Neutral Citation Number: [2024] EWHC 1671 (Ch)

Case No: HC-2015-001224 & Ors

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 18th June 2024
Start Time: **14.31** Finish Time: **14.51**

Before:

MR JUSTICE RICHARDS

- -

Between:

TEST CLAIMANTS IN THE FRANKED INVESTMENT INCOME GROUP LITIGATION	**Claimants**
- and -	
(1) THE COMMISSIONERS OF INLAND REVENUE **(2) THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**	**Defendants**

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MR JONATHAN BREMNER KC appeared for the **Claimants**
MR FREDERICK WILMOT-SMITH appeared for the **Defendants**

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR JUSTICE RICHARDS:

1. This matter arises in relation to a request for me to make a final order for the disposal of Evonik's claim. That claim has the following components:

   i) a claim for unutilised surplus ACT of around £8.8 million;

   ii) a claim under s35A of the Senior Courts Act 1981 for interest on that £8.8 million, it being common ground that the court should exercise its discretion to award interest at base rate plus 2% in the period up to (final) judgment; and

   iii) a "FID Claim" which is based on the foreign income dividend or "FID" regime. Under that regime, Evonik had to pay ACT when a FID was paid, but was able to reclaim that ACT when it filed its tax return for the accounting period in question. The FID Claim is for compensation for the time value cost associated with Evonik being out of its money until repayment of that ACT.

2. It is common ground that Evonik is entitled to judgment on all three aspects of its claim. However, the position is complicated by the fact that, until the Supreme Court's judgment in *Prudential Assurance Company Ltd v HMRC* [2018] UKSC 39 ("*Prudential*"), which departed from the law set out in *Sempra Metals v IRC* [2007] UKHL 34 ("*Sempra*"), it was thought that Evonik was entitled to a restitutionary remedy for its FID Claim including compound interest for the period until the ACT was repaid. In 2016, Henderson J made orders for summary judgment on the FID Claim based on the pre-*Prudential* understanding of the law (the "Summary Judgments").

3. Following *Prudential*, Parliament enacted s85 of the Finance Act 2019 ("Section 85") which provided for the remedy for FID claims such as Evonik's to consist only of (i) simple interest at a statutory rate from the date on which ACT was paid until the date it was recovered (referred to in some of the authorities as the "period of prematurity") plus (ii) simple interest on the figure in (i) until payment, also at the statutory rate.

4. In *Test Claimants in the FII Group Litigation v HMRC* [2021] UKSC 31 *("FII SC3*") the Supreme Court held that Section 85 provided an "adequate indemnity" and so provided a remedy for Evonik's FID claim that was compatible with EU law. It is therefore now common ground that (i) Evonik has a good FID claim on which it is entitled to judgment and (ii) its remedy is simple interest on the basis set out in Section 85.

The Summary Judgments

5. The Summary Judgments were for the FID Claim only. In paragraph [65] of his judgment reported at [2016] EWHC 86 (Ch) Henderson J specifically considered whether summary judgment was available on part of a claim only.

6. Henderson J gave summary judgment on the basis that there was a restitutionary claim (which was the position in *Sempra* until the law was changed in *Prudential*). He ordered that Evonik should obtain compound interest for the "period of prematurity" from the date the ACT was paid on the FID to the date it was reclaimed. However, he declined to award compound interest for the period afterwards.

7. On 23 March 2016 HMRC paid £11.6 million gross pursuant to the orders for summary judgment (the "Summary Judgment Orders"). I say gross because they made that payment under deduction of 45% withholding tax on their view of the law set out in Part 8C of the Corporation Tax Act 2010 ("Part 8C") and so made a cash payment of £6.4 million.

8. The parties are not agreed as to whether withholding tax was due pursuant to Part 8C. There is litigation on that matter in the Upper Tribunal (Tax and Chancery). However, both sides agree that I can determine the issues before me today on the basis that HMRC simply paid Evonik cash of £6.4 million and that I can effectively ignore the withholding tax.

