 (“*Sempra Metals*”)] which is important is that it was accepted for the first time that a claim would lie at common law for the use value of money by which the defendant was unjustly enriched, even if the money itself had been repaid, and that the enrichment could normally be calculated by compounding interest over the period of the enrichment. That decision was not contemplated by Parliament when it enacted sections 78 and 80, many years earlier. If a claim based on the principle established by that decision were held to be available to Littlewoods, on the basis that it fell within the critical words in section 78(1) (“if and to the extent that they would not be liable to do so apart from this section”), then it would equally be available in any other case where an amount was paid under section 80. As counsel for Littlewoods accepted in argument, section 78 would effectively become a dead letter. It follows that the literal reading fatally compromises the statutory scheme created by Parliament. It cannot therefore be the construction of the critical words which Parliament intended. ...

40. Since the scheme created by section 78 is inconsistent with the availability of concurrent common law claims to interest, it must therefore be interpreted as impliedly excluding such claims. The reservation set out in section 78(1) must therefore be construed as referring only to statutory liabilities to pay interest. So construed, section 78 impliedly excludes the claims made by Littlewoods, as a matter of English law, and without reference to EU law.”

55. The second issue before the court was “whether the CJEU has ruled that HMRC must reimburse in full the use value of the money which over an exceptionally long period of time Littlewoods has paid by mistake” or, put more briefly, whether there was an entitlement to compound interest under EU law. In that regard, the Supreme Court held that:-

“70. ... there is no requirement in the CJEU’s jurisprudence that the value which the member state, by the award of interest, places on the use of money should make good in full the loss which a taxpayer has suffered by being kept out of his money ...

71. We are satisfied that the judgment of the Grand Chamber of the CJEU in this case, which addresses directly the issue which will determine this case, is clear when read as a whole. The Grand Chamber has specifically addressed the issue of whether simple or compound interest is required, in a reference made in these very proceedings. It has given such guidance as it considered appropriate. It has ruled that “it is for national law to determine, in compliance with the principles of effectiveness and equivalence, whether the principal sum must bear ‘simple interest’, ‘compound interest’ or another type of interest”. Here, national law provides for simple interest. No issue of

equivalence arises. So far as effectiveness is concerned, the Grand Chamber has held that it is for the national court to determine whether the national rules would deprive the taxpayer of an adequate indemnity for the loss caused by the undue payment of VAT. In that regard, it has said that it should be noted that the interest already paid exceeds the principal amount due by more than 23%. It is now the duty of this court to apply that guidance. There is no basis for a further reference to the CJEU.”

*Portfolio Dividends SC (2018)*

56. *Portfolio Dividends SC* took the Supreme Court’s decision in *Littlewoods SC* further and departed from the reasoning of the House of Lords in *Sempra Metals*. The first thing it did, however, was to uphold *Prudential CA* in affirming that EU law required a tax credit in respect of overseas dividends to be set by reference to the foreign nominal rate rather than the overseas tax actually paid.

57. In relation to compound interest and the reasoning in *Sempra Metals*, I do not intend to set out the Supreme Court’s treatment at length. It is perhaps enough to set out the Court’s own summary at paragraph 79 as follows:-

“79. For the foregoing reasons, we therefore depart from the reasoning in *Sempra Metals* so far as it concerns the award of interest in the exercise of the court’s jurisdiction to reverse unjust enrichment. As mentioned earlier, it is unnecessary for us to consider the reasoning in that case so far as it concerns the award of interest as damages, and nothing in this judgment is intended to question that aspect of the decision. Since the award of compound interest to PAC by the courts below was based on the application of the reasoning in *Sempra Metals* which we have disapproved, it follows that the revenue succeed on Issue II, and PAC’s claims to compound interest under categories (b) and (c) must be rejected. PAC’s claim to compound interest under category (a) would also have been rejected, if it had not been accepted by the revenue”.

58. It is useful, in the light of the arguments of the parties after this decision was delivered, to note that the three categories in issue in *Portfolio Dividends SC* were set out at paragraph 34 as follows:-

“34. ... The amounts on which interest is sought, and the periods over which it is submitted that interest should be compounded, are as follows: (a) unlawfully levied ACT which was subsequently set off against lawfully levied MCT, from the date of payment by PAC to the date of set-off; (b) all other unlawfully levied tax (including unlawfully levied ACT which was never set off against lawful MCT, and unlawfully levied ACT which was set off against unlawfully levied MCT), from the date of payment by PAC to the date of repayment by HMRC; and (c) the time value of utilised ACT (resulting from (a) above), from the date of set-off to the date of payment by the HMRC”. ...

59. The Supreme Court decided other issues too, but these are not material to what I have to decide.

The lawfulness of amendments to limitation periods and providing for exclusive remedies

60. This section deals with the important cases on the abrogation of limitation periods and the ousting of common law claims in favour of statutory remedies. I have already dealt with *Littlewoods SC*, which related to the latter question, but will now consider in chronological order the main authorities that the parties have relied upon under these headings.

*Autologic (2005)*

61. The relevance of *Autologic* was much in issue in this case. Mr Aaronson put it at the centre of his submissions, whilst Mr Ewart contended that it was of no relevance.
62. Mr Aaronson submitted that the majority in *Autologic* (Lords Nicholls and Millett, with whom Lord Steyn agreed) decided that the legislation there in issue (namely Chapter IV of Part X of ICTA regarding group loss relief) was an implicit exclusive statutory regime. The logical conclusion to be derived from that exclusive regime was that High Court actions would be struck out, but that was not what the House of Lords did. Instead, the House stayed the High Court claims and held that, insofar as the ICTA claims in the tax tribunal could not proceed for limitation or other reasons, the High Court claims could be revived. That was a pragmatic solution, which was applicable in a case where courts and tribunals had jurisdiction and where statutory claims ran in parallel with common law claims.
63. Mr Ewart submitted that *Autologic* was irrelevant because it did not concern a case where there was an express statutory exclusion of common law claims, as in this case. Moreover, the House of Lords had not explained why it stayed rather than struck out the common law claims, and had certainly not said that they could proceed if the statutory claims were statute-barred.
64. Lord Nicholls said this in *Autologic*:-

“7. The procedural dispute now before the House arises out of a contention by [HMRC] that the principal claims for relief covered by the loss relief group litigation order are not properly justiciable in the High Court. Claims for group relief should be made to an inspector of taxes ...

...

11. In resolving this question of jurisdiction the starting point is to note two basic principles. The first concerns the exclusive nature of the appeal commissioners’ jurisdiction to decide certain types of disputes arising in the administration of this country’s tax system. The present disputes concern claims for group relief ... What matters is that ... an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation ... Further, the statutory code makes its own provision for appeals ...

12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt

the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.

...

16. The second basic principle concerns the interpretation and application of a provision of United Kingdom legislation which is inconsistent with a directly applicable provision of Community law ...

17. Thus, when deciding an appeal from a refusal by an inspector to allow group relief the appeal commissioners are obliged to give effect to all directly enforceable Community rights ...

#### **Claimant companies which can still obtain group relief**

18. Against that background I turn to the other complicating feature of these appeals: the different positions of the claimants ...

19. As I see it, these claimants fall into two broad classes. One class comprises cases where, if the claimant company's contentions on Community law are well-founded, it is still open to the company to obtain in full the group relief to which, on that footing, the company is entitled. The other class comprises cases where this course is not open to the claimant company. The difference between these two classes corresponds to the distinction between (a) giving effect to the group relief provisions as read and applied in accordance with Community law and (b) awarding damages for breach of a Community law right.

20. In my view in the former of these two classes the ... claims in the High Court are misconceived. Where a claimant company can obtain through the statutory procedures the very tax relief of whose non-availability it is complaining, I see no justification for the company by-passing the statutory route and, instead, going to the High Court and claiming damages or a restitutionary remedy based on the proposition that the company has been wrongly refused the tax relief to which it is entitled under Community law.

...

23. ... these claims in the High Court are prima facie a misuse of the court's process. These claims cover the same ground in all respects as the appeals pending before the appeal commissioners. The remedy sought is co-

extensive with adjudicating upon existing, open assessments. The essence of the High Court claims is that these assessments were wrong, that the court should so hold, and that the court should itself calculate the amounts which ought to have been assessed and order repayment of the overpaid excess. There could hardly be a more obvious example of seeking to sidestep the statutory procedure. ...

27. ... The claimants are able to obtain the group relief to which they are entitled by following the statutorily-prescribed route. That is the route they should follow.

28. The taxpayers contend that to oblige all claimants to follow this route, especially those who have not yet made group relief claims to [HMRC], would be inconsistent with the approach indicated by the European Court of Justice in the *Hoechst* case ...

...

The Court of Appeal regarded this ruling as determinative of these test cases.

29. I am unable to agree. The taxpayers' reliance on this ruling in the present cases is misplaced. The taxpayers are seeking to apply the European court ruling out of context ... The *Hoechst* ruling was not directed at a situation where, as here, the claimants' claims have yet to be decided by the national court and there exists a statutorily prescribed route by which the claimants are able to obtain the tax relief they say is their entitlement under Community law. Which court or tribunal has jurisdiction to hear disputes involving rights derived from Community law is a matter for determination by each member state ...

30. Of course, to be compliant with Community law the remedial route prescribed by the legal system of a member state must be such that the rules ... must not render "practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)": see the *Hoechst* case, para 85. The statutory route prescribed for group relief claims was not designed for claims in respect of non-resident companies. So, as United Kingdom law presently stands, at the initial step a taxpayers' group relief claim will inevitably be refused by [HMRC]. Further, as already noted, some statutory requirements will need adaptation to accommodate claims in respect of non-resident companies. But neither of these features should present any major problem. Neither of them renders the statutory route "practically impossible or excessively difficult" ...

...

### **Claimant companies which cannot now obtain group relief**

39. Thus far I have been considering cases where the subject matter of the ... claims in the High Court is group relief claims which can still be allowed by the appeal commissioners if the claimants' Community law contention is correct. I now turn to the other class of cases, where this is not so. The most

obvious example is where it is now too late, in respect of the relevant accounting periods, for a claimant to make a group relief claim to [HMRC] or to appeal to the appeal commissioners. The claimant is outside the prescribed time limits ...

...

41. In such cases the taxpayers' remedy necessarily lies elsewhere. In such cases the taxpayer's remedy is of a different character. The taxpayer's remedy lies in pursuing proceedings claiming restitutionary and other relief in respect of the United Kingdom's failure to give proper effect to Community law. The appeal commissioners have no jurisdiction to hear such claims. Such claims are outside the commissioners' statutory jurisdiction, and the commissioners have no inherent jurisdiction. Claims in this class should therefore proceed in the High Court ...

42. I add one caveat. [HMRC] and the appeal commissioners have power to extend time limits for late amendments and late appeals. Before proceeding with their High Court claims claimant companies in this class of cases should therefore take the simple step of inviting [HMRC] or the appeal commissioners to extend the time limits appropriately. If this invitation is accepted, the claimants should proceed along the statutory route. If the invitation is declined, or if [HMRC] and the appeal commissioners have no power to grant the necessary extensions, the way will be clear for the High Court proceedings to continue.

...

44. I would therefore allow these appeals ... The cases falling within the first class described above ("claimant companies which can still obtain group relief") should be stayed. They should be stayed until further order rather than struck out the more readily to accommodate any unforeseen turn of events. And the stay should not preclude the court referring questions to the European Court if practical convenience so dictates. The cases in the second class ("claimant companies which cannot now obtain group relief") should proceed in the High Court. These six test cases should be remitted to the Chancery Division to give effect to the judgment of the House."

65. Lord Millett agreed with Lord Nicholls and added this:-

"63. It is impossible to foresee all eventualities, and I agree with Lord Nicholls that the proceedings in the High Court in respect of claims which should have been brought before the commissioners should be stayed and not struck out. This would have two advantages. It should encourage [HMRC] to co-operate in waiving or extending time limits and removing procedural and other obstacles to the commissioners' jurisdiction; and it would enable the High Court claims to be revived in the event of unforeseen difficulties arising before the commissioners which cannot be overcome."

*Fleming (trading as Bodycraft) v. HMRC [2008] UKHL 2 (“Fleming”)*

66. *Fleming* concerned amendments to the limitation period for making claims for repayments of VAT. With effect from 1<sup>st</sup> May 1997, a new regulation 29(1A) was inserted into regulation 29 of the Value Added Tax Regulations 1995 by the Value Added Tax (Amendment) Regulations 1997. This was introduced with no transitional period, and provided that HMRC were not to allow a claim for deduction of input tax made more than three years after the date of the return for the relevant period. The taxpayer claimants had made claims after 1<sup>st</sup> May 1997 in relation to tax paid in 1990 and earlier years, which were accordingly rejected by HMRC. The Court of Appeal considered, however, that regulation 29(1A) was incompatible with the principle of effectiveness, and the House of Lords agreed.
67. Lord Neuberger set out the following propositions relating to amendments to limitation periods derived from EU case law:-

“79. It appears to me that the following relevant propositions can be derived from well established principles of Community law and, more specifically, from the reasoning of the [CJEU] in *Marks & Spencer plc v Customs and Excise Comrs* (Case C-62/00) [2003] QB 866 (known as “Marks & Spencer II”) and *Grundig Italiana SpA v Ministero delle Finanze* (Case C-255/00) [2002] ECR I-8003 (known as “Grundig II”):

(a) It is open to the legislature of a member state to impose a time limit within which a claim for input tax must be brought: *Marks & Spencer II*, para 35.

