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Case No: HC-2015-001224 & Ors

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 05/02/2024

Before :

MR JUSTICE RICHARDS

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Between :

(1) BAT INDUSTRIES PLC and others **(2) FCE BANK PLC** **(3) EVONIK UK HOLDINGS LIMITED and others** **(4) EMI GROUP LIMITED and others**	**Claimants**
- and -	
(1) COMMISSIONERS OF INLAND REVENUE **(2) COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**	**Defendants**

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- -

Graham Aaronson KC and Jonathan Bremner KC (instructed by **Joseph Hage Aaronson LLP)** for the **Claimants**
David Ewart KC, Elizabeth Wilson KC, Barbara Belgrano, Jennifer MacLeod, Frederick Wilmot-Smith and Ben Blades, instructed by **the General Counsel and Solicitor for HM Revenue & Customs** for the **Defendants**

Hearing dates: 22, 23, 24, 27 November 2023, and 1 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE RICHARDS:

INTRODUCTION

1. The Claimants are members of the FII Group Litigation Order (the "FII GLO") which was established on 8 October 2003. As a consequence of litigation that has been pursued over the last 20 years, members of the FII GLO have succeeded in demonstrating that, when they paid certain tax to the UK revenue authorities ("HMRC"), they did so on the mistaken understanding that the UK tax regime then applicable to overseas dividends was compatible with the provisions of the various treaties establishing, variously, the European Economic Community, the European Community and the European Union (referred to compendiously in this judgment as the "Treaty" and the "EU").

2. Accordingly, members of the FII GLO are in principle entitled to recover from HMRC amounts by way of tax that they paid under that mistake of law. The only question remaining is whether and to what extent they have brought certain of their claims within the limitation period. In the remainder of this judgment, I address that question drawing, where relevant, on a number of authorities, both of this country and of the European Court of Justice and the Court of Justice of the European Union (together the "CJEU"). The judgments I will refer to most frequently are the following:

Name of case	**Definition used**
Commission v France (Case C-270/83) [1986] ECR 273	*Avoir Fiscal*
Bachmann v Belgian State (Case C-204/90) [1992] ECR I-249	*Bachmann*
Finanzamt Koln-Altstadt v Roland Schumacker (C-279/93)[1996] QB 28	*Schumacker*
Metallgesellschaft Ltd v Inland Revenue Commissioners; Hoechst AG v Inland Revenue Commissioners (Joined Cases C-397/98 & C-410/98) [2001] Ch 620	*Hoechst*
Staatssecretaris van Financiën v Verkooijen (Case C-35/98) [2002] STC 654	*Verkooijen*
Proceedings brought by Manninen (Case C-319/02) [2005] Ch 237	*Manninen*
Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners [2008] EWHC 2893 (Ch)	*FII HC1*
FII Claimants v HMRC [2014] EWHC 4302 (Ch)	*FII HC2*
Test Claimants in the FII Group Litigation v Inland Revenue Commissioners (Case C-446/04) [2012] 2 AC 436	*FII CJEU1*
Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2016] EWCA Civ 1180	*FII CA2*
Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2020] UKSC 47	*FII SC2*

3. By his order dated 30 January 2015, Henderson J concluded that the limitation period commenced on 8 March 2001, the date on which the CJEU gave its judgment in *Hoechst*. Henderson J made that order following his judgment reported in *FII HC2*.

4. In its judgment in *FII CA2* the Court of Appeal reached a different conclusion, namely that the limitation period started on 12 December 2006, the date on which the CJEU gave judgment in *FII CJEU1*. Both Henderson J and the Court of Appeal approached the question of limitation on the basis that s32(1)(c) of the Limitation Act 1980 (the

"Limitation Act") applied to claims for the restitution of sums paid under a mistake of law. They therefore considered when the Claimants discovered their mistake, or could with reasonable diligence have discovered it.

5. The Supreme Court in its judgment reported at *FII SC2* conducted a wholesale re-examination of (i) the threshold question of whether s32(1)(c) of the Limitation Act applied to payments made under a mistake of law at all and (ii) if so, the principles that should be applied in deciding when the limitation period commenced.

6. In *FII SC2*, the Supreme Court held (by a majority) that s32(1)(c) of the Limitation Act does apply to the Claimants' claims for restitution of sums paid under a mistake of law. However, the Supreme Court differed from both Henderson J and the Court of Appeal as to principles that apply when determining the commencement of the limitation period. Concluding that it did not have the necessary evidence before it to decide when the claimants could with reasonable diligence have discovered their mistake, it remitted that question back to the High Court for consideration. It is that question which I determine in this judgment.

THE CONTEXT IN WHICH THE LIMITATION ISSUE ARISES

7. I will assume that any reader of this judgment has a good understanding of the UK tax regime applicable to both the payment of, and receipt of, dividends by UK resident companies in the period from 1973 to 1999. The previous 20 years of litigation in the FII GLO have subjected that tax treatment to microscopic scrutiny and it would not be possible to capture the nature of that scrutiny in any short summary.