The order of the Supreme Court in *FII SC3*

9. The Summary Judgment Orders were among the orders that went on appeal to the Supreme Court in *FII SC3*, as recorded at [50] of the Supreme Court's judgment.

10. The issues that were before the Supreme Court in *FII SC3* were defined by reference to a numbered list of issues in the Court of Appeal proceedings below that was set out in a Schedule the Supreme Court's order of 22 July 2019 made following renewed oral applications for permission to appeal. So far as material for present purposes, Issue 10 was set out in this schedule as "FIDs and summary judgment". Issue 26(a) was "Whether interest should be simple or compound".

11. In its order of 22 July 2019, the Supreme Court granted HMRC permission to appeal on Issue 10 but only "insofar as it relates to the Sempra issue". The Supreme Court granted HMRC permission to appeal on Issue 26 without qualification.

12. At [49], of *FII SC3*, the scope of that permission was explained as follows:

> The Revenue applied for permission to appeal to this court. The applications were stayed pending this court's determination of the appeals in *Littlewoods* and *Prudential*. After those judgments had been handed down, this court in an order dated 8 April 2019 granted permission to appeal in respect of issue 10 (in so far as it relates to the *Sempra* issue) and issue 26(a). Permission was thus given to raise the question whether interest should be simple or compound, and this court expressly permitted the Revenue to withdraw their earlier concession in respect of *Sempra* interest. By directions dated 10 July 2019 this court clarified that the permission to withdraw the concession was without prejudice to the test claimants' entitlement to argue that, even if the Revenue were to succeed in their argument as to the law, the consequences should not apply in the present case.

13. Therefore, "Issue 10 (in so far as it relates to the *Sempra* issue)" and "Issue 26(a)" were of a piece. Insofar as applicable to the Summary Judgment Orders, the question before the Supreme Court was about quantification: namely how interest for the "period of prematurity" should be calculated and, specifically, whether it should be calculated on a simple interest or compound interest basis. Even though *Prudential*

had decided, as a matter of law, that there was no restitutionary claim for compound interest, the "simple interest versus compound interest" question was still live in *FII SC3*, because the Test Claimants were arguing that, since HMRC had conceded earlier on in the proceedings that compound interest was available, they should not be permitted to resile from that concession. Significantly, *FII SC3* was not concerned with whether there was some claim for time value in a FID claim for the "period of prematurity"; it was concerned with the quantification of that claim.

14. At [118] of FII SC3, their Lordships held that:

> … the Revenue's appeal on issues 10 and 26(a) in the second phase should be allowed. The summary judgment should also be set aside, and the cases in question remitted to the High Court.

15. The Supreme Court's judgment so far as applicable to the Summary Judgments Orders was perfected in an order of 13 May 2024 (the "FII SC3 Order"). By paragraph 2(i) of the FII SC3 Order:

> HMRC's appeal is allowed on issues 10 (limited to the Sempra issue) and 26(a) of CA2.

16. By paragraph 4 of the FII SC3 Order:

> 4. The summary judgments which are the subject of Issue 10 CA 2 (limited to the Sempra Issue) are set aside to that extent only and the claims remitted to the High Court for determination on the basis of this Court's findings.

17. HMRC argue by reference to *Gibbs v Lakeside Developments* [2018] EWCA Civ 2874 and other cases that when the Summary Judgment Orders were, or are, set aside HMRC became entitled to restitution of the sums paid pursuant to those orders and interest on the principal sum from the date of payment until the date of restitution. I do not agree with that proposition for the following reasons.

18. *Gibbs v Lakeside* holds that a step taken in accordance with an order is necessarily lawful. Therefore, in that case the tenant's claim for a remedy in unjust enrichment against the landlord who re-let a property following a possession order could not succeed unless and until that possession order was set aside. However, in my judgment, that is a far cry from saying that every order that is set aside can result in an action for unjust enrichment if sums have been paid pursuant to that order. The question is to determine what the order means in each case.