(b) It is further open to the legislature to introduce a new time limit, or to shorten an existing time limit, within which such a claim must be brought, even where the right to claim has already arisen (an “accrued right”) when the new time limit (a “retrospective time limit”) is introduced: *Marks & Spencer II*, paras 37 and 38.

(c) Any such time limits must, however, be “fixed in advance” if they are to “serve their purpose of legal certainty”: *Marks & Spencer II*, para 39.

(d) Where a retrospective time limit is introduced, the legislation must include transitional provisions to accord those with accrued rights a reasonable time within which to make their claims before the new retrospective time limit applies: *Marks & Spencer II*, para 38 and *Grundig II*, para 38.

(e) In so far as the legislature introduces a retrospective time limit without a reasonable transitional provision (as in *Grundig II*) or without any transitional provision (as in *Marks & Spencer II*), the national courts cannot enforce the retrospective time limit in relation to accrued right, at least for a reasonable period; otherwise, there would be a breach of Community law: see *Autologic Holdings plc v Inland Revenue Comrs* [2006] 1 AC 118, paras 16–17.

(f) The adequacy of the period accorded by the transitional provision (“the transitional period”) is to be determined by reference, inter alia to the principles of effectiveness and legitimate expectation: Marks & Spencer II, paras 34 and 46, and Grundig II, para 40; in particular, it must not be so short as to render it “virtually impossible or excessively difficult” for a person with an accrued right to make a claim: Marks & Spencer II, para 34, and Grundig II, para 33.

(g) It is primarily a matter for the national courts to decide whether the length of any transitional period is adequate, although the [CJEU] will give a view if the transitional period is “clearly” so short as to be inconsistent with Community law: Grundig II, paras 39 and 40.

(h) The absence of a transitional period of adequate length is not, however, automatically fatal to the enforcement of the retrospective time limit: Grundig II, para 41.

(i) Where there is no adequate transitional period, it is for the national court to fashion the remedy necessary to avoid an infringement of Community law: Marks & Spencer II, para 34, Grundig II, paras 33, 36, 40, and 41, Autologic, paras 16 and 17, and the [CJEU’s] decision in *Metallgesellschaft Ltd v Inland Revenue Comrs* (Joined Cases C-397/98 and C-410/98) [2001] Ch 620, para 85.

(j) That remedy would, at least normally, be to disapply (perhaps only for a period) the operation of, the retrospective application of the new time limit to claims based on accrued rights: Marks & Spencer II, paras 34–41, and Grundig II, paras 38–40 and especially (with regard to temporary disapplication) para 41.”

*Test Claimants in the FII Group Litigation v. HMRC* [2012] UKSC 19 (“*FII SC*”)

68. For present purposes, the primary relevance of *FII SC* lies in the following consideration by Lord Sumption of the retrospective curtailment of limitation periods in the light of the principle of effectiveness:-

“151. The fundamental requirement of the principle of effectiveness is that limitation periods should be reasonable, ie not so short as to make recovery by action “impossible” or excessively difficult: see *Rewe I* [1976] ECR 1989, para 5 and *Comet BV v Produktschap voor Siergewassen* (Case 45/76) [1976] ECR 2043, paras 16–18. But the assessment of what is reasonable allows for considerable variation between different national systems. There is abundant case law concerning limitation periods much shorter than six years, which have been held to be reasonable. Moreover, it is not inconsistent with the principle of effectiveness that under national law the limitation period for the recovery of unlawful charges should run from the time of payment: see *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* (Case C-231/96) [1998] ECR I-4951, para 35 and *Ministero delle Finanze v Spac SpA* (Case C-260/96) [1998] ECR I-4997, para 32. Nor is there any rule of EU law requiring the running of a limitation period to be deferred until the existence of a right to recover the payment has been



judicially established. It is not uncommon for a claim to repayment to have become time-barred in national law while proceedings are still in progress to determine whether the member state was in breach of EU law. This was, for example, the position in *Rewe I*. It was also the position in many of the decisions about the retrospective curtailment of limitation periods, which I shall consider next.

...

153. EU law might have taken an absolute line on national legislation retrospectively extinguishing the possibility of enforcing existing rights to recover money charged contrary to EU law. In fact, it has taken a more flexible and nuanced position. It follows from the liberty given to member states to devise their own domestic law means of giving effect to EU rights, that national legislatures are in principle entitled to change their laws. Because they are not obliged to provide more than the minimum level of protection for EU rights necessary to make them effective, the changes may adversely affect claims to assert EU rights, provided that the new law still provides an effective means of doing so. The compromise which EU law has adopted between these conflicting considerations is to allow the retrospective curtailment of limitation periods within limits set by the principle of the protection of legitimate expectations. **Legislation curtailing limitation periods is in principle consistent with the principle of effectiveness provided that a period of grace, which may be quite short, is allowed, either by giving sufficient advance notice of the change or by including transitional provisions in the legislation.** These propositions are derived from the four leading decisions of the *Court of Justice on this question, namely Aprile Srl v Amministrazione delle Finanze dello Stato (No 2)* (Case C-228/96) [2000] 1 WLR 126 (“Aprile II”), *Dilexport Srl v Amministrazione delle Finanze dello Stato* (Case C-343/96) [2000] All ER (EC) 600, [*Grundig II*] and [*Marks & Spencer II*]” [emphasis added].

69. Later on in his judgment, Lord Sumption considered the *Marleasing* principle in the context of tax recovery claims, as follows:-

“176. *Marleasing*, at any rate as it has been applied in England, is authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom. **It is no doubt correct that, however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision.** But it does not follow that there was not, at the time, an unlawful requirement to pay the tax. It simply means that the unlawfulness consists in the exaction of the tax by the Inland Revenue, in accordance with a non-conforming interpretation of what must (on this hypothesis) be deemed to be a conforming statute. This is so, notwithstanding that the tax may have been paid without anything in the nature of a formal demand by the revenue. The rule as the House of Lords formulated it in *Woolwich Equitable* is in large

measure a response to realities of the relationship between the state and the citizen in the area of tax. The fact that as a matter of strict legal doctrine a statute turns out always to have meant something different from what it appeared to say is irrelevant to the realities of power if it was plain at the relevant time that the tax authorities would enforce the law as it then appeared to be. Strictly speaking, in *Woolwich Equitable* itself there were no unlawful regulations, because, being ultra vires the enabling Act, they were and always had been a nullity. But that did not stop the *Woolwich* from recovering” [emphasis added].

*Leeds City Council v. Revenue and Customs Commissioners* [2016] STC 2256 (“*Leeds City Council*”)

70. Like *Fleming*, *Leeds City Council* concerned the UK rules relating to claims for repayment of VAT. It dealt, however, with a different set of legislative provisions. On 18<sup>th</sup> July 1996, the Paymaster General had announced in Parliament the Government’s intention to reduce the limitation period for claims for the recovery of overpaid output tax to three years with immediate effect. This change was implemented in section 80(4) of the VAT Act 1994 by the Finance Act 1997. Section 80(4) initially had retrospective effect from the date of the Paymaster General’s announcement but, following the House of Lords’ decision in *Fleming*, HMRC made extra-statutory concessions so that it applied to claims for tax paid or declared prior to 4<sup>th</sup> December 1996 (the date from which the House of Commons’s resolution had taken effect).
71. The claimant and appellant, Leeds City Council (“Leeds”), had made claims in 2007 and 2009, which were rejected by HMRC in so far as they related to tax accounted for prior to 4<sup>th</sup> December 1996. In these circumstances, the Court of Appeal held that section 80(4) did not breach the EU law principle of effectiveness, and dismissed Leeds’s appeal. In his judgment (with which Ryder and Christopher Clarke LJ agreed), Lewison LJ held:-

“19. It is common ground that as a matter of EU law a taxable person has a right to recover overpaid VAT: [*San Giorgio*] at [12]. Such a claim is often known in the jargon as a San Giorgio claim. It is also common ground that domestic law may validly impose time limits on when a San Giorgio claim may be made.

20. Leeds relies on a number of principles of EU law in arguing that the domestic limitation period is invalid: the principles of effectiveness, equivalence, proportionality, legal certainty and legitimate expectation. The existence of these principles is not in dispute. What is disputed is whether their application leads to the conclusion that the domestic limitation period infringes those principles. We have been referred to a large number of decisions of the CJEU and its predecessor. But, while admiring the learning and industry involved, in my judgment we need not look much further than *Fleming*.

...

24. *Fleming* was principally concerned with regulation 29 (1A) of the VAT Regulations 1995 ... Like the changes made to section 80 of the VAT Act by the Finance Act 1997 it curtailed a limitation period retrospectively and was introduced without any transitional provisions ... One of the questions before the House was whether the invalidity under EU law of the impugned provision meant that the court could itself disapply the offending provision for a limited period. By a majority the House decided that it could not ... The main reason was that a decision of the court would itself be retrospective and that would infringe the principle of legal certainty which requires any such period to be “fixed in advance” ...

25. The vice of a retrospective period of limitation is that a person who has a valid claim on Day 1 sees it disappear on Day 2 in a puff of smoke.

26. At bottom, therefore, it seems to me that in the first instance the dispute in our case boils down to a relatively narrow issue. Has Leeds been given a readily ascertainable prospective opportunity of a reasonable length within which to bring the claims that it makes (assuming them to be well-founded in law)? If it has, then in the absence of special circumstances, none of the applicable principles of EU law will have been breached. If it has not, they will have been.

27. **We must remind ourselves that all the live claims relate to payments on or after 4 December 1996.** By 4 December 1996 the House of Commons had passed its resolution shortening the applicable limitation period to three years and removing the extended limitation period in cases of mistake. A reader of that resolution would have known that as regards any overpayment of VAT made on, say, 5 December 1996 he had until 4 December 1999 within which to make a claim. On the face of it that is a readily ascertainable prospective period of a reasonable length. Since the live claims all relate to VAT in accounting periods after 4 December 1996, those claims have never had the benefit of any longer limitation period than the three years allowed under the House of Commons’ resolution. In short, therefore, there has been no retrospective alteration of the limitation period applicable to these claims [emphasis added].

28. In essence this was the reasoning of the Upper Tribunal at [98]:

“It must have been clear to Leeds on 18 July 1996 (and if it was not, should have been) that the then government intended to implement a three-year limitation period for s 80 claims. From that day on, Leeds could have had no more than a hope that Parliament might not enact the necessary legislation; it could certainly not assume that it would not. In fact, on 3 December 1996 Parliament passed a resolution, as we have said, which brought the three-year cap into effect; and from the passing of that resolution the only possible expectation which Leeds could have held, in respect of claims arising thereafter, was that they would be affected by a three-year time limit, and that Parliament would in due course pass (as it did) the legislation which provided for it.”

29. That reasoning is, in my judgment, on the face of it impeccable. Are there any special factors which should lead to a contrary conclusion?

...

35. ... Mr Ghosh argues that the court [in Case C-427/10 *Banca Antoniana Popolare Veneta SpA* [2012] STC 526 (“Banco Antoniana”)] held that the fact that the tax authority adopts a position that is wrong in law means that it is excessively difficult for a tax payer to secure the refund of VAT to which he would otherwise be entitled. That reasoning should have been directly applied to the facts of our case ... I do not agree with Mr Ghosh ... If it were the case that whenever the tax authorities misinterpreted a provision of the VAT code that led to a disapplication of the time limits for making a claim, the consequences would be very far-reaching indeed. I cannot accept that that is what the CJEU decided ...

...

40. I can return, then, to the points on which Mr Ghosh relies as necessitating a relaxation of the limitation period in Leeds’ particular case.

...

43. ... there is no rule of EU law requiring the running of a limitation period to be deferred until the existence of a right to recover the payment has been judicially established. It is not uncommon for a claim to repayment to have become time-barred in national law while proceedings are still in progress to determine whether the member state was in breach of EU law: FII at [151] (Lord Sumption). Thus the fact that HMRC advanced a view of the law which is now conceded to be wrong does not preclude reliance on the limitation period. If a taxpayer is dissatisfied with HMRC’s view of the law, the proper course is to appeal to the appropriate tribunal. That course has always been open to Leeds ... Ignorance of one’s legal rights is not a ground for disapplying a limitation period: *British Telecommunications plc v HMRC* [2014] EWCA Civ 433 ... at [106] and [123]. But Mr Ghosh argued that he was complaining not merely that HMRC were wrong, but that they had thrown Leeds off the scent by failing to mention article 4.5 at all and focussing on what turned out to be legally irrelevant arguments. I cannot see that this makes any difference. The provisions of the Sixth Directive were readily available and were (and were known to be) directly effective. If (as was the case) HMRC were barking up the wrong tree, Leeds could readily have identified the right tree: *British Telecommunications plc v HMRC* at [123] ...