8. A high-level overview of the UK tax regime applicable to dividends both paid and received by a UK resident company is set out in an agreed statement that Henderson J recorded at [12] of *FII HC1*. The following aspects of that regime are of particular significance to this judgment:

    i) Profits earned by a UK company were in principle subject to corporation tax. Accordingly, a dividend paid by a UK resident company to a shareholder was paid out of profits that had, in principle, already been subjected to UK tax. Between 1965 and 1973, the UK operated a "classical" system of dividend taxation. A UK resident non-corporate shareholder was fully subject to income tax on a dividend received from a UK resident company. This could result in economic double taxation as the profits represented by the dividend could be taxed both by the company earning those profits and by the shareholder receiving the dividend.

    ii) In 1973, the UK moved towards an "imputation" system to mitigate the effects of this economic double taxation. As described in more detail below, a UK resident who received a dividend from a UK resident company could obtain a tax credit which reduced the tax charge arising on the dividend. This tax credit could be understood as "imputing" part of the corporation tax borne by the paying company on its profits to the UK resident shareholder. Non-UK resident shareholders were not generally entitled to any tax credit on receipt of a dividend from a UK company. However, by way of exception to that general rule, some tax treaties between the UK and other countries entitled non-UK resident recipients of dividends to some tax credit.

    iii) A dividend paid by a UK resident company between 1973 and 1999 in principle required the paying company to account for advance corporation tax ("ACT") on

that dividend. An exception was where the dividend was paid by one UK member of a group to another, in which case a "group income election" could be made which prevented ACT from becoming due. A group income election could only be made by two UK resident companies.

iv) In principle ACT paid by a UK resident company could be set off against the paying company's obligation to account for corporation tax on its profits (often called "mainstream corporation tax" or "MCT"). However, if the paying company's liability to MCT in the accounting period in question was lower than the ACT paid in that accounting period a full set-off would not be possible and the company would have what was described as "surplus ACT".

v) Surplus ACT could be carried forward or back by the UK paying company and could be surrendered to its UK resident subsidiaries where they had a sufficient UK corporation tax liability to allow set off. However, to the extent that surplus ACT could not be used in this way, it represented an absolute cost to the company or group concerned.

vi) Only dividends paid by a UK resident company which triggered a liability to ACT carried the tax credit described in paragraph ii). A UK recipient of that dividend who was not liable to tax (such as a pension fund) could, until 1997, recover the amount of that tax credit in cash from HMRC. UK resident individuals could recover the tax credit until 1999 and, to a limited extent, thereafter.

vii) A UK resident company receiving a dividend from another UK resident company was not subject to corporation tax on that dividend. In addition, to the extent that the dividend paid had triggered an ACT liability (so that in particular it was not paid under a group income election), the dividend carried with it a tax credit. The aggregate of the dividend plus the tax credit constituted "franked investment income" ("FII") of the UK resident recipient. Being "franked" by the ACT that was payable when the dividend was declared, FII reduced the obligation of the recipient to account for ACT on dividends paid.

viii) A UK resident company that received a dividend from a non-UK resident company was subject to corporation tax on that dividend but was entitled to credit relief for foreign taxes paid ("double tax relief" or "DTR"). Such non-UK dividends were not treated as FII and so did not eliminate or reduce the ACT payable on onward distributions made by the UK resident company.

9. Without prejudging any question of how *Bachmann* was thought to apply, the regime summarised in paragraph 8 had a logic to it when analysed purely by reference to UK tax considerations. Specifically:

i) The UK exempted UK dividends from corporation tax because those dividends had already been paid out of profits that had been subjected to UK tax. There was a logic to treating overseas dividends (which were paid out of profits that had been subjected, if at all, to overseas tax rather than UK tax) differently. Providing a credit for foreign tax paid was a rational means of preventing what might be economic double taxation of the underlying profits which was adopted by many other countries (including the US).

ii) It was logical to treat a dividend that a UK parent received from a UK subsidiary (outside a group income election) as FII which reduced the UK parent's obligation

to account for ACT on dividends it paid, since ACT would have arisen on the dividend paid by the subsidiary. It was rational for the UK to decline to treat a dividend paid by a non-UK resident subsidiary as FII since the subsidiary, being resident outside the UK, would not have paid ACT on the dividend it paid.

10. However, logical though they were in pure UK tax terms, the rules caused problems for UK groups who earned significant profits overseas. For example:

    i) A UK group might have a subsidiary resident overseas that was subject to a lower rate of tax than the rate of UK corporation tax. In that case, when profits earned by the subsidiary were distributed by way of dividend, there would be a residual UK corporation tax liability on that dividend since the tax credit attaching to the dividend would be insufficient to shelter it from UK corporation tax. That could be seen as economic double taxation of the profits earned by the overseas subsidiary: once in the hands of the overseas subsidiary and again in the UK on distribution by way of dividend.

    ii) More significant was the problem generated by the ACT rules. If a UK group generated much of its profits overseas, it might have a relatively low UK corporation tax liability since foreign tax credits would reduce the tax payable on dividends received from overseas. Dividends received from overseas were not FII and therefore the group generated a full ACT charge when it distributed profits to its external shareholders. However, since it had a relatively low MCT liability, the group would be generating surplus ACT which represented an absolute cost (see paragraph 8.v). That also could be seen as an instance of economic double taxation arising as the result of the interaction between the UK tax system and the tax system applicable to the overseas subsidiary.

11. In 1994 legislation was enacted that permitted UK companies to treat a dividend paid as a "foreign income dividend" ("FID"). A UK company paying a FID could recover the ACT that it had to pay on that dividend. That was intended to mitigate the results summarised in paragraph 10above which was particularly acute for UK companies that paid dividends funded out of dividends received from non-UK resident subsidiaries (hence the term "foreign income dividends").