19. HMRC have brought no claim for unjust enrichment against Evonik and certainly no claim that is before me today. In my judgment, it would be difficult to see how Evonik have been "unjustly" enriched by receiving £6.4m of HMRC's money in 2016 when it is common ground that the value of Evonik's total claim against HMRC both in 2016 and today is much greater than this sum.

20. I do not doubt that Supreme Court could, when allowing the appeal against the Summary Judgment Orders, have ordered Evonik to repay HMRC both £6.4m and

interest on that sum until repayment (see, for example *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation* [2020] UKPC 23). However, the FII SC3 Order contains no requirement for Evonik to repay £6.4m and contains no order requiring Evonik to account to HMRC for interest on that sum. There was no need to make any such order since, taking into account the Supreme Court's judgment in *FII SC3*, HMRC are still debtors to Evonik in relation to Evonik's claim.

21. The Summary Judgment Orders were for part of the claim only. Those orders were made without full knowledge of the true legal position, namely that compound interest is not available and Section 85 governs the remedy for FID claims. If the Supreme Court had not set aside the Summary Judgment Orders they would continue to be operative and would result in the final judgment on Evonik's overall claim, which the Supreme Court has required me to make, being wrong. In my judgment, the true effect of the FII SC3 Order is that it remits the matter back to the High Court to decide how much Evonik is owed based on the correct principles as to the quantification of its entire claim against HMRC. The Supreme Court was not saying that HMRC did not owe Evonik £6.4 million as it would have been well aware that that was just a payment of <u>part</u> of a wider claim.

22. Nor is there any need for me, sitting as a judge of the High Court, to make any order requiring Evonik to repay HMRC £6.4m plus interest. As I have said, it is common ground that HMRC owe Evonik a greater sum than this. Neither party says that I should make any order to address the point that Evonik is not liable to withholding tax under Part 8C on the final relief that it will obtain but HMRC applied a withholding tax to sums paid pursuant to the Summary Judgment Orders. Although Evonik does not accept that any withholding tax was validly levied, both it and HMRC agree that the incidence of the withholding tax will "sort itself out" without any intervention from me today.

23. I therefore do not accept that I should proceed on the basis that an amount that HMRC owe to Evonik should be netted off against a "claim" by HMRC which (i) has not been made, (ii) whose existence is not borne out by the terms of the FII SC3 Order and (iii) would be difficult to sustain in circumstances where HMRC owe money in connection with Evonik's wider claim rather than the other way round. Rather, in my judgment, my task is to determine what is owed now in the light of the fact that Evonik has had £6.4 million of HMRC's money since the Summary Judgment Orders were made. That leads to the question of apportionment that I now describe.

The apportionment question

24. I consider that Evonik is correct to say that the court is being asked today to enter a final judgment in favour of Evonik. To do so, I should determine: first of all, what Evonik is due; secondly, how much has been paid already; and, third, in the light of the £6.4m paid pursuant to the Summary Judgment Orders, what interest is due.

25. That gives rise to a question of allocation which can be illustrated by reference to the following figures. Until recently it was common ground that, at the date of the Summary Judgment Orders, Evonik's total claim could be broken down as follows (ignoring the £6.4m paid pursuant to those orders);

    i) Surplus ACT - £8.8m

ii) Interest under s35A on surplus ACT - £11.4m

iii) Interest under Section 85 in respect of the FID Claim - £2.3m.

26. Over the past day, Evonik has come to doubt the amount due in respect of its FID Claim. It believes that not all of the ACT on FIDs had been repaid at the time it commenced proceedings so that it is entitled to claim interest at the higher s35A rates on some of that ACT, instead of interest at lower Section 85 rates. The parties are going to investigate that point in more detail but for the time being I use the figures in paragraph 25..

27. Evonik argues that the £6.4 million should be treated as if it were a part payment of the total interest (£11.4m + £2.3m) that had accrued at March 2016. The key point on Evonik's methodology is that the £8.8 million of surplus ACT was not reduced by the payment under the Summary Judgment Orders and so that figure continues to accrue interest at section 35A rates.