...

46. If a limitation period were held to apply only to ill-founded claims it would serve very little purpose. It must follow that it is permissible for claims that are well-founded in law to be barred for limitation reasons alone. Moreover the principle of effectiveness means not that it must be easy to obtain a remedy, but that it must not be “excessively difficult” to do so.

Where, as in the UK, there is a specialist tax tribunal system whose principal purpose is to allow the taxpayer to challenge decisions by HMRC I cannot see that it is “excessively difficult” to obtain a remedy.”

*Jazztel plc v. Revenue and Customs Commissioners* [2017] EWHC 677 (Ch) (“*Jazztel*”)

72. This case concerned restitutionary claims for the recovery of stamp duty reserve tax (“SDRT”) charged contrary to EU law and said to have been paid under a mistake. Marcus Smith J held that the application of section 320 to such claims, where the claims related to tax paid on or before 8<sup>th</sup> September 2003, was not compliant with EU law. However, where the claims related to tax paid after that date, section 320 applied, in line with the Court of Appeal’s decision in *Leeds City Council*. His essential reasoning was as follows:-

“96. I consider that section 320 ... infringes Community law both in its express retrospectivity and in its hidden retrospectivity:

(i) Express retrospectivity. The effective date of the provision (8 September 2003) precedes by some nine months the date on which it passed into law (22 July 2004). The announcement in Parliament on 8 September 2003 by the Paymaster General cannot have the effect of rendering the provision compliant with Community law, given that the announcement was made on the very date section 320 (retrospectively) became law. Persons affected would thus find, from one day to the next, that their rights had changed for the worse, with no transitional provisions of any sort in place.

(ii) Hidden retrospectivity. The hidden retrospectivity of section 320 also infringes Community law ... As regards that class of taxpayer having an accrued right to recover money mistakenly paid pursuant to an unlawfully levied demand for tax, the legal regime changes without notice from one day to the next. Where the taxpayer has commenced proceedings on or before 8 September 2003, the taxpayer can avail him or herself of section 32(1)(c) of the Limitation Act 1980, and (depending on his or her “date of knowledge”) recover payments made over six years prior to the issue of the claim form. By contrast, a taxpayer commencing proceedings after 8 September 2003 cannot avail him or herself of section 32(1)(c) and will be restricted to recovering payments made within six years of the issue of proceedings. Thus, by way of example: (a) Taxpayer 1 discovers that in 1985 he or she made a mistaken payment in respect of a tax unlawfully levied. Taxpayer 1 discovers this on 7 September 2003 and, with commendable promptitude, issues proceedings on the same day. The payment can be recovered. (b) Taxpayer 2 makes the same discovery of a mistaken payment in 1985, but does so on 9 September 2003. Even if taxpayer 2 acts with the same speed as taxpayer 1, he or she will not be able to recover the payment, due to the intervention of section 320. It is worth noting that this is so, even if section 320 were not also expressly retrospective. Taxpayer 2 would be adversely

affected by section 320 even if it had been introduced prospectively with a year's notice.

97. It may be that the Paymaster General's statement in Parliament was intended to be some form of transitional provision. If so, by ensuring that section 320 took effect from the date of its announcement in Parliament, there was no transitional protection for taxpayers in relation to section 320's express retrospectivity.

98. As regards the hidden retrospectivity, there was no transitional provision at all. The issue went unaddressed. ...

99. The question, therefore, is whether a remedy can be fashioned by the court so as to render section 320 Community law compliant or (to put the same question another way) to what extent must section 320 be dis-applied in order to provide the necessary transitional protection?

100. I begin with the remedy that needs to be fashioned to ameliorate section 320's express retrospectivity, before considering the question of hidden retrospectivity. However, as will be plain from the consideration below, it is neither possible nor desirable completely to separate these questions. At the end of the day, it is a remedy to avoid section 320's infringement of Community law—considering section 320's effects in the round—that is required:

(i) The remedy that needs to be fashioned to ameliorate the express retrospectivity of section 320 turns on the question of notice of the introduction of the provision. It will be recalled that whilst section 320 was passed into law on 22 July 2004, and was announced in Parliament on 8 September 2003, its effective date is 8 September 2003. There was therefore no prior notice of the introduction of section 320.

(ii) It is necessary to differentiate between Payments 1–9 (which were all made prior to 8 September 2003 and so concerned rights that had accrued as at 8 September 2003) and Payments 10–23 (which were all made after 8 September 2003, and so accrued after that date).

(iii) As regards the Payments made after 8 September 2003 (Payments 10–23), it is my judgment that—with the possible exception of Payment 10, which I consider separately below—no dis-application is required at all. That is for the reasons given by Lewison LJ in *Leeds City Council* [2016] STC 2256, paras 27–28: (a) In *Leeds City Council*, the resolution shortening the applicable limitation period and removing the extended limitation period in cases of mistake applied to payments made on or after 4 December 1996. (b) The resolution implementing this change was passed by the House of Commons on 3 December 1996. That resolution had been foreshadowed by an earlier announcement made on 18 July 1996. (c) Lewison LJ held that because all of the claims before him related to payments made on or after 4 December 1996, the payer (Leeds City Council) had a readily

ascertainable prospective period of a reasonable length in which to make its claims according to the new time limit as it stood. There was no need for any dis-application of the new time limit. This is Jazztel's position. The Paymaster General's announcement was on 8 September 2003 and—with the possible exception of Payment 10, which was made on 17 December 2003—Jazztel had plenty of time to adjust to the new dispensation.

(iv) Payment 10 was made, as I have said, on 17 December 2003, three months after the Paymaster General's announcement. Given the indication in *Grundig II* [2003] All ER (EC) 176, para 42 that a transitional period of six months is the minimum period required when time limits are being changed, there is a strong argument that section 320 should be dis-applied for the period 8 September 2003 to 8 March 2004.

(v) But this would, as it seems to me, go beyond what Community law requires. It would entail a dis-application of section 320 in circumstances where the express retrospectivity of section 320 has not affected Jazztel at all. When these proceedings were commenced (on 19 December 2013), section 320 had been in force for a number of years. Payment 10 would be irrecoverable even on the basis of a transitional period of several years, let alone six months.

**(vi) The real mischief, which I consider must be addressed in order to render section 320 compliant with Community law, is the loss of accrued rights of which their owner is ignorant—that is, the hidden retrospectivity of section 320.** When fashioning an appropriate remedy to deal with hidden retrospectivity, it is important to note that the mere question of notice of the introduction of section 320 is an insufficient remedy. **Where the taxpayer knows he or she has a claim, then a period of adequate notice that the time within which such a claim must be brought is contracting will be sufficient. That is the basis on which *Fleming* [2008] 1 WLR 195 and *Leeds City Council* proceed.** This case is different. Although Jazztel and taxpayers in Jazztel's position have (prior to 8 September 2003) an accrued right to recover overpaid SDRT, they do not know about this right. A transitional provision giving them notice of the introduction of section 320 will not give such taxpayers any notice of the claims that they have.

(vii) In my judgment, it is necessary to have regard to this basic fact—that the taxpayer has a claim that he or she knows nothing about—when fashioning a remedy to render section 320 compliant with Community law. The only remedy that will sufficiently protect the rights that have already accrued is to exclude from the section 320 regime those accrued rights. I therefore dis-apply section 320 in relation to: (a) Claims accruing on or prior to 8 September 2003, which (b) Would be time-barred according to the ordinary six-year limitation period, and which can only be vindicated by the taxpayer

relying upon section 32(1)(c) of the Limitation Act 1980. Put the other way round, section 320 can apply to all claims accruing after 8 September 2003 and to all claims accruing on or prior to 8 September 2003 which do not depend upon section 32(1)(c) for their vindication.

101. I regard this approach as entirely consistent with that adopted by Lewison LJ in *Leeds City Council*. That case, it will be recalled from para 27, concerned only claims accruing after the coming into effect of the new time limit. There is obviously no reason why a legal system needs to have a period of limitation (or other time bar) that is calculated by reference to the claimant's state of mind. I can see nothing wrong in cutting back the scope of section 32(1)(c) provided accrued rights are unaffected. That is obviously the case as regards rights accruing after the entry into force of the new regime" [emphasis added].

73. With that lengthy introduction to the relevant statutes and most relevant authorities, I turn to deal with the issues for determination.

The paragraph 51(6) issue

74. As already indicated, the parties' arguments on the paragraph 51(6) issue passed like ships in the night. The basic question is, of course, whether paragraph 51(6) operates so as to oust the claimants' common law claims. It will operate in that way unless it falls foul of the EU law principle of effectiveness. The issue, therefore, becomes whether paragraph 51(6) makes it impossible in practice or excessively difficult for the claimants to exercise their *San Giorgio* right to recover overpaid tax and interest thereon.
75. The solution to this issue breaks down into the following sub-issues, most of which represent arguments advanced by the claimants to rebut HMRC's contention that sections 790 and 826 of ICTA provided an effective remedy for the recovery of the claimants' overpaid tax and interest:-
- i) Do the principles to be derived from *Autologic* mean that, even where there is an exclusive regime for the vindication of a statutory claim, common law rights are not altogether excluded?
  - ii) Did Henderson J misunderstand *Haribo* in *Portfolio Dividends HC 1*, when he said at paragraphs 52-53 that it had decided that it was an intrinsic part of an imputation system to require taxpayers to provide details of the foreign tax actually paid on the distributed profits, even in the case of portfolio dividends, so that such a system did not impose an excessive administrative burden or practical impossibility on taxpayers, even where they could not find out how much tax the foreign company had paid, because the foreign company must have that information?
  - iii) Is the relief allowed by section 790 prevented from being an effective remedy because it only applies to portfolio dividends as a result of the application of the *Marleasing* principle so as to make it conform with the principles of EU law established in *FII CJEU 1* and *FII CJEU 2*?



- iv) Is the relief allowed by section 790 prevented from being an effective remedy because in some cases the claimants can show that they did not **actually know** that they had such a remedy before the abbreviated limitation periods meant that their remedy had become statute barred?
- v) Is the relief allowed by section 790 prevented from being an effective remedy because the taxpayers could not have been certain how much to claim under paragraph 54?
- vi) Are HMRC estopped from contending that section 790 provides a statutory remedy for the claimants in this case, when they had conceded the point in *Portfolio Dividends HC 1* as recorded in paragraph 263 of the judgment?
- vii) Is the practice generally prevailing defence in paragraph 51A(8) to be read as excluded by the *Marleasing* principle so as to mean that the claimants here did have an effective claim under section 790?
- viii) Did the reduction of the limitation periods provided for by schedule 18 in some other way mean that the claimants had no effective remedy under section 790?
- ix) Can the allegedly obstructive conduct of HMRC in making it more difficult for the claimants to make their claims affect what would otherwise be the legal position?

76. I can now deal with these sub-issues relatively briefly.

*The first sub-issue: Does Autologic mean that, even where there is an exclusive regime for the vindication of a statutory claim, common law rights are not altogether excluded?*

77. I can say at once that I cannot see anything in *Autologic* that determines the issue that I have to decide. *Autologic* did not concern an exclusive statutory regime for the vindication of a statutory right. There was no express provision in the regime considered in that case for common law rights to be excluded. The House of Lords said nothing about whether common law claims could be brought as a matter of European law when expressly excluded by an operative statutory provision like paragraph 51(6).

78. Mr Aaronson submitted that the House of Lords decided in *Autologic* that corporation tax assessments could only be altered by following the statutory procedure, but nonetheless that High Court claims for periods which were no longer open to adjudication under the statutory regime could proceed. But as Lord Nicholls made clear at paragraph 41, that was because the appeal commissioners had no jurisdiction to hear such claims, and the High Court claims could therefore proceed to give effect to EU law rights. He said nothing about a situation where such High Court claims were expressly excluded by statute.

79. The speeches in *Autologic* concerned a long-standing statutory scheme that would have been defeated if a taxpayer could simply “leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes” (see Lord Nicholls at paragraph 12). It is true

that the House of Lords stayed rather than struck out the High Court claims for periods which were still open to be adjudicated upon under the statutory procedure (Lord Nicholls at paragraph 44); but that was in case the claims could not for some unforeseen reason proceed, so that the claims would fall into the second category where High Court claims could proceed.

80. In my judgment, when properly understood, *Autologic* provides no basis to hold that common law claims can proceed where specifically ousted by statute.