12. The FII GLO is concerned with the UK tax regime applicable to dividends that a UK company receives. The challenges brought within the FII GLO were to the following aspects of the regime that I have summarised in paragraph 8 above:

    i) The "DV Challenge" sought to challenge the difference between the corporation tax treatment of non-UK dividends (which were subject to tax under Case V of Schedule D albeit with a credit for overseas tax) with the corporation tax treatment of UK dividends (which were not subject to corporation tax at all).

    ii) The "ACT Challenge" sought to challenge the proposition that overseas dividends were incapable of constituting FII.

    iii) The "FID Challenge" challenged aspects of the regime applicable to FIDs but it is not relevant to the issues I must consider in this judgment.

13. The DV Challenge and the ACT Challenge proceeded by asserting that (i) domestic UK legislation contravened provisions of the Treaty such as the freedom of establishment and the free movement of capital, (ii) that the domestic UK legislation imposed a higher

tax liability than would have been imposed if those provisions were compatible with the Treaty, that (iii) members of the GLO had paid the additional UK tax liabilities purportedly due under a mistake of law, namely a mistaken belief that the UK statutory provisions were compatible with the Treaty and that therefore (iv) they were entitled to a restitutionary remedy.

14. The parties are agreed that in this judgment I am determining a "GLO issue" for the purposes of CPR 19.21 which is binding on all members of the FII GLO. Their agreed formulation of that GLO issue is as follows:

> *When could the claimant in the FII GLO, with reasonable diligence, have discovered their mistake in relation to the payment of:*
>
> *a. corporation tax paid on income chargeable under Case V of Schedule D; and*
>
> *b. advance corporation tax ("ACT")?*

15. The Claimants for the purposes of this trial have been selected to be broadly representative of various points in time at which members of the FII GLO brought their claims. The first claimant group identified in the table below ("Evonik") was the first member of the FII GLO to bring a claim. The other Claimants have been selected broadly to cover claims made towards the beginning, towards the middle and towards the end of the period covered by the FII GLO.

Claimant Group	**Issue Date**	**Date 6 years before issue of claim form**
Evonik	12 July 2002	12 July 1996
BAT	18 June 2003	18 June 1997
FCE Bank	2 March 2007	2 March 2001
EMI	18 December 2009	18 December 2003

THE PRINCIPLES THAT I WILL APPLY

16. The general rule applicable is that a claim in unjust enrichment, such as that arising in these proceedings, must be brought within six years after the accrual of the cause of action. Since payment of tax to HMRC under a mistake of law gave rise to the unjust enrichment, the general rule would require proceedings to be commenced no later than 6 years after payment of that tax. However, that position is varied by s32(1)(c) of the Limitation Act.

17. Section 32 of the Limitation Act (as in force when the Claimants issued their claims) provides as follows:

> ***32.— Postponement of limitation period in case of fraud, concealment or mistake.***
>
> *(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *…*
>
> *(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…*

18. Section 32 therefore refers to two triggers for the start of a limitation period: the date on which a claimant actually discovers a mistake and the date on which a claimant "could with reasonable diligence have discovered it". It is common ground that only the second trigger event is relevant for the purposes of this judgment. Accordingly, I focus on the principles to be applied in deciding the point at which the Claimants could "with reasonable diligence" have discovered their mistake to which I will refer as the question of when there was a "constructive discovery".

19. Those principles were set out in *FII SC2* and have been applied in later cases. The Supreme Court formulated the applicable principles following a detailed and finely balanced consideration of whether s32(1)(c) of the Limitation Act was applicable to an action based on a mistake of law at all. The majority in the Court of Appeal had held that the question for the purposes of s32(1)(c) was when the Claimants discovered, or could with reasonable diligence have discovered, "the truth" namely that UK statute law was incompatible with the Treaty and that this was discovered only when the CJEU gave judgment in *FII CJEU1*. The Supreme Court held that this involved a paradox: the Claimants had been perfectly able to identify their mistake of law for the purposes of pleading a cause of action that led to a reference to the CJEU while supposedly being unable to discover it for the purposes of the Limitation Act.

20. The majority of the Supreme Court who concluded that s32(1)(c) of the Limitation Act was capable of applying to claims based on a mistake of law were anxious to ensure that this paradox was avoided when establishing the principles to be applied in determining a date of constructive discovery. If the position were otherwise, the Supreme Court was concerned that claims based on a mistake of law would enjoy an unprincipled advantage over other claims which had to be brought before they were certain to succeed.