28. HMRC argue that having paid £6.4 million in 2016 pursuant to the Summary Judgment Orders that either were or should be set aside, they should be treated as entitled to a notional interest return on that £6.4 million which is then set against their total obligation to pay interest to Evonik. Although HMRC do not put their argument this way, the economic effect of that is that Evonik would get interest on £2.4 million of the surplus ACT rather than £8.8 million. That is equivalent to allocating the £6.4 million payment under the Summary Judgment Orders against the £8.8 million surplus ACT rather than against interest.

29. Therefore, the question of allocation can be understood as whether the £6.4 million should be allocated against the £8.8 million, which would reduce the "principal" of Evonik's surplus ACT claim or whether it should be allocated against "interest" which would result in interest continuing to accrue on the full £8.8 million of "principal".

30. I have derived little assistance from the extracts from *Chitty* to which I was referred on the question of allocation as between principal and interest on contract debts.

31. Nor do I derive much assistance from the fact that HMRC evidently treated the £6.4 million as a payment on account of "interest" at the time they made that payment since they applied the withholding tax to it. Whatever the precise meaning of the FII SC3 Order, the fact of the matter is that HMRC and, indeed, all the parties were proceeding on the basis of a flawed understanding of the law at that point.

32. The real battleground, in my judgment, comes out of the following points that Evonik makes. Evonik argues that the economics of HMRC's approach are fundamentally unfair because they result in it obtaining interest on £2.4 million rather than £8.8 million. Yesterday, I asked my clerk to send an email to the parties querying that argument. True it is that HMRC's formulation would result in HMRC paying interest on £2.4 million rather than £8.8 million. However, it might be said that this is because Evonik has had the use of £6.4 million since 2016. HMRC's interest on £2.4 million plus the interest return that Evonik can assume to earn by having the use of £6.4 million in its business equates to interest on £8.8 million and, therefore, I did not immediately see the injustice to which Evonik refers.

33. Evonik counters that this would be to focus on only part of the picture, it should have had over £13 million of interest in 2016 and the Revenue have had the use of the time value in the interim.

34. As I have noted, HMRC have approached the question not as one of "allocation" (as between principal and interest) but rather as an exercise in setting off their "claim" against the sum they owe Evonik. I have rejected that approach but I am conscious that I have had no submissions from HMRC on what I consider to be the correct "allocation" question. Since the parties need to come back with further numbers (to deal with the point set out in paragraph 26.) when doing so, I will give them an opportunity to make brief written submissions, not to exceed 5 pages in length each, on that "allocation" question. I indicated to the parties that there does not seem to be any compelling reason why the £6.4 million has to be allocated all to "principal" or all to "interest" and invited them to consider whether they might be able to agree something in between.

Whether to designate a further GLO issue

35. I have decided to decline Evonik's request that I designate this question of allocation as a further GLO issue so that its outcome becomes binding on other GLO participants unless the court directs otherwise.

36. I am not, as matters stand at least, convinced that there would be that much utility to making it a GLO issue. I recognise that there is potential for this issue to be of application to other litigants. However, that seemed to be a possibility only. I was not given the details of other litigants affected by the issue. The court can revisit the question if it is clear that the matter does affect a lot of litigants and is generating controversy.

37. I also agree with Mr Wilmot-Smith's submission that the proper allocation as between principal and interest has the capacity to be fact-sensitive. In principle, much might depend on what was said and done at the time any payments under summary judgment orders were made. That too militates against designating the issue as GLO issue.

Interim payments

38. Evonik asked me to make an order requiring HMRC to set out their position on various matters relating to interim payments. For essentially similar reasons, I am not going to make that order.

39. I do not think it would be appropriate, at least at this stage, for the court to order HMRC to answer questions that might turn out to be entirely hypothetical or fact-sensitive. I derive reassurance from Mr Wilmot-Smith's statement on instructions that HMRC are prepared to engage with dialogue with the taxpayers on this issue and try to agree a common approach or, if no common approach can be agreed, then at least to articulate their differences. In the light of that assurance, I do not think it is appropriate at this stage to make an order to require HMRC to answer questions.

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(This Judgment has been approved by the Judge.)

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