*The second sub-issue: Did Henderson J misunderstand Haribo in Portfolio Dividends HC 1, when he held that the effectiveness principle was not violated when a taxpayer had to state how much tax the foreign company had paid, but could not find out?*

81. In relation to the second sub-issue, Mr Aaronson sought to draw a number of the most subtle possible distinctions in relation to the CJEU's decision in *Haribo*. Mr Aaronson complained that Henderson J had misunderstood *Haribo* because he had applied the answer given by the CJEU to question 2 in that case to a situation where there was no statutory right to a tax credit, only a right to be implied in order to give effect to the EU law principle of effectiveness. This, as I see it, is a distinction without a difference. In *Haribo*, the CJEU was dealing with a number of different situations that were thrown up as a result of the Austrian legislation, but the principle is clear from the CJEU's answer to question 2, and from paragraph 58 of Advocate General Kokott's opinion and paragraph 98 of the CJEU's judgment. The principle was that, where a statutory claim for recovery of overpaid tax on foreign dividends required the taxpayer to state the amount of corporation tax paid by the foreign company, the EU law principle of effectiveness was not violated merely because "the shareholder is not in a position ... to obtain that information". It is not the Member State's responsibility if investors cannot obtain sufficient information to make a claim to recover foreign tax paid by a company in which they have invested. The rationale of this decision was not affected by the issue whether there was a true statutory right to recover the overpaid tax or simply a right implied by the *Marleasing* principle in order to give effect to the EU law principle of effectiveness. The CJEU made clear (at paragraphs 144-147) that there was no difference between the situation where the tax in question was paid by a company in another Member State and where the tax was paid by a company in a state outside the EU.

82. Accordingly, in my judgment, Henderson J did not misunderstand *Haribo* in *Portfolio Dividends HC 1*. He was right to hold that the principle of effectiveness was not violated when, in order to make a claim to recover overpaid tax, a taxpayer had to state how much tax the foreign company had paid, but could not in fact find out.

*The third sub-issue: Is the relief allowed by section 790 prevented from being an effective remedy because it only applies to portfolio dividends as a result of Marleasing?*

83. The third sub-issue was only faintly argued as a free-standing point apart from the arguments concerning the proper interpretation of *Haribo*. It has been clear since *FII CJEU 1* in December 2006 that, in order to comply with EU law, section 790 had to be given a conforming interpretation so that it applied to portfolio dividends. That was an application of the *Marleasing* principle. In those circumstances, section 790 must, at least from that date, be taken to apply fully to portfolio dividends. As Lord

Sumption said at paragraph 176 of *FII SC*, "... however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision". That is the position here, and the claimants must be deemed to have known since 2006 that such relief was available in respect of portfolio dividends under the conforming construction of section 790.

84. I, therefore, conclude that the relief allowed by section 790 is not prevented from being an effective remedy for the recovery of overpaid tax because it only applies to portfolio dividends as a result of *Marleasing*.

*The fourth sub-issue: Is the relief allowed by section 790 prevented from being an effective remedy where the claimants can show that they did not **actually know** that they had such a remedy before their remedy had become statute barred?*

85. Mr Aaronson submits that I should follow the decision of Marcus Smith J in *Jazztel* so as to decide that a claimant who does not know that a remedy is available to him cannot have an effective remedy for the purposes of EU law. I accept for present purposes that it might be shown that some of the claimants did not actually know at any time before the relevant limitation period expired that they had a right to relevant relief under the conforming interpretation of section 790 in respect of their portfolio dividends.
86. The paragraph 51(6) issue is, of course, whether paragraph 51(6) operates so as to oust the claimants' common law claims. In this context, it will only **not** do so if those common law claims had accrued before paragraph 51(6) was introduced on 1<sup>st</sup> April 2010, and the notice that was given of its introduction did not enable claimants to make the appropriate claims for relief during the transitional period because they did not know that such claims existed. That is what Marcus Smith J described as "hidden retrospectivity", which he held was contrary to the EU law principle of effectiveness. I have considered his reasoning on this point carefully, but I am unable to agree with him.
87. Paragraph 100(vi) of the judgment of Marcus Smith J shows what he saw as the vice of section 320(1), when he said that "[t]he real mischief, which I consider must be addressed in order to render section 320 compliant with Community law, is the loss of accrued rights of which their owner is ignorant—that is, the hidden retrospectivity of section 320", and "[w]here the taxpayer knows he or she has a claim, then a period of adequate notice that the time within which such a claim must be brought is contracting will be sufficient. That is the basis on which *Fleming* and *Leeds City Council* proceed". He concluded that his case was different: "[a]lthough *Jazztel* and taxpayers in *Jazztel*'s position have (prior to 8 September 2003) an accrued right to recover overpaid SDRT, they do not know about this right. A transitional provision giving them notice of the introduction of section 320 will not give such taxpayers any notice of the claims that they have".
88. In my judgment, this is a misunderstanding of the EU law cases and of the EU law principle of effectiveness itself. The principle was best expressed in *FII CJEU 3* as follows: "[t]he detailed procedural rules governing actions for safeguarding a

taxpayer's rights under EU law ... must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law". It is the procedural rules that must not be framed in such a way as makes it impossible to claim. The knowledge of the claimant as to the existence of a claim is nothing to the point.

89. As Lord Neuberger explained in *Fleming* at paragraph 79(b): "[i]t is ... open to the legislature to introduce a new time limit, or to shorten an existing time limit, within which such a claim must be brought, even where the right to claim has already arisen (an "accrued right") when the new time limit (a "retrospective time limit") is introduced [see *Marks & Spencer II*, paras 37 and 38]", and "(d) Where a retrospective time limit is introduced, the legislation must include transitional provisions to accord those with accrued rights a reasonable time within which to make their claims before the new retrospective time limit applies: *Marks & Spencer II*, para 38 and *Grundig II*, para 38".
90. What these authorities did not say is that the limitation period can only be attenuated when the claimant is shown to have known that he or she had the accrued right in question. That would be contrary to principle, and would, as Mr Ewart submitted, mean that taxpayers could have claims that had accrued in respect of many years past that would be impossible to remove until it could be shown that the taxpayers knew about them. That knowledge might not exist until the CJEU had finally ruled on the nature of the claim, which might be long in the future. As Lord Sumption said, once the CJEU rules, that law is taken always to have existed (see paragraph 176 of *FII SC*). In *Jazztel* itself, of course, the taxpayers could not have known between 2004, when section 320 took effect, and 2009, when the CJEU ruled, that the SDRT in question was being levied in breach of EU law.
91. Marcus Smith J's approach can be seen from the following paragraphs of his judgment:-
- i) At paragraph 89(ii), he explained that the "detrimental effect occurred without the fault of Jazztel and in circumstances where this detrimental effect could not be ameliorated by the "usual" transitional provisions, by which I mean a reasonable period of time during which taxpayers are aware that the regime is going to change and have the opportunity to bring such claims vindicating accrued rights as they wish".
  - ii) In the same paragraph, he explained that "[s]uch transitional provisions are only effective where the affected party is *aware* of the effect the legislation will have on him or her, and is able to take protective steps" (original emphasis), so that "[h]ere, Jazztel could do nothing to protect itself until it appreciated the mistake it had made. In truth, the only way in which the hidden retrospectivity of section 320 could be ameliorated would be by excluding from its effect all rights accruing on or before 8 September 2003".
  - iii) At paragraph 100(vi), Marcus Smith J said that the "real mischief" which had to be addressed to make section 320 compliant with EU law was "the loss of accrued rights of which their owner is ignorant". To remedy that problem: "the mere question of notice of the introduction of section 320 is an

insufficient remedy”. He said that “[w]here the taxpayer *knows* he or she has a claim, then a period of adequate notice that the time within which such a claim must be brought is contracting will be sufficient. That is the basis on which [*Fleming*] and *Leeds City Council* proceed”.

92. Whilst it is true, as Marcus Smith J said, that *Fleming* and *Leeds City Council* concerned cases in which the claimants were taken to have known of their claims during the relevant transition period, he was, I think, wrong to suggest that the courts in those cases regarded the taxpayers’ knowledge of their claims as a relevant factor. In the absence of express statutory provision making the claimant’s knowledge relevant to limitation (such as section 32(1)(c) and section 14A of the Limitation Act 1980), it is not relevant.
93. I do, of course, pay full regard to a decision of a court sitting at the same level, but if, as is the case here, I respectfully but clearly take the view that Marcus Smith J was wrong on this point, I can and should decline to follow him.
94. Thus, in my judgment, the relief allowed by section 790 is not prevented from being an effective remedy because in some cases the claimants can show that they did not **actually know** that they had such a remedy before the abbreviated limitation periods meant that their remedy had become statute barred.
95. In argument on 18<sup>th</sup> January 2019, Mr Aaronson sought to remind me of some of the cases in which the CJEU had looked at the particular circumstances of the case in order to conclude that the EU law principle of effectiveness was transgressed. He was seeking to rebut the proposition that one can only consider the application of the principle from an objective standpoint. Mr Aaronson referred specifically to *Levez v. Jennings* (Case C-326/96) [1998] ECR I-7835 (“*Levez*”) and *Impact v. Minister for Agriculture and Food* (Case C-268/06) [2008] 2 CMLR 47 (“*Impact*”).
96. In *Levez*, Mrs Levez had worked in a betting shop owned by Mr Jennings. It later transpired that she was receiving less wages than the previous (male) employee, whom she had replaced, for the same work. Mr Jennings had deliberately misrepresented to Mrs Levez the level of remuneration received by the previous male employee. The question was whether Mrs Levez could overcome the statutory inhibition on recovering arrears in respect of a time more than 2 years before proceedings were issued. The CJEU held that she could where the employer’s deceit caused the worker’s delay. It nonetheless recognised at paragraphs 19 and 20 that the 2-year restriction was not in itself open to criticism, but that the critical fact was that Mrs Levez was late in bringing her claim because of the inaccurate information provided by her employer (paragraphs 27-28). The case, in my judgment, does not elucidate any principle that a claimant must know of the claim before the principle of effectiveness will allow it to be removed by statute. *Impact*, in my judgment, also takes the matter no further, since it merely restates in the passages cited by Mr Aaronson (paragraphs 51-53) the nature of the principle of effectiveness.
97. In my judgment, section 790 can provide an effective remedy even where the claimants can show that they did not **actually know** that they had such a remedy before it had become statute barred.

The fifth sub-issue: Is the relief allowed by section 790 prevented from being an effective remedy because the taxpayers could not have been certain how much to claim under paragraph 54?

98. The fifth sub-issue raises one of Mr Aaronson's main points, namely whether one could have an effective remedy for relief under section 790 before any taxpayer could know how much to claim under paragraph 54. As I have said, Mr Aaronson argued that such certainty was not achieved until, at the earliest, 2012, when the CJEU's decision in *FII CJEU 2* was delivered and it was clarified that the taxpayer's claim for relief should be at the foreign nominal rate. Mr Ewart's response, as I have also said, was that it was sufficient to make a claim that any figure was put in, provided it was quantified, because the legislation did not say that the claim had to be for the correct amount in order to be valid as a matter of law.
99. In my judgment, it is necessary to look closely at the statutory provisions to resolve this question. Paragraph 54 provided, as set out above, that a claim "under any provision ... for a relief ... must be for an amount which is quantified at the time when the claim is made". By itself, that provision makes no reference to the amount being accurate, only to it being quantified. And one can quite see why quantification is necessary in a self-assessment system, where paragraph 7 of schedule 18 provides for taxpayers to make a self-assessment tax return "of the amount of tax which is payable by the company for that period ... (a) on the basis of the information contained in the return, and (b) taking into account any relief ... for which a claim is included in the return". Moreover, paragraph 56 allows for a supplementary claim to be made to correct an original claim.
100. In these circumstances, it is, in my view, clear that the taxpayer could have had an effective remedy for the available reliefs by claiming under section 790 for any quantified amount, even if it did not know at the time of claiming whether the correct claim was for the foreign tax actually paid on the dividends or the tax that would have been paid at the foreign nominal rate. The lack of knowledge of the precise rate at which the claim should be made may make it harder to make an effective claim, but it does not make it impossible in practice, as is required for the EU law principle of effectiveness to be violated.
101. Accordingly, the relief allowed by section 790 is not, I think, prevented from being an effective remedy because the taxpayers could not have been certain how much to claim under paragraph 54.

The sixth sub-issue: Are HMRC estopped from contending that section 790 provides a statutory remedy for the claimants in this case, when they had conceded the point in *Portfolio Dividends HC 1* as recorded in paragraph 263 of the judgment?

102. The sixth sub-issue is, I think, easily resolved. When HMRC conceded in *Portfolio Dividends HC 1* (as recorded in paragraph 263 of the judgment – see paragraph 50 above) that the statutory claims procedure for unilateral relief under section 790 did not exclude the claimants' common law claims, they did so in relation to a period **before** the introduction of paragraph 51(6). Paragraph 51(6) only came into force on 1<sup>st</sup> April 2010, and, as I have said, all the claims in *Portfolio Dividends HC 1* arose before that date. It was only once paragraph 51(6) came into force that the claimants'

common law claims were excluded. It will be recalled that all the class 8 claims were issued after 31<sup>st</sup> March 2010.