21. I draw the following conclusions from both *FII SC2* and subsequent authorities:

    i) The task is to identify when the Claimants could, with reasonable diligence, have discovered "the mistake". That is the mistake that the Claimants have pleaded, and succeeded in establishing, namely that, contrary to what they thought at the time, UK tax law was incompatible with the Treaty (see [199] of *FII SC2*).

    ii) The burden is on the Claimants. Therefore, if the Claimants put forward a time (T) as the earliest date of a constructive discovery, the burden is on them to show that they could not have discovered their mistake earlier than time T without exceptional measures that they could not reasonably have been expected to take ([203] of *FII SC2*).

    iii) The "reasonable diligence" standard is objective. The Claimants are to be judged "by reference to how a person carrying on a business of the relevant kind would act on the assumption that he desired to know whether or not he made a mistake, if he had adequate but not unlimited staff and resources and was motivated by a reasonable but not excessive sense of urgency". ([213(16)] of *FII SC2*). At [255] of *FII SC2* this hypothetical reasonable person was referred to, as a shorthand, as a "well-advised multi-national group in the UK".

iv) Paragraph (iii) above is dealing with a standard of behaviour. The question posed by s32(1) is what the Claimants (themselves) could have discovered if they had exercised reasonable diligence coming up to that standard ([48] of Males LJ's judgment in *OT Computers Ltd (in liquidation) and others v Infineon Technologies AG and others* [2021] EWCA Civ 501). That invites a consideration of two questions, both of which may shed light on each other:

a) When, having exercised reasonable diligence, would the Claimants have had sufficient confidence to justify embarking on the preliminaries to the issue of proceedings such as submitting a claim to HMRC, taking advice and collecting evidence ([191] and [193] of *FII SC2*)?

b) When, having exercised reasonable diligence, would the Claimants have discovered that they had a "worthwhile claim"?

v) The questions posed in paragraph iv) above are not directed at when the Claimants could have expected that their pleaded claims would succeed (as the discussion in *FII SC2* of the "logical paradox" reveals). Nor are they directed at a complex evaluation of chances of success (see [47] of *Gemalto Holding BV and others v Infineon Technologies AG and others* [2022] EWCA Civ 782) although, of course, if at time T, all that the Claimants could, with reasonable diligence, have discovered was a claim that would be struck out as disclosing no cause of action, they would not have discovered a "worthwhile" claim.

vi) The question is whether the mistake "could" with reasonable diligence have been discovered rather than whether it "should" have been.

22. In their closing submissions, HMRC submitted that the Claimants' analysis focused unduly on judicial decisions, thereby contravening the guidance that Lord Reed and Lord Hodge gave in the final sentence of [178] of *FII SC2*. In my judgment, that submission overstated matters as the final sentence of [178] must be read in the light of the entire paragraph that precedes it. Lord Reed and Lord Hodge were not suggesting in that paragraph that an analysis of judicial decisions is impermissible when deciding when the Claimants could, with reasonable diligence, have discovered their mistake. Rather, they were cautioning against focusing on judicial decisions instead of a claimant's ability to discover a worthwhile claim. The reasons for that are set out in paragraph [178] when read as a whole. First, if a focus is made on judicial decisions as part of an enquiry as to when the Claimants could have discovered "the truth", the resulting analysis will be flawed because of the "logical paradox" that the Supreme Court rejected. Second, once it is accepted that the limitation period can start running before the Claimants could have had absolute certainty that their claim would succeed, a focus on judicial decisions would risk overlooking the other factors mentioned in paragraph [178] for example: that i) points of law could often have been decided earlier if a claim had been brought earlier and ii) judicial decisions that change the law represent a culmination of a process of a development of legal thinking within a wider community consisting of practitioners, universities, legal journals and the judiciary.

23. In this case, the Claimants argue that legal thinking, until particular "landmark" judicial decisions, was that the aspects of the UK tax regime under challenge in the FII GLO were entirely compatible with the Treaty. Therefore, they argue that legal thinking, of the kind referred to at [178] of *FII SC2*, could not develop until certain "milestone" principles had been established by particular judicial decisions. I will consider the validity of that

argument later in this judgment, but I do not consider that [178] of *FII SC2* precludes the Claimants from putting, or evidencing, their case in this way.

24. In their closing submissions, the Claimants invited me to place more emphasis on the question of when the Claimants could have discovered a "worthwhile claim" (the aspect of the enquiry I have summarised in paragraph 21.iv)b) above) than on when the Claimants could have had the confidence summarised in paragraph 21.iv)a) above. They submitted that this approach was justified by the fact that, as set out at [255] and elsewhere of *FII SC2*, the question of "reasonable diligence" is to be judged by reference to the standards of a "well-advised multi-national group". A "well-advised" group, the Claimants argue, would already have in hand the kind of enquiries that are summarised in paragraph 21.iv)a) so that the focus can appropriately be on when they could have discovered a "worthwhile claim".

25. I will not, however, give either question that I have summarised in paragraph 21.iv) any greater significance than the other given the guidance from the Supreme Court that both formulations are appropriate and each can shed light on the other.

MY APPROACH TO QUESTIONS OF FACT

26. The Claimants relied on the expert evidence of Malcolm Gammie CBE KC. HMRC relied on expert evidence of Professor Catherine Barnard FBA FLSW. Neither side challenged the expertise of the other's expert and I am satisfied that both were qualified to give expert opinion evidence. Both experts were cross-examined. The Claimants additionally relied on unchallenged factual evidence of various witnesses and from Dr Whitehead, a solicitor involved in many GLOs established after 2001 claiming relief in respect of UK tax provisions said to infringe EU law, who was cross-examined. I deal with the expert evidence in detail below. Dr Whitehead's evidence was relied on to a much lesser extent but I record at this stage that I found him to be an honest and reliable witness.

27. Professor Barnard and Mr Gammie's expert reports between them ran to several hundred pages, including annexes. Those reports referred to over 100 authorities from the CJEU and footnoted a large number of academic and other writings. There were other witness statements, including from Dr Whitehead. The parties' written opening and closing submissions ran to over 150 pages. It is simply not possible for me to address individually all the points that have been raised in this material in this judgment although I have them all in mind.