103. I do not, therefore, think that HMRC are estopped by their concession recorded at paragraph 263 of *Portfolio Dividends HC 1* from relying on section 790 as an exclusive statutory remedy for the claimants in this case.

*The seventh sub-issue: Is the practice generally prevailing defence in paragraph 51A(8) to be read as excluded by the Marleasing principle so as to mean that the claimants here did have an effective claim under section 790?*

104. The seventh sub-issue concerns Mr Aaronson’s argument that paragraph 51A(8) makes recovery of the overpaid tax practically impossible because it provides that HMRC “are not liable to give effect to a claim under paragraph 51 if or to the extent that ... liability was calculated in accordance with the practice generally prevailing at the time”. It is common ground that in some cases, at least, it is likely that HMRC could show that the overpaid tax was calculated in accordance with the practice generally prevailing at the time. HMRC, however, submit that, even if some claims would, in theory, have been excluded by paragraph 51A(8), the legislation must be read without the practice generally prevailing defence in order to comply with the EU law principle of effectiveness. In this regard, HMRC submits that *FII SC*’s decision refusing to exclude section 33 of the TMA on the same basis can be distinguished. Section 33 did not, unlike paragraph 51(6), seek expressly to oust common law claims, so what was said in *FII SC* at paragraphs 119 (Lord Walker) and 204 (Lord Sumption) is not applicable here.
105. Mr Aaronson relied on passages in *FII SC*, which described the practice generally prevailing defence as a cardinal feature or fundamental component of the scheme of the legislation (paragraphs 10, 119, 205 and 219), and said that there was “nothing to suggest that the “generally prevailing practice” defence in [the new paragraph 51 was] any less an integral part of that provision”.
106. In my judgment, Mr Ewart’s submissions on this point are to be preferred. First, the *dicta* upon which the claimants rely did not relate to a provision such as is found in paragraph 51(6), which expressly ousts common law claims. Secondly, as I see it, the practice generally prevailing defence is indeed easily severable from the rest of the paragraph 51 procedure and would, under the EU law principle of effectiveness, have been disapplied in order to ensure that the claimants had an effective remedy. It has been clear since the CJEU’s decision in *Fantask* in December 1997 that “Community law precludes actions for the recovery of charges levied in breach of [Council Directive 69/335 concerning indirect taxes on the raising of capital] from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful” (paragraph 41).
107. It may be that this sub-issue only applies to a small proportion of the claims in issue in these cases. As it seems to me, however, this sub-issue is to be answered on the basis that the practice generally prevailing defence in paragraph 51A(8) is to be read

as excluded by the *Marleasing* principle so as to mean that the claimants here did have an effective claim under section 790.

*The eighth sub-issue: Did the reduction of the limitation periods provided for by schedule 18 in some other way mean that the claimants had no effective remedy under section 790?*

108. The eighth sub-issue concerns the suggestion that the reduction of the limitation periods provided for by schedule 18 deprived the claimants of an effective remedy under section 790. It is clear from the authorities that I have already mentioned that it is open to a Member State to abbreviate limitation periods, provided that reasonable notice of at least 6 months is given of the change. In this case, none of the changes made to abbreviate the right to claim under paragraph 51 or section 790 were made on less than 6 months' notice. The relevant amendments to paragraph 51 (namely the introduction of paragraph 51(6) providing that HMRC was not liable to give relief in respect of overpaid tax outside the legislation, and the introduction of paragraph 51B reducing the limitation period from 6 to 4 years) had been included in the Finance Act 2009, which received Royal Assent on 21<sup>st</sup> July 2009, and only took effect some 8 months later on 1<sup>st</sup> April 2010.
109. Accordingly, the reduction of the limitation periods provided for by schedule 18 did not deprive the claimants of an effective remedy under section 790.

*The ninth sub-issue: Can the allegedly obstructive conduct of HMRC in making it more difficult for the claimants to make their claims affect what would otherwise be the legal position?*

110. The claimants made this point repeatedly throughout their written and oral submissions, but without ever taking the court to the factual material that was said to support it. Mr Aaronson's skeleton argument said that it was a "point of general application", and that "even if and to the extent that, in theory, [paragraph 51] provided [the] Claimants with an effective remedy, in reality they have been prevented from availing themselves of that remedy by the conduct of HMRC and the timing and substance of the relevant legislation".
111. In the final stages of the third day's submissions, Mr Aaronson returned to the point by citing *Levez* and *Impact* as examples of cases where the CJEU has held that the applicability of the EU principle of effectiveness can be affected by the facts. He submitted that HMRC had originally said that paragraph 51 did not provide a remedy for EU law claims because of the practice generally prevailing defence. Then, in June 2010, following *FII CA I*, HMRC had announced that paragraph 51 could be used for EU law claims, followed by some vacillation in the Revenue and Customs Brief 22/10. After *FII SC*, HMRC reserved the right to rely again on the practice generally prevailing defence as excluding paragraph 51 EU law claims. In any event, it was only after *FII CJEU II* in 2012, when the CJEU identified a credit at the foreign nominal rate as being appropriate (after which the limitation period had been reduced to 4 years), that the Claimants would have been in a position to quantify their claims.
112. The claimants concluded their original submissions on this point by saying that: "[g]iven the requirement of an effective remedy under EU law, it is submitted that, where it would otherwise apply, a conforming construction must be given to sub-paragraph 51(6) so as to permit claims to be brought in the High Court". The



claimants repeat their complaints that HMRC (a) have disputed the jurisdiction of the High Court in an elliptic and inconsistent manner, and (b) have made “elusive and/or disobliging responses” to the various attempts by claimants to make, or preserve the right to make, statutory claims, and (c) “have been at pains to avoid stating in a clear and straightforward way how they consider statutory claims should be made, preferring instead to engage in a game of cat and mouse”.

113. In my view, this sub-issue concerning HMRC’s allegedly obstructive conduct is simply answered. It is not agreed that HMRC has behaved inappropriately. These preliminary issues were put forward as issues of law. The agreed facts are attached to this judgment. A factual case might presumably be alleged against HMRC by a claim for judicial review of its decisions or conduct, or perhaps otherwise, but that is not what this court has been asked to determine. In particular, as it seems to me, the question of whether the claimants’ common law claims in unjust enrichment under *Woolwich* and mistake and in damages, including claims for compound interest, issued after March 2010, are ousted by paragraph 51(6) is specifically a question of law, which one would not expect to be affected by the day-to-day communications between HMRC and taxpayers.
114. Whilst I have read all the factual material placed before the court by the parties, there has not been a pleaded case of fraud or misfeasance against HMRC that I have been asked to consider. All I am deciding is that the question of law posed by the first preliminary issue is to be answered in the affirmative. I have already explained how the EU law principle of effectiveness operates. It does not seem to me that cases like *Levez* and *Impact* affect what I have just said. Whilst I do not rule out that a factual case in fraud or misfeasance could be advanced, that is not what this court has been asked to decide.
115. The allegedly obstructive conduct of HMRC does not, therefore, affect the legal position as set out above.

*Conclusion on the paragraph 51(6) issue*

116. Before leaving the paragraph 51(6) issue, I should mention the effect that the parties suggest *Portfolio Dividends SC* may have had upon it. In essence, HMRC contend that, since the Supreme Court has decided that claims in category (a) in that case (compound interest on unlawfully levied ACT which was subsequently set off against lawfully levied MCT, from the date of payment by [Prudential] to the date of set-off) are invalid as a matter of law, Standard Life cannot claim such interest. HMRC rely on (i) the need for the court to decide the issues before it applying the law as it currently stands, (ii) the fact that Standard Life, as a party to the GLO is bound by the outcome in *Portfolio Dividends SC* under CPR part 19.12, and (c) clauses 85 and 86 of the current Finance (No. 3) Bill will anyway give Standard Life some (presumably simple) interest on their claims.
117. The claimants conversely submit that HMRC have conceded in this case that compound interest is due in Standard Life’s situation in paragraphs 18 and 26 of their original skeleton argument, or at least that such claims were not ousted by paragraph 51(6) (“[i]t is common ground that claims that seek restitution in respect of the time value of tax paid rather than the recovery of tax itself would not fall within the scope

of paragraph 51(6)"). This concession was repeated orally by Mr Ewart at the first hearing in this trial. Mr Aaronson submitted that HMRC would have to apply formally for permission to withdraw this concession, which it has not done.

118. In my judgment, there are two reasons why these points need not detain me for long. First, Mr Ewart's concession in this case was expressly only as to whether or not paragraph 51(6) ousted such claims, not as to the validity or otherwise of the substance of such claims. Thus, nothing I have to decide in relation to paragraph 51(6) directly affects Standard Life's claims of this type in any event. Secondly, the Supreme Court seems to have accepted that HMRC's concession in the *Portfolio Dividends* cases was binding on them, notwithstanding its decision on category (a) claims. I cannot say, without hearing full argument, whether that concession may or may not be binding on HMRC in relation to Standard Life. That question is simply not before me in relation to the agreed preliminary issues. All I know about the concession is found in paragraph 35 of the Supreme Court's decision to the effect that "HMRC have accepted that compound interest is payable in respect of the utilised ACT falling within category (a) above, since that is what the House of Lords decided in *Sempra Metals*".
119. My conclusion on the paragraph 51(6) issue is therefore, for all the reasons I have given, that paragraph 51(6) does indeed operate to oust the claimants' common law claims. This outcome does not, in my judgment contravene the EU law principle of effectiveness.

#### The transitional period issue

120. In the light of my decision on the paragraph 51(6) issue, the transitional period issue does not arise. The 6-month transitional period provided for by section 231 was for the introduction of paragraph 51A(9) on 17<sup>th</sup> July 2013, which disapplied the operation of the practice generally prevailing exclusion in paragraph 51A(8), where the amount paid or liable to be paid was tax which was charged contrary to EU law. That provision took effect for claims made after 17<sup>th</sup> January 2014.
121. The claimants had argued that, if common law claims issued before the transitional period were not ousted because the practice generally prevailing defence breached the principle of effectiveness, then claims issued during the transitional period were not ousted for the same reason. Since, however, I have decided that the practice generally prevailing defence never applied because of its non-compliance with the EU law principle of effectiveness, this issue does not, as I have said, arise.

#### The section 320 issue

122. I have already dealt, in substance, with this issue, which asks whether section 320 has effect in relation to claims for restitution of tax paid before and/or after its introduction, and if so, whether its effective date was its date of taking effect on 8<sup>th</sup> September 2003 or the date of Royal Assent on 22<sup>nd</sup> July 2004.
123. I have already said that I am unable to agree with Marcus Smith J in *Jazztel*, when he held that the legislature's ability to deprive taxpayers of an existing claim to recover overpaid tax depended on whether those taxpayers **knew** that they had such a claim when the right was removed. In these circumstances, in my judgment, section 320

was effective to remove common law claims to restitution in respect of tax paid before section 320 took effect. Mr Aaronson accepted that this court was bound by *Leeds City Council* as regards claims relating to tax paid on or after 8<sup>th</sup> September 2003, but reserved his position in the event of any appeal.

124. Accordingly, the answer to the third issue is that section 320 has effect from 22<sup>nd</sup> July 2004, whether the claim relates to tax paid before or after 8<sup>th</sup> September 2003. After a draft of this judgement was provided to the parties, the claimants sought to re-argue this issue by referring to the decisions in *FII SC* and *FII CJEU 3* as reasons why the issue should be answered differently whether or not *Jazztel* was correctly decided. As Mr Ewart submitted, however, the claims that were in issue in *FII CJEU 3* were claims in relation to tax paid more than six years before 8<sup>th</sup> September 2003. It was those claims which had been removed by section 320 with immediate effect and without a transitional period. In this case, the argument is about whether section 320 was effective to remove claims that had accrued before the legislation took effect, but in respect of which a part of the limitation period (at least 6 months) had still to run when the legislation took effect. The claimants argued that *Jazztel* meant that section 320 was not compliant with EU law, because of its hidden retrospectivity i.e. that the taxpayer might not have known that it had such claims before they were removed. It was that argument that I have held to be wrong. As it seems to me, without it, the decisions in *FII* do not affect the facts of this case, because, as I say, in these cases there remained an unexpired part of the limitation period after section 320 was introduced, which was not the case on the facts in *FII*.

#### The constructive discovery issue

125. This issue asks the court to identify the date upon which the claimants could with reasonable diligence have discovered their mistake under section 32(1)(c). The possible dates are 8<sup>th</sup> March 2001 (the decision in *Hoechst*), 12<sup>th</sup> December 2006 (the decision in *FII CJEU 1*) and 13<sup>th</sup> November 2012 (the decision in *FII CJEU 2*). HMRC, whilst reserving their position in respect of an appeal from *FII CA 2*, accepted that the Court should follow that case and determine 12<sup>th</sup> December 2006 as the relevant date. Mr Aaronson argued for 13<sup>th</sup> November 2012 on the basis that, until that date, the taxpayers could not possibly have known how much to claim.
126. In my judgment, this issue, insofar as it has any ongoing relevance, is easy to determine in the light of the decision of the Court of Appeal in *FII CA 2*, which indicated at paragraph 373 that:-

“In our view it follows by parity of reasoning – as indeed Henderson J said – that the mistakes relied on by the claimants were not discoverable until the decision of the CJEU in [*FII CJEU 1*]. It was only at that point that it was authoritatively established that, to quote from the pleading, the ACT provisions were not lawful or enforceable, and that they had not been lawfully obliged to make the ACT payments. (The same goes for the Case V tax provisions, though those were not the focus of the argument.) The situation is substantially identical to that considered in *DMG* and we are bound by the reasoning of the majority”.

127. I have no doubt that I should follow that decision. Mr Aaronson was effectively making the same points here as under the fourth sub-issue that I have identified above in relation to the paragraph 51(6) issue, and I reject them for the same reasons. Accordingly, the date upon which the claimants could with reasonable diligence have discovered their mistake under section 32(1)(c) was 12<sup>th</sup> December 2006.

The disputed issues

128. Mr Daniel Margolin QC argued these issues for the claimants. His main submission was that all the disputed issues had already been dealt with, or ought to have been dealt with, in the *Prudential* test case, which was intended to resolve common issues of liability and quantum regarding portfolio dividends for all CFC GLO claimants.
129. CPR Part 19.12 provides that “[w]here a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues - (a) that judgment or order is binding on the parties to all other claims that are on the group register” in the absence of some other court order.
130. It would therefore be contrary to CPR Part 19.12 and the very purpose of the GLO, and contrary to the principle established in *Henderson v. Henderson* (1843) 3 Hare 100, to permit HMRC to argue them now.

The first disputed issue

131. HMRC wish to be able to continue to argue about whether the effective rate of corporation tax paid by UK companies was generally lower than the nominal rate of corporation tax paid by the claimants. Mr Margolin submitted that that had been determined by paragraphs 97-99 of Henderson J’s decision in *Portfolio Dividends HC I*, where he said this:-

“97. Before moving on, I should note a further argument relating to portfolio dividends received by insurance companies which [HMRC] articulated for the first time in an (undated) written note sent to me on 3 September 2013 (six weeks after the conclusion of the hearing), to which the claimants replied on 6 September. The argument is that the reasoning of the [CJEU] in [*FII CJEU 2*] cannot apply to an insurance company such as Prudential, because such companies do not generally pay corporation tax at the normal UK nominal rate, but at a lower nominal rate equivalent to the basic or lower rate of income tax on the policy holders’ share of profits calculated on the I [income] minus E [expenses] basis. Accordingly, it is said, when Prudential received portfolio dividends from UK-resident companies, it did not receive a notional tax credit at the nominal rate of the subsidiary, but only at the lower nominal rate which Prudential paid on the policy holders’ share of its profits. [HMRC] do not accept, and the claimants have not argued, that the effective rate of corporation tax paid by UK companies was generally less than the lower nominal rate of corporation tax paid by Prudential. Thus, say [HMRC], there is no reason to think that in obtaining exemption from tax on its UK dividends Prudential got relief for any more than its proper share of the actual tax paid by the companies in question. Accordingly, Prudential would be given equivalent treatment in respect of portfolio dividends which it received

from non-UK resident companies if the only credit which it received were one for the proper share of the actual tax paid by those companies.

98. I am unable to accept this argument. In my judgment it follows from the [CJEU's] reasoning in [*FII CJEU 2*] that the exemption of UK-source dividends is equivalent to taxing the dividends and giving credit at the relevant UK nominal tax rate. This principle applies to dividends received by an insurance company which are taxed on the I minus E basis and allocated to the policy holders' share of profits in the same way as it applies to dividends taxed at the full UK corporation tax rate, the only difference being that the assumed credit is correspondingly smaller because it is capped at the lower nominal rate. Equal treatment of foreign dividends can therefore be achieved by granting a credit based on the foreign nominal rate but capped at the UK policy holder rate. So, for example, where the foreign nominal rate is 30% and the UK policy holder rate is 20%, the credit is limited to 20%. In principle, this is no different from the case where an ordinary UK company receives a dividend from a country whose nominal rate is higher than the normal UK corporation tax rate. In such cases the foreign nominal rate credit is again capped at the rate at which the dividends are taxed in the UK.

99. Nor is it relevant, in my view, if the effective rate of tax paid by UK companies is generally the same as, or higher than, the policy holders' share rate of corporation tax. I am in no position to judge whether that is in fact the case. But even assuming it were, it would not in my opinion detract from, or render inapplicable, the approach laid down by the [CJEU] in [*FII CJEU 2*], which is firmly based on a systemic lack of equivalence in the UK between the exemption and tax credit methods of relieving economic double taxation. It is true that the [CJEU] was, of necessity, proceeding on the basis of the findings of fact which I had made, with the benefit of expert evidence, in the *FII* litigation. But that evidence related to the position of UK companies generally: see *FII* (High Court) at paragraph [64]. In the light of that evidence, I do not think it credible to suppose that the [CJEU] would have regarded its reasoning as inapplicable to the special case of the policy holders' share of profits charged to tax at a lower nominal rate, especially when it is remembered that the shareholders' share of the profits remained taxable at the full UK rate. Furthermore, if the Revenue wished to run such an argument, it would in my judgment have been necessary for them both to plead it and to adduce evidence to substantiate the proposition that the effective rate of tax paid by UK companies is not generally lower than the policy holder rate."

132. HMRC argued that Henderson J's points were *obiter dicta* because he had held at paragraph 99 that HMRC ought to have pleaded the point and adduced evidence "to substantiate the proposition that the effective rate of tax paid by UK companies is not generally lower than the policy holder rate". Moreover, HMRC complained that Henderson J did not reflect what he had decided in his order, and, when they tried to appeal the point, the Court of Appeal refused them permission on the ground that the judge had refused to allow the issue to be raised because it was raised too late. HMRC argues, therefore, that there has been no judgment or order on the issue.

133. I do not agree. There must be finality to litigation. The GLO process has been established in order to facilitate that outcome. HMRC can only have raised the point, albeit late, because they knew that it was material to the issues that Henderson J was deciding. He decided that they should have raised it earlier and pleaded and proved it. But the fact that they had not done so does not mean that the matter has not been decided. Henderson J concluded that it was not “credible to suppose that the [CJEU] would have regarded its reasoning as inapplicable to the special case of the policy holders’ share of profits charged to tax at a lower nominal rate”. The Court of Appeal refused permission to appeal. The fact that HMRC might have done better if they had raised the point earlier does not assist them.
134. I am satisfied that HMRC should not be permitted to raise this disputed point again in this GLO. It has already been finally decided.

*The second disputed issue*

135. This disputed issue is whether elections would, in fact, have been made under section 438(6) of ICTA in respect of the relevant dividend income so as to treat the income as exempt. Mr Margolin argued that this was a point that had also been determined in *Portfolio Dividends HC 1* at paragraphs 144-151, where Henderson J said this:-

“144. The agreed question under this heading is:

“Did the election regime under section 438(6) entail a less favourable treatment of Portfolio Dividends contrary to Article 63 TFEU and, if so, what was that less favourable treatment?”

145. ... The first part of the question which I now have to consider is the question remitted to the national court, namely “whether, in light of the fact that the permitted election, as regards dividends of national origin, entailed the waiver of tax credits, a company receiving dividends of foreign origin, which could not exercise such an election, was treated less favourably because of that fact alone” (paragraph 56).

146. The question is essentially one of fact, and it was addressed by Mr McCullough in his second statement. He explains that the rate of corporation tax on pension business profits always exceeded the rate of tax applicable to the tax credit carried by FII, and it was therefore beneficial to make the election so long as it did not cause other reliefs claimed to be displaced due to an overall insufficiency of profits remaining in charge to tax. His unchallenged evidence, which I accept, is that:

“Where we received dividends from UK resident companies we always made s438(6) elections where the election reduced the company's liability to tax. Had it been possible to make an election for foreign dividends, and the tax computations for the year indicated that it would be beneficial to do so, we would obviously have done so.”

147. In the light of this evidence, I am in no doubt that the confinement of the ambit of section 438(6) to FII did involve less favourable treatment of

foreign portfolio dividends in breach of Article 63, and that the question remitted by the [CJEU] should be answered in the affirmative. The next question is to identify the precise nature of the less favourable treatment accorded to such portfolio dividends (or, more accurately, the proportion of them allocated to the shareholders' share of pension business profits) ...”.

136. Mr Ewart submitted that the issue should be open to argument because, as Henderson J had made clear at paragraph 146, it was “essentially one of fact” to be determined in the light of the claimant’s evidence.
137. In my judgment, this question is indeed, as Henderson J said, essentially one of fact. In those circumstances, it must be open to HMRC to argue that the facts are different in one case from another, even in the context of a GLO. Whilst I would not be encouraging HMRC to raise this point unnecessarily in the light of Prudential’s clear practice to which Henderson J referred, I do not see that HMRC are precluded from doing so.

*The third disputed issue*

138. Mr Margolin submitted that the answer to the third disputed issue (whether some or all of the claimants’ High Court claims ought to be stayed or struck out applying the principles in *Autologic*) had been agreed by the parties in *Portfolio Dividends HC 1*. A recital to Henderson J’s order dated 28<sup>th</sup> January 2014 provided that:-

“[T]he answer to GLO Issue IX.1 [“Should claims which relate to open years, or years in which a Taxes Act claim under section 790 ICTA 1988 could have been made on the date High Court proceedings were brought, be stayed according to Autologic principles?”] is that the claims which relate to open years, or years in which a Taxes Act claim under section 790 ICTA 1988 could have been made on the date High Court proceedings were brought, should not be stayed according to Autologic principles and that the judgment of the High Court should apply to all periods of those claims (subject to the limitation issues at GLO Issues VIII.1 and 2) and should where possible be given effect through the statutory appeal machinery in the absence of agreement”.

139. Mr Ewart submitted that the agreement between HMRC and Prudential was not binding on the other CFC GLO claimants, nor on HMRC in relation to these claimants.
140. The issue is similar to the second disputed issue, in that the agreement reached does, in my view, seem to have related only to Prudential’s claims. It must, I think, be open to HMRC to seek to argue that a different process should be followed in relation to other cases. Once again, the claimants sought to re-open this issue after the draft judgment was delivered, by reference to transcripts of the hearing before Henderson J in *Portfolio Dividends HC 1*. I take the view, as I have said, that the order cited above does not go beyond the claimants in *Portfolio Dividends HC 1* whatever may have been said in argument.

*The fourth disputed issue*

141. This issue turns on the decision of the Supreme Court in *Portfolio Dividends SC*. It seems now, in the light of that decision, to be common ground that the fourth disputed issue (what the actual benefit to the defendants was in respect of the use of any corporation tax and ACT paid by mistake) no longer arises.

*The fifth disputed issue*

142. Mr Margolin submitted that HMRC had been refused permission to appeal the fifth disputed issue (whether the defendants were enriched by the amount of any ACT that was paid by the claimants, or whether the computation of any enrichment must take into account credits received by the claimants' shareholders as a result of the payment of ACT) to the Court of Appeal in the *Prudential* test case, and that that decision was binding on HMRC in relation to all CFC GLO claims. In any event, he continued, the issue had already been decided against HMRC by the CJEU in Case C-628/15 *Trustees of the BT Pension Scheme v. Revenue and Customs Commissioners* [2018] 2 WLR 1405 ("*BT Pension Scheme*"), and rejected in *FII CA 2* at paragraphs 243-255.

143. Mr Ewart submitted that this was plainly a difficult issue, which may reach the Supreme Court in the *FII* Litigation (HMRC having sought permission to appeal in *FII CA 2*). In those circumstances, HMRC should not be prevented from raising the issue at trial in the CFC Litigation. *BT Pension Scheme* had addressed an entirely distinct issue and was therefore irrelevant. In the light of *Portfolio Dividends SC*, Mr Ewart submitted that this issue is likely to be of less relevance as it can only apply to claims in restitution to recover unlawful ACT that remains unutilised.

144. In my judgment, this was a legal issue that HMRC tried, but was refused permission, to raise in the *Portfolio Dividends* cases, and it cannot have two bites at the cherry, on *Henderson v. Henderson* principles. Mr Ewart may well be right to say that, on the facts, it is now less likely to arise in these claims, but the point is that the issue is a purely legal question and there is, therefore, no reason why the answer would be different in these claims as opposed to the *Prudential* claims.

Summary of conclusions

145. In relation to the paragraph 51(6) issue, I have concluded on the agreed facts that paragraph 51(6) operates to oust the claimants' common law claims issued after March 2010, and that this does not contravene the EU law principle of effectiveness. My reasons for this conclusion can be summarised as follows:-

- i) *Autologic* provides no basis to hold that common law claims can proceed where specifically ousted by statute.
- ii) Henderson J was right in *Portfolio Dividends HC 1* to hold that *Haribo* was authority for the proposition that the principle of effectiveness was not violated when, in order to make a claim to recover overpaid tax, a taxpayer had to state how much tax the foreign company had paid, but could not in fact find out.