28. The test I have outlined in the section above is concerned with what a well-advised multi-national could with "reasonable diligence" have discovered over 20 years ago and, on HMRC's case, over 30 years ago. Proceedings in the FII GLO have had a number of twists and turns as might be expected of litigation that sought to strike at the heart of UK statute law and involved multiple trips to both the CJEU and the highest courts in this country. It is all too easy to make assertions as to what could have happened in the light of knowledge of the ultimate outcome of the litigation. Assertions as to what a well-advised multi-national could have discovered between 20 and 30 years ago need to be tested carefully against evidence of what people were thinking and doing at the time.

29. In my judgment, determining the commencement of the limitation period requires me to address the following issues:

i) What steps would a well-advised multi-national group based in the UK have taken, throughout the period under enquiry, to seek to discover whether the provisions of UK law that are the subject of the DV Challenge and the ACT Challenge ("Relevant UK Law") were compatible with the Treaty on the hypotheses summarised in paragraph 21.iii) above? To the extent those steps would include taking advice from an appropriately qualified adviser or advisers (the "Appropriate Adviser"), what are the characteristics of that Appropriate Adviser, noting that the characteristics of that adviser might change over time?

ii) What would the Appropriate Adviser have known, or believed throughout the period material to the enquiry, noting that knowledge and beliefs can change and evolve over time?

iii) What would an Appropriate Adviser have advised about the possibility that the Relevant UK Law was not compatible with the Treaty (i.e. the pleaded mistake on which the Claimants rely) throughout the period under enquiry? Again, it is relevant to note that the hypothetical advice could change over time.

iv) In the light of the answers to the previous questions, when could the well-advised UK multi-national group have either discovered a "worthwhile claim" or had the confidence to embark on the kind of preliminaries summarised in paragraph 21.iv)a)?

30. The parties' respective positions help to navigate the period under enquiry. HMRC argue that the limitation period applicable to both the DV Challenge and the ACT Challenge started running at the latest on 11 July 1996. They identified this date not because they argue that any great development in EU law, or professional understanding of it, took place then but rather because it is the date that falls 6 years and one day before the first claim in the FII GLO was made. HMRC do not concede that the limitation period had not started running by July 1996, but did not positively argue for an earlier date, no doubt because they did not need to since, if the limitation period started on 11 July 1996, none of the claimants in the FII GLO would be able to benefit from s32(1)(c) as they had all brought their claims more than 6 years after that date. In his oral submissions on behalf of the Claimants, Mr Aaronson argued that the s32(1)(c) limitation period applicable to the DV Challenge commenced on 6 June 2000, the date of the judgment of the CJEU in *Verkooijen* with that applicable to the ACT Challenge starting later. (Before these oral submissions, the Claimants' primary case was that the limitation period applicable to the DV Challenge commenced after 6 June 2000.)

31. I have had full regard to all the evidence and submissions of the parties. However, in this judgment, I will not deal in any great detail with evidence and submissions that appear to me to be unduly influenced by hindsight since there was no shortage of other evidence and submissions, unaffected by hindsight, on which I could draw. This observation affects the following aspects of the parties' cases (although I will not set out an exhaustive list of all areas where I considered any party at risk of deploying undue hindsight):

i) The Claimants referred to a number of ingredients within the CJEU's reasoning in *FII CJEU1* that had not been established in earlier cases. The absence of those ingredients, they argue, meant that necessary "stepping stones" to the CJEU's ultimate conclusion were not present at relevant earlier times. That argument risks relying on hindsight. Without knowledge of the outcome of *FII CJEU1*, a practitioner at the time could not know whether something was, or was not, a stepping stone to that judgment. That said, if professional opinion at the time would

have regarded the perceived correctness or incorrectness of a particular proposition of law as an obstacle to a DV Challenge or an ACT Challenge, that would, of course, be a relevant consideration.

ii) The Claimants refer to a number of later authorities including Case C-292/04 *Meilicke and others v Finanzamt Bonn-Innenstadt* [2008] STC 2267 and *Pirelli Cable Holding NV v IRC* [2006] UKHL 4 as providing a commentary on earlier authorities of the CJEU. They argue that *Meilicke* indicates that *Verkooijen* represented a significant change in the then understanding of EU law and on Lord Walker's statement in *Pirelli* about the "explosive effect" of the CJEU's judgment in *Hoechst*. However, comments such as these, made by judges after the period under enquiry, rather than by taxpayers or practitioners during the period under enquiry, are in my judgment of little significance unless they find some echo in contemporaneous material not least because the comments in question are not directed at s32(1)(c) of the Limitation Act and were made without the benefit of the extensive expert evidence that I have received.

iii) To a significant extent, Professor Barnard's expert report sought to explain what she saw as the significance of various judgments of the CJEU in the light of later judgments. So, for example, in paragraphs 204 and 205 of her expert report, Professor Barnard commented that the legacy effect of the judgment of the CJEU in *Avoir Fiscal* was more profound and far-reaching than scholars had thought at the time. Professor Barnard also sought to identify broader patterns and trends in EU case law. I have approached that analysis critically to test, for example, whether what Professor Barnard sees as the great significance of *Avoir Fiscal* was perceived by practitioners at the time. Similarly, I have approached her analysis of "trends" critically since a trend that can be identified only with the hindsight that comes from the Claimants' success, in 2006, in *FII CJEU1* is unlikely to be of much value in ascertaining the state of legal thinking between 1996 and 18 December 2003 (the end of the period for which the parties have permission to rely on expert evidence pursuant to the order of Falk J referred to in paragraph 33 below).