- iii) The relief allowed by section 790 is not prevented from being an effective remedy for the recovery of overpaid tax because it only applies to portfolio dividends as a result of *Marleasing*.
  - iv) Section 790 can provide an effective remedy even where the claimants can show that they did not actually know that they had such a remedy before it had become statute barred.
  - v) The fact that the taxpayers could not have been certain until *FII CJEU 2* how much to claim under paragraph 54 also does not prevent section 790 from providing an effective remedy as a matter of law.
  - vi) HMRC are not estopped by their concession recorded at paragraph 263 of *Portfolio Dividends HC 1* from relying on section 790 as an exclusive statutory remedy for the claimants in this case.
  - vii) The practice generally prevailing defence in paragraph 51A(8) is to be read as excluded by the *Marleasing* principle, so that the claimants here did have an effective claim under section 790.
  - viii) The reduction of the limitation periods provided for by schedule 18 did not deprive the claimants of an effective remedy under section 790.
  - ix) The allegedly obstructive conduct of HMRC does not affect the legal position as set out above. It was agreed that I should determine preliminary issues of law, and that is what the court has done.
146. The transitional period issue does not arise, in the light of my conclusion above regarding the practice generally prevailing defence.
147. In relation to the section 320 issue, that section has effect from 22<sup>nd</sup> July 2004, whether the claim relates to tax paid before or after 8<sup>th</sup> September 2003.
148. In relation to the constructive discovery issue, the date upon which the claimants could with reasonable diligence have discovered their mistake under section 32(1)(c) was 12<sup>th</sup> December 2006, namely the date of the CJEU's decision in *FII CJEU 1*.
149. In relation to the disputed issues:-
- i) The first disputed issue (whether the effective rate of corporation tax paid by UK companies was generally lower than the nominal rate of corporation tax paid by the claimants) was determined in *Portfolio Dividends HC 1* and is accordingly not open to HMRC to raise at trial.
  - ii) The second disputed issue (whether elections would have been made under section 438(6) of ICTA in respect of the relevant dividend income so as to treat the income as exempt) is essentially a question of fact, so that it is open to be argued by HMRC at trial.
  - iii) The third disputed issue (whether some or all the claimants' High Court claims ought to be stayed or struck out applying the principles in *Autologic*) is also

open to be argued by HMRC at trial, because the agreement on that issue in *Portfolio Dividends HC I* was only with Prudential and did not apply to the other CFC GLO claimants.

- iv) The fourth disputed issue (what the actual benefit to the defendants was in respect of the use of any corporation tax and ACT paid by mistake) does not require determination after *Portfolio Dividends SC*.
- v) The fifth disputed issue (whether the defendants were enriched by the amount of any ACT that was paid by the claimants, or whether the computation of any enrichment must take into account credits received by the claimants' shareholders as a result of the payment of ACT) was raised in *Portfolio Dividends*, and determined in that the Court of Appeal refused permission for it to be pursued. It is a legal issue that cannot be run again in these cases.

150. I would be grateful if counsel could draw up an appropriate order to reflect these conclusions.

## **Schedule 1 – Agreed Statement of Facts**

### **Chronology**

1. On 25<sup>th</sup> November 1997 it was announced in the pre-budget statement that Advance Corporation Tax (“ACT”) would be abolished.
2. On 6<sup>th</sup> April 1999 ACT was abolished pursuant to section 31 Finance Act 1998 in respect of qualifying distributions made on or after 6<sup>th</sup> April 1999.
3. On 8<sup>th</sup> March 2001 the Court of Justice of the European Union (“CJEU”) delivered its judgment in Joined Cases C-397/98 *Metallgesellschaft Ltd v. Inland Revenue Commissioners* and C-410/98 *Hoechst AG v. Inland Revenue Commissioners* EU:C:2001:134; [2001] Ch 620.
4. On 8<sup>th</sup> September 2003, legislation, which was subsequently enacted in the form of section 320 of the Finance Act 2004, was announced by the Paymaster General in the House of Commons.
5. On 22<sup>nd</sup> July 2004 Section 320 of the Finance Act 2004 came into force. Section 320(1) of the Finance Act 2004 stated that “[t]his subsection has effect in relation to actions brought on or after 8<sup>th</sup> September 2003”.
6. On 25<sup>th</sup> October 2006 the House of Lords delivered its judgment in *Deutsche Morgan Grenfell Group Plc v. IRC* [2006] UKHL 49, [2007] 1 AC 558.
7. On 12<sup>th</sup> December 2006, the CJEU gave its first preliminary ruling in the FII Group Litigation (*FII CJEU 1*).
8. On 23<sup>rd</sup> April 2008 the CJEU delivered the Reasoned Order in the Portfolio Dividends GLO (Case C-201/05 *Test Claimants in the CFC and Dividend Group Litigation v. Revenue & Customs Comrs*).
9. Trial of the test cases in the FII Group Litigation was split between issues of liability and quantum. On 27<sup>th</sup> November 2008, the High Court gave judgment in the FII Group Litigation following the first stage of the trial on issues of liability (*Test Claimants in the FII Group Litigation v. HMRC* [2008] EWHC 2893 (Ch); [2009] STC 254) (“*FII HC 1*”).
10. On 22<sup>nd</sup> April 2009 Budget Note 87 stated *inter alia* that:
  - i) “legislation will be introduced in Finance Bill 2009 to provide a means of reclaiming overpayments of income tax, CGT and CT [corporation tax] where there is no other statutory route. It will replace any non-statutory claims”;
  - ii) “The measure will have effect for claims made on or after 1 April 2010”;
  - iii) “The measure will also make explicit that HMRC are not liable to repay an amount except as provided by the measure or another provision of the Taxes Acts”; and
  - iv) “From 1 April 2010 they [repayments] must be claimed within four years”.

11. On 30<sup>th</sup> April 2009 the full text of the Finance Bill 2009 was published. Clause 99 and Part 2 of Schedule 52 of the Bill amended provisions relating to the recovery of overpaid corporation tax and introduced paragraph 51(6) (see below).
12. The new dividend regime was inserted in Part 9A of the Corporation Tax Act 2009 by Schedule 14 of the Finance Act 2009. Under the new regime, which had effect in relation to distributions paid on or after 1<sup>st</sup> July 2009,<sup>1</sup> no distinction was drawn between domestic and foreign dividends.<sup>2</sup>
13. On 21<sup>st</sup> July 2009 the Finance Act 2009 received Royal Assent.
14. On 23<sup>rd</sup> February 2010, the Court of Appeal gave judgment in the FII Group Litigation on appeals from the judgment on issues of liability (*Test Claimants in the FII Group Litigation v. HMRC* [2010] EWCA Civ 103; [2010] STC 1251) (“*FII CA I*”).
15. On 1<sup>st</sup> April 2010, amendments to paragraph 51 of Schedule 18 to the Finance Act 1998 (“paragraph 51”) took effect in relation to claims made on or after 1<sup>st</sup> April 2010. These amendments included the reduction in the time period for bringing a claim under paragraph 51 (a “paragraph 51 Claim”) from six years to four years,<sup>3</sup> the exclusion of a paragraph 51 Claim where an accounting period was under enquiry (paragraph 51A(3)) and the introduction of a new provision in paragraph 51(6) as follows:<sup>4</sup>

“[HMRC] are not liable to give relief in respect of a case described in sub-paragraph (1)(a) or (b) except as provided—

(a) by this Schedule and Schedule 1A to the Taxes Management Act 1970 (following a claim under this paragraph), or

(b) by or under another provision of the Corporation Tax Acts.”
16. Also with effect from 1<sup>st</sup> April 2010, the time period for claiming double tax relief by way of unilateral relief (formerly under section 790 ICTA and with effect for accounting periods ending on or after that date under section 18 of the Taxation (International and Other Provisions) Act 2010 (“TIOPA”)) was reduced from 6 years to 4 years following the end of the accounting period.<sup>5</sup>

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<sup>1</sup> Paragraph 31 of Schedule 14 to the Finance Act 2009.

<sup>2</sup> At least not in relation to “not small” companies.

<sup>3</sup> Section 100 of the Finance Act 2009 and paragraph 13 of Schedule 52 thereto, introducing *inter alia* paragraphs 51(4) and 51B of Schedule 18 to the Finance Act 1998.

<sup>4</sup> Paragraph 51(6) and 51A(3) were introduced on 21 July 2009 by section 100 of, and paragraph 13 of Schedule 52 to, the Finance Act 2009.

<sup>5</sup> Section 118 of the Finance Act 2008 and paragraphs 16 and 24 of Schedule 39 thereto (clause 113 and Schedule 39 paragraphs 16 and 24, respectively, of the Finance Bill 2008, which was published on 27 March 2008) and article 2(2) of the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 (SI 2009/403) (made on 26 February 2009, published on 4 March 2009), amending section 806(1) Income and Corporation Taxes Act 1988 (“ICTA”); for accounting periods ending on or after 1 April 2010 Schedule 10(1) TIOPA, repealing section 806(1) ICTA, and

17. On 3<sup>rd</sup> June 2010, HMRC issued HM Revenue and Customs Brief 22/10, which stated *inter alia* that:

**“Practice generally prevailing**

Both error or mistake relief and overpayment relief have an exception where the tax was calculated in accordance with prevailing practice at the time. HMRC have considered the comments of the Court of Appeal concerning prevailing practice in the Franked Investment Income Group Litigation (paragraphs 255 to 264).

In the view of the court, the practice generally prevailing exception is to be read as subject to the limitation 'that it applies only if and to the extent that the United Kingdom can consistently with its [EU] treaty obligations impose such a restriction'. The court concluded that practice generally prevailing does not affect a claim for repayment of taxes paid in breach of EU law.

HMRC understand this principle also applies to the new overpayment relief. Therefore, if a claim for error or mistake relief or overpayment relief relates to taxes paid in breach of EU law, HMRC will not seek to disallow it on the basis that the tax liability was calculated in accordance with the prevailing practice.

The other conditions for error or mistake relief and overpayment relief, such as time limits, will still need to be met in all cases.”

18. On 5<sup>th</sup> November 2010, the High Court gave judgment in the Prudential test case (*The Prudential Assurance Co Ltd v. HMRC* [2010] EWHC 2811 (Ch); [2011] STC 214) adjourning the trial to await further developments in the FII Group Litigation.
19. On 8<sup>th</sup> November 2010, the Supreme Court gave the Claimants permission to appeal from the Court of Appeal’s judgment in the FII Group Litigation (i.e. *FII CA 1*) on certain issues of limitation and jurisdiction, including whether paragraph 51 provided an exclusive remedy. For other issues the Supreme Court extended the period for seeking permission. The Supreme Court refused permission to appeal against the reference of certain questions to the CJEU and referred a further question to that Court. The case was remitted to the High Court to make that reference. The second reference to the CJEU from the High Court was made on 15<sup>th</sup> December 2010.
20. On 23<sup>rd</sup> May 2012, the Supreme Court gave judgment in the FII Group Litigation (*FII SC*).
21. On 13<sup>th</sup> November 2012, the CJEU gave its second preliminary ruling in the FII Group Litigation (*FII CJEU 2*).
22. On 7<sup>th</sup> December 2012 nine investment companies, under the management of Fidelity International issued claims for restitution of corporation tax allegedly paid upon and

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section 381(1) (renumbered from 16 November 2017 as section 506(1)) TIOPA), bringing into force section 19 TIOPA.

reliefs allegedly utilised against non-resident dividend income and ACT allegedly paid by mistake or under an unlawful demand.