iv) In Part 6 of his expert report, Mr Gammie also expressed some opinions on trends in the development of the case law of the CJEU. However, in paragraph [165] of his report, he noted that the "trends" he identified could be ascertained only with hindsight. Since Mr Gammie acknowledges the risks associated with hindsight, I consider his conclusions are less likely to be affected by unconscious hindsight, but I have applied the same critical examination to his conclusions on trends as I have to Professor Barnard's report.

32. The parties' expert reports analyse a large number of judgments of the CJEU and academic writings in minute detail. A well-advised multi-national exercising reasonable diligence to ascertain whether it had a worthwhile claim would have nothing like this quality or quantity of material available to it. That is because, as noted in paragraph 21.iv)b) above, the analysis of whether a "worthwhile claim" exists is a prelude to further analysis that must be performed in deciding whether to proceed with a claim or not. It follows that neither an Appropriate Adviser, nor a well-advised multi-national would perform anything approaching the detailed analysis of authorities which Mr Gammie and Professor Barnard have undertaken when considering whether there is a worthwhile claim. Instead, they would be guided by a high-level appreciation of relevant legal principles in the expectation that, if a worthwhile claim is indicated, there would be a more detailed analysis subsequently. Therefore, when I make findings as to what a well-

advised multi-national or an Appropriate Adviser would know or believe, my focus will be on core knowledge rather than more recondite matters that would could be ascertained only following detailed analysis or investigation.

THE EXPERT EVIDENCE

33. In her order of 27 May 2022, Falk J (as she then was) gave permission to all parties to rely on expert evidence in the following terms:

> *The parties have permission to call at the remitted trial one expert. Should either party choose to call an expert, an expert report must be served by 30 November 2022 on the subject of how legal thinking on whether the UK tax treatment of dividends received by UK-resident companies from non-resident subsidiaries in the form of ACT on subsequent distributions and tax on dividend income was compatible with EU law developed in the period to 18 December 2003.*

34. Significantly in my judgment, the permission given was for expert evidence on the subject of how legal thinking on the specified issue developed in the period to 18 December 2003. Falk J was not giving permission for expert evidence on the very issue the court has to determine, namely when a reasonable taxpayer could have discovered that there was a "worthwhile claim". Rather, the clear purpose of her order was to enable the parties to furnish the court with expert evidence on legal thinking at the relevant time to enable the court to undertake the kind of enquiry that is set out at [178] of *FII SC2*.

Mr Gammie

35. Mr Gammie started his career as a solicitor specialising in tax matters. He became a partner at Linklaters & Paines in 1987 leaving in 1997 to start a career at the tax bar. He has expertise in both tax law and European law and between 1998 and 2019 was a professor at the University of Leiden teaching and writing on subjects in international and European tax law. He has also been a senior visiting fellow, and latterly associate professor, with research interests in UK and international taxation at various academic institutions in the UK and Australia.

36. At the pre-trial review, I disclosed to the parties that I had been a partner at Linklaters from 2004 to 2012. I knew Mr Gammie when I was a trainee in the Linklaters tax department in 1996, but our careers at Linklaters barely overlapped since, by the time I qualified as a solicitor in 1997, Mr Gammie had left. I also disclosed to the parties that I knew Mr Gammie professionally as he had been a fee-paid judge in the First-tier Tribunal (Tax Chamber) and in the Upper Tribunal (Tax and Chancery) where I had been a full-time judge before being appointed as a High Court judge. I explained that I also knew Mr Gammie professionally from his appearances as an advocate in cases before me. I indicated to the parties that I saw no need to recuse myself from this case because of my acquaintance with Mr Gammie and neither side sought to persuade me otherwise.

37. I had no doubts about Mr Gammie's expertise. I considered that his expert report was scholarly, careful and fair and sought above all to assist the court on matters within his expertise.

38. HMRC suggested that Mr Gammie's expert report was deficient because it failed to explain clearly how he personally would have advised a client who consulted him in connection with a possible DV Challenge or ACT Challenge at various points between

1996 and 2003. I do not agree. Mr Gammie stuck carefully to matters within the scope of Falk J's direction set out in paragraph 33 above which sought opinion evidence on "legal thinking" generally, rather than the views of any particular adviser.

39. HMRC also suggested that Mr Gammie "ducked" a central question by declining to express a view on the advice that a hypothetical adviser would have given on whether there would have been a "worthwhile" DV Challenge or ACT Challenge, by saying that this was a question for the court rather than him. I do not agree with that either. Rather, reading his cross-examination as a whole, Mr Gammie was careful to draw a distinction between questions such as, on the one hand, what "legal thinking" was and, on the other, the question of when the Claimants could, with reasonable diligence, have discovered a "worthwhile claim". Mr Gammie expressed no reluctance to give his professional opinion on the first category of issues but, in my view rightly, noted that the second category of issues was for the court to determine.

40. Later in this judgment I address HMRC's argument that tax advisers suffered from an unduly "fixed mindset" on questions touching on the compatibility of UK law with the Treaty. However, whatever the merits of that argument, Mr Gammie's report was able to offer opinion evidence, from the standpoint of a tax practitioner, on the thinking of tax advisers at relevant times, which Professor Barnard could not.

Professor Barnard

41. Professor Barnard is the Professor of EU Law and Employment Law at Cambridge University and senior tutor and fellow of Trinity College, Cambridge. Prior to that she held a number of academic appointments both in Europe and the United States. She writes widely on matters concerning EU law particularly on matters touching on freedoms conferred by the Treaty (including the freedom of establishment and the free movement of capital) and on the internal market.

42. I had no doubts about Professor Barnard's expertise in matters of EU law. Her expert report was also scholarly, careful and fair, seeking above all to assist the court on matters within her expertise.

43. Professor Barnard, however, has no expertise in tax matters. While, of course, she obtained a clear understanding of how the UK tax regime worked, so far as relevant to the DV Challenge and ACT Challenge for the purpose of these proceedings, she has never written academically on UK tax matters and has never advised clients on such matters. Falk J's direction was for expert evidence to be given on how legal thinking developed on a specific issue: namely whether the UK tax treatment of overseas dividends was compatible with EU law. Because Professor Barnard was not herself writing on UK tax issues and was not part of a community of practitioners advising on such issues, she was less well-placed than Mr Gammie to provide evidence on this matter specifically. Her expert report was, in large measure, an examination of how various EU law principles were developed and applied in a continuum of cases before the CJEU going back to 1973 and earlier.

44. The Claimants characterise Professor Barnard's report as a "general essay on how the EU freedoms case law developed". That goes too far as it is not possible to categorise a document as lengthy and scholarly as Professor Barnard's report in a single phrase. However, there is a core truth in the Claimants' categorisation. Since Professor Barnard was not actually advising interested parties on the viability of DV Challenges or ACT Challenges at relevant times her analysis frequently fell short of shedding a light on what

the state of legal thinking was at the time as well as, on occasions, being unduly affected by hindsight (see paragraph 31.iii) above).

45. There was a further aspect of Professor Barnard's report that meant I obtained less assistance from it than I did from Mr Gammie's report. Professor Barnard started her report by saying, in paragraph 2:

> *HMRC has requested me to provide an Opinion on the date on which a well-advised multi-national company could with reasonable diligence have discovered that sections 14, 231 and 238-255 of the Income and Corporation Taxes Act 1988 were "at all material times contrary to the Treaty Provisions and unlawful".*

46. The fuller statement of the instructions that HMRC had given was set out in an Appendix 2 to Professor Barnard's report. That fuller statement did refer to the specific direction that Falk J had given. However, the summary of HMRC's instructions that I have set out in paragraph 45 was not an isolated infelicitous statement. It set out the issue on which Professor Barnard understood she had been instructed to provide an opinion that was reflected in her ultimate conclusion set out in a section headed "6. When could the mistake have been discovered by a well advised multi-national company?"

47. The difficulty is that the area in which Professor Barnard believed that she was giving expert opinion is in fact the entire issue that the court has to determine. That is not simply a protectionist statement of what the court regards as its domain. Rather, because Professor Barnard thought that she was providing an opinion on the entire issue that was before the court, and did so from the perspective of someone without expertise in tax matters, her report has not provided some of the "raw material" which I found so helpful in Mr Gammie's report, namely the state of thinking of those who would actually have been advising multi-nationals on potential DV Challenges and ACT Challenges at the relevant time.

48. I make these observations only to explain why I derived more assistance from Mr Gammie's expert report than I did from Professor Barnard's. They should not be taken as criticisms of her independence. Professor Barnard was absolutely clear and straightforward about those matters in which she had expertise and those in which she did not.

Matters that were not expert evidence – Mr Aaronson's submissions

49. Mr Aaronson conducted much of the oral advocacy on behalf of the Claimants. He has been closely involved in the FII GLO for a long time now. He was leading counsel for the taxpayers in *FII HC1* and indeed Mr Ewart was leading counsel for HMRC in that case. As would be expected, Mr Aaronson has a deep familiarity with many matters germane to the DV Challenge and the ACT Challenge derived from advising the Claimants in connection with this litigation. As a leading member of the bar practising in this area, he may well have been advising taxpayers other than the Claimants on similar issues.

50. At points in his oral submissions, Mr Aaronson appeared to refer to his own personal perceptions as to what he thought at various points in the litigation. He did not reveal privileged advice, whether given to the Claimants or anyone else, but he did for example, say that, at the time of *Hoechst* "no one would have dreamed" that UK legislation dealing with foreign dividends was incompatible with EU law. HMRC objected to these

statements, pointing out that it was not for Mr Aaronson to give any evidence, still less expert evidence. For my part, I treated this and other similar statements that Mr Aaronson made as rhetorical flourishes. I did not consider that he was seeking impermissibly to give evidence himself, but I have put his statements out of my mind when deciding this case. I remind myself that the only expert evidence that is before this court is given by Mr Gammie and Professor Barnard.

THE POSITION AS AT JULY 1996

The steps that a well-advised multi-national would take

51. It is appropriate to start the analysis of this issue by considering the relevant attributes of the hypothetical "well-advised multi-national". The whole function of this construct is to enable the court to consider what would have been discovered, and when, if the Claimants had exercised "reasonable diligence".

52. Since that question arises in the context of the DV Challenge and the ACT Challenge, the well-advised multi-national should, for the purposes of the comparison relevant to a DV Challenge, be assumed to be in receipt of overseas dividends on which there was a UK tax charge because DTR was insufficient to eliminate the UK corporation tax liability on those dividends. For the purposes of the comparison relevant to the ACT Challenge, the well-advised multi-national would have surplus ACT that it could not use for reasons similar to those set out in paragraph 10.ii) above.

53. Therefore, the hypothetical well-advised multi-national would have a structural issue. The UK tax issues summarised in paragraph 52 were fundamental and arose because of its very multi-national status. There was ample evidence as to the depth of the concern of multi-national groups who found themselves in a structural surplus ACT position. In the 1980s, a "surplus ACT sufferers' club" was organised that included BAT. That group lobbied extensively for changes in the law to alleviate the situation. BAT was quite prepared to undertake tax planning transactions and litigate them as a means of reducing its surplus ACT. These matters demonstrate that the well-advised multi-national would be eager indeed to find some way of dealing with tax issues that it faced.

54. All sides were agreed that a well-advised multi-national would take some kind of professional advice. However, they were not agreed on the questions that it would put to its advisers, or indeed on the characteristics of the advisers that they would instruct (for example whether those advisers would be pure UK tax advisers, pure advisers on matters of EU law, or a mixture of both).

55. As noted in paragraph 21.i), the test of "reasonable diligence" focuses on discoveries relevant to the Claimants' pleaded case. Moreover, the well-advised multi-national is assumed to want to discover whether any mistake has been made. Accordingly, the well-advised multi-national should be assumed to be asking for advice on whether the Relevant UK Law was compatible with EU law. A taxpayer asking that question in 1973, when the UK first joined the EEC, would have been far-sighted indeed since there was at that time very little to suggest that the Relevant UK Law was not compatible with EU law. However, by July 1996 which, on HMRC's case, was the latest date for any constructive discovery, there was an appreciation that even direct tax measures, ostensibly within the competence of member states, could contravene Treaty freedoms (see, for example *Avoir Fiscal*). Therefore, while there is no evidence as to whether the Claimants were actually asking advisers about whether the Relevant UK Law was

compatible with EU law in July 1996, I do not consider that any conceptual difficulties arise in considering what they could have discovered if they had asked that question.

56. That leads naturally to the question of who a well-advised multi-national would approach for advice. There was debate as to whether advice would come from an "EU law generalist" or from a "tax specialist". However, it is clear to me from the evidence of both Mr Gammie and Dr Whitehead that the adviser consulted would have to have expertise in both tax and EU law matters. It does not matter greatly whether that expertise was held by a single individual (such as Mr Gammie himself) or by a team of individuals. Nor does it matter greatly who the multi-national approached initially: if a "tax specialist" was initially approached who lacked EU law expertise, he or she would necessarily involve someone with the necessary EU expertise. If an "EU law generalist" was initially approached, he or she would necessarily involve a tax specialist given that any view on whether there was a "worthwhile claim" would have to be grounded in a detailed appreciation of the UK tax regime applicable to both domestic and overseas dividends.

57. I conclude, therefore, that a well-advised multi-national exercising reasonable diligence would take professional advice as to whether a DV Challenge or an ACT Challenge would be worthwhile. That professional advice would be given by an adviser, or team of advisers, ("the Appropriate Adviser") having expertise both in the UK tax system applicable to domestic and overseas dividends and in EU law matters.

What the Appropriate Adviser would know or believe as at July 1996

58. The Appropriate Adviser would know and understand salient features of the UK tax regime applicable to overseas dividends and ACT including, but not limited to, those matters summarised in paragraph 8 above. Therefore, the Appropriate Adviser would understand that there was a difference between the way in which a UK resident company was taxed on receipt of overseas dividends, as compared with the receipt of a dividend from another UK company. The Appropriate Adviser would appreciate that there was, at least in UK tax terms, a rationale for that difference in treatment which I have summarised in paragraph 9.

59. The Appropriate Adviser would know that the Treaty contained no provision that required member states to harmonise their direct tax regimes applicable to cross-border dividends. The Appropriate Adviser would recognise that Article 73d of the Treaty, that took effect from 1 January 1994, expressly envisaged that member states were entitled to apply relevant provisions of their tax law to distinguish between taxpayers with different places of residence, while noting that this did not afford member states the power to engage in arbitrary discrimination or a disguised restriction on the free movement of capital. The Appropriate Adviser would also understand that, whereas Article 99 of the EEC Treaty as in force in July 1996 contained a specific legal basis for the harmonisation of indirect taxes, there was no equivalent provision applicable to direct taxes. Moreover, the Appropriate Adviser would realise that, when the requirement that single market measures be taken unanimously by the Council was relaxed following the Maastricht Treaty, Article 100a of the EEC Treaty was added to exclude fiscal provisions from the scope of that relaxation.

60. Accordingly, the Appropriate Adviser would consider that there were a number of provisions of EU law that appeared to give member states a good degree of flexibility in formulating a system for the taxation of cross-border dividends. That said, the Appropriate Adviser would realise that member states who adopted an imputation system would be implementing