23. Also on 7<sup>th</sup> December 2012 ‘Baillie Gifford UK’, ‘Balanced Funds ICVC’, ‘the Monks Investment Trust Plc’, Pacific Horizon Investment Trust Plc, Mid Wynd International Investment Trust Plc and two ‘Unigate’ claimants issued claims for restitution.
24. On 10<sup>th</sup> December 2012 six ‘Aviva’ claimants and twenty ‘Alliance Trust’ claimants issued claims for restitution.
25. On 11<sup>th</sup> December 2012 a Tax Information and Impact Note was published in the Overview of Legislation in Draft for Finance Bill 2013 and provided *inter alia* that:

“This measure amends legislation to confirm that where tax was levied contrary to EU law, overpayment relief will not be affected by any prevailing practice. It also amends the four year time limit for overpayment relief claims to make clear that the four years run from the period to which the mistake relates.”
26. The Note included draft legislation that provided:

“(3) In Part 6 of Schedule 18 to FA 1998...in paragraph 51A...after subparagraph (8) insert—

(9) Case G does not apply where the amount paid, or liable to be paid, is tax which has been charged contrary to EU law.”
27. Also on 11<sup>th</sup> December 2012 thirty-seven Standard Life claimants issued claims for restitution of corporation tax allegedly paid upon and reliefs allegedly utilised against non-resident dividend income and ACT allegedly paid by mistake or under an unlawful demand.
28. Also on 11<sup>th</sup> December 2012 four ‘Blackrock’ claimants issued claims, six ‘BNY Mellon’ claimants and two ‘Baring’ claimants issued claims.
29. On 12<sup>th</sup> December 2012 three ‘First State Investments’/‘Scottish Oriental’ claimants issued claims.
30. Trial of the Prudential test case was resumed and heard on 15<sup>th</sup>-19<sup>th</sup> July 2013.
31. On 24<sup>th</sup> October 2013, the High Court gave a judgment following the resumed trial in the Prudential test case (*Portfolio Dividends HC 1*).
32. On 9<sup>th</sup> May 2013 the full text of the Finance Bill 2013 was published. Clause 228 of the Bill introduced paragraph 51A(9) and (10) of Schedule 18 to FA 1998 (see below).
33. On 17<sup>th</sup> July 2013 section 231 of the Finance Act 2013 introduced a provision as paragraph 51A(9) which disapplied the operation of the practice generally prevailing exclusion (paragraph 51A(8)) where the amount paid or liable to be paid was tax which was charged contrary to EU law. That provision took effect in relation to any

- claim made after the end of a six-month transitional period, i.e. for claims made after 17<sup>th</sup> January 2014.
34. On 15<sup>th</sup> January 2014 Schroders Investment Fund issued a claim seeking restitution for tax allegedly paid (allegedly by mistake) on dividend income from non-resident companies and other relief.
  35. Also on 15<sup>th</sup> January 2014 JP Morgan Trustee and Depositary Company Limited as trustee issued a claim on behalf of eight unit trusts managed by Schroders. JP Morgan ICVC also issued a claim as did JP Morgan Asian Investment Trust plc.
  36. Also on 15<sup>th</sup> January 2014 Asian Total Return Investment Company plc issued a claim.
  37. On 16<sup>th</sup> January 2014 seventeen ‘Aberdeen’ claimants, 64 ‘F&C Funds’ claimants and 140 ‘Friends Life’ claimants issued claims.
  38. Also on 16<sup>th</sup> January 2014 Barclays issued a claim on behalf of 24 Claimants seeking restitution for tax allegedly paid (allegedly by mistake) on dividend income from non-resident companies and for reliefs allegedly utilised against liabilities for tax on dividend income received from non-resident companies.
  39. On 18<sup>th</sup> December 2014, the High Court gave judgment in the FII Group Litigation following the second stage of the trial on issues of quantification (*Test Claimants in the FII Group Litigation v. HMRC* [2014] EWHC 4302 (Ch); [2015] STC 1471) (“*FII HC II*”).
  40. On 26<sup>th</sup> January 2015, the High Court gave judgment in the Prudential test case following a supplementary hearing to determine issues which had arisen in the working out of the order following trial (*Portfolio Dividends HC 2*).
  41. On 19<sup>th</sup> April 2016, the Court of Appeal gave judgment on appeal from *Portfolio Dividends HC 1* and *Portfolio Dividends HC 2* (*Portfolio Dividends CA*).
  42. On 24<sup>th</sup> November 2016, the Court of Appeal gave judgment in the FII Group Litigation on appeal from the second stage trial on issues of quantification (*FII CA 2*).
  43. Permission to appeal to the Supreme Court from both decisions of the Court of Appeal in the FII Group Litigation remains pending.
  44. The Supreme Court heard the appeal from the judgment of the Court of Appeal in the Prudential test case on 20<sup>th</sup>-21<sup>st</sup> February 2018 and its decision is pending.

### **Fidelity International**

45. Fidelity International is a worldwide investment fund management business. It provides, among other business lines, investment management and advice to a variety of different investment vehicles.
46. A High Court claim was issued on 7<sup>th</sup> December 2012 by nine investment companies under the management of Fidelity International. The Claimants are either investment

companies with variable capital (“ICVCs”), open ended investment companies (“OEICs”) or a publicly listed company. All were established and resident in the UK.

47. The Claimants include six OEICs and one plc which as part of their investment businesses held portfolios of equities in non-resident companies throughout the world from which they received dividend income. These shareholdings never reached 10% in any company in which they invested. The investment strategy of each fund targeted particular sectors, industries and regions. The funds were structured for either institutional or retail investors or both. They were:
- i) Fidelity Institutional Funds – Pacific (Ex-Japan) Fund;
  - ii) Fidelity Institutional Funds – South East Asia Fund;
  - iii) Fidelity Institutional Funds – Emerging Markets Fund;
  - iv) Fidelity Investment Funds – Fidelity Moneybuilder Balanced Fund;
  - v) Fidelity Investment Funds – Fidelity South East Asia Fund;
  - vi) Fidelity Investment Funds – Fidelity Moneybuilder UK Index Fund; and
  - vii) Fidelity European Values plc.
48. The dividend income from non-resident companies received by these Claimants was subject to tax in the UK under Case V of Schedule D to section 18 ICTA (“Case DV”). The Claimants paid tax on that income in accordance with the UK taxing provisions as they stood which allowed credit for foreign withholding taxes but not for tax on the underlying profits. The High Court claim seeks restitution for the tax paid on the non-resident dividend income or management expenses and other reliefs utilised against it by mistake or under an unlawful demand or exaction on the grounds that the tax was levied unduly contrary to article 63 TFEU.
49. The High Court claim seeks restitution computed on a compound interest basis or alternatively simple interest pursuant to section 35A of the Senior Courts Act 1981. If interest is to be calculated on the latter basis HMRC’s view is that the applicable rate of interest is bank base rate plus 1% per annum until 4<sup>th</sup> February 2009 and 2% per annum over bank base thereafter.
50. The Fidelity International claim was enrolled on the group register of the CFC & Dividend group litigation on 8<sup>th</sup> April 2013. The claim of Prudential is and has been the representative test case for the common issues of fact and law in relation to both liability and quantification which arise in the Fidelity claim. As stated above, the decision of the Supreme Court in the Prudential claim is pending.

### **Standard Life**

51. In August 2017 the Standard Life and Aberdeen Asset Management groups merged. This claim concerns taxes paid by funds managed by the legacy Standard Life business from 2010 and earlier.



52. The Standard Life Group provided investment management or advisory services or company secretarial or corporate directorate services to a wide variety of investment vehicles which include the Standard Life Claimants in the claim. The claim by the Standard Life Claimants is for restitution of corporation tax paid upon and reliefs utilised against non-resident dividend income and ACT paid by mistake or under an unlawful demand or exaction which taxes were levied contrary to EU law. The Standard Life Claimants seek interest on the same basis as the Fidelity Claimants. Their claim is a test case in relation to the ACT component of their claim only.
53. The Standard Life Claimants issued their claim on 11<sup>th</sup> December 2012 which was enrolled in the CFC & Dividend group litigation on 8<sup>th</sup> April 2013. Like Fidelity the Prudential claim has been the representative test case for the common issues of fact and law arising in the Standard Life claim.
54. The ACT component of the claim concerns ACT paid by Standard Life International Trust (formerly Standard Life Overseas Larger Companies Trust). Standard Life International Trust was and is a unit trust which invested on an international basis in an actively managed portfolio consisting wholly or mainly of equities and equity-type investments. Its investments were in holdings below 10% of the shares of the company in which it invested. It held investments in companies resident throughout the world. Its claim has been brought by its trustee, Citibank Europe plc (UK branch), the 17th Claimant on the claim form, on behalf of its investors. As a unit trust Standard Life International Trust was a taxpayer which filed its own tax returns and was liable to corporation tax on its non-resident dividend income and ACT upon its distributions.
55. Its ACT claim concerns ACT paid upon foreign income dividends (“FIDs”) paid in the accounting periods ending in 1995 to 1999. Standard Life International Trust accounted for tax on non-resident dividend income on a UK Basis and filed its ACT returns in accordance with the UK provisions as they stood. The FIDs were matched with distributable foreign profits received by Standard Life International Trust itself in the same or preceding accounting period.
56. The ACT paid by Standard Life International Trust was first utilised against the corporation tax due upon the non-resident dividend income under Case DV and other forms of mainstream corporation tax (“MCT”) as required by section 246N ICTA. The balance of the ACT was then repaid in all cases but one on the due date for the repayment of FID ACT, namely, the corporation tax liability payment date for the accounting period in which the ACT was paid. The exception was the repayment of the first FID ACT payments for 1995 in the amount of £2,207,293 which was due to be repaid on 30<sup>th</sup> June 1996 but which was repaid on 21<sup>st</sup> March 1997.

### **Schroders**

57. Like Fidelity and Standard Life, Schroders is also a well-known investment management house providing fund management services and investment advice to a variety of different types of investment funds. It has issued three High Court claims enrolled in the CFC & Dividend group litigation. The claim chosen for its role as a test case is a claim by eight unit trusts which are managed by Schroders. The claim

has been brought by their trustee. This was the 1<sup>st</sup> Claimant at the dates the subject taxes were paid and the claim was issued and is now the 2<sup>nd</sup> Claimant.

58. Unit trusts are treated as separate tax payers for corporation tax purposes and have their own tax reference number and file tax returns in their own names. The unit trusts all received dividend income from non-resident companies throughout the world in which they had made investments of below 10% of the shareholding of each company as part of their investment business. The unit trusts were designed for both institutional and retail investors and are:
- i) Schroder Asian Alpha Plus Fund;
  - ii) Schroder Asian Income Fund (formerly Schroder Far East Income Fund);
  - iii) Schroder European Fund (formerly Schroder Institutional European Fund);
  - iv) Schroder Institutional Pacific Fund;
  - v) Schroder Institutional Global Equity Fund (now known as Schroder Global Equity Fund, formerly known as Schroder Institutional Overseas Equity Fund);
  - vi) Schroder Pacific Fund (which has since merged into Schroder Asian Alpha Plus Fund);
  - vii) Schroder QEP Global Active Value Fund (formerly Global Quantitative Active Value Fund); and
  - viii) Schroder QEP Global Core Fund (formerly Global Quantitative Core Equity Fund).
59. The Schrodgers High Court claim was issued on 15<sup>th</sup> January 2014. It is in very similar terms to the Fidelity claim and seeks restitution for tax paid upon dividend income from non-resident companies paid by mistake or under an unlawful demand contrary to EU law and other relief. The Schrodgers claim seeks interest on the same basis as Fidelity and Standard Life (see paragraph 49 above). The claim was enrolled on the group register of the CFC & Dividend group litigation on 21<sup>st</sup> May 2014. The Prudential claim has been the representative test case for the common issues of fact and law. The Schrodgers Claimants paid tax on non-resident dividend income. The Schrodgers High Court claim is limited to tax paid within six years of the issue date and therefore concerns tax paid for the 2007-2009 accounting periods.

### **Barclays Bank**

60. The Barclays Bank claim has been brought by companies within the well-known Barclays Bank corporate group. It does not concern investment funds but income received by companies in the Barclays Bank group from the group's own investments in non-resident companies. Those investments concern interests both above and below 10%. The Claimants are:
- i) Barclays Bank PLC, the majority shareholder of which is Barclays PLC;

- ii) Woolwich Limited, a wholly-owned subsidiary of Barclays Bank PLC. Woolwich Limited's claims were assigned to Barclays Bank PLC by a deed of assignment dated 11 September 2017;
  - iii) Barclays PLC;
  - iv) Barclays Capital Finance Limited, a wholly-owned subsidiary of Barclays Bank PLC; and
  - v) Barclays Industrial Investments Limited, also a wholly-owned subsidiary of Barclays Bank PLC.
61. The claim was issued on 16<sup>th</sup> January 2014 and was enrolled on the group register of the CFC & Dividend group litigation on 19<sup>th</sup> May 2014. The Prudential case has been the representative test case for the portions of the claim which concern tax paid on dividends from investments below 10%. The claim is in similar terms to the Fidelity claim:
- i) The Claimants claim, among other relief, restitution for tax paid and reliefs utilised against liabilities for tax under Case DV upon dividend income received from non-resident companies contrary to EU law;
  - ii) Restitution is claimed in mistake and reliance is placed on section 32(1)(c) of the Limitation Act 1980;
  - iii) The Claimants seek restitution computed on the same interest terms as the Fidelity, Standard Life and Schroders Claimants (see paragraph 49 above).
62. The claim concerns dividends from non-resident companies worldwide whether or not from member states of the EU/EEA and whether or not the holding was above or below 10%. The High Court claim concerns tax paid on dividends from non-resident companies: from 1973, in relation to controlling interests in EU resident companies; from 1990, in relation to portfolio investments in EU resident companies; and from 1994 for portfolio investments and controlling interests in companies resident elsewhere.
63. The Barclays Claimants acknowledge that as the result of *FII CA 1* their claims for tax on dividend income from controlling interests in companies beyond the EU/EEA currently will fail subject to further appeal. For valuation purposes they limit that component of their claim to EU/EEA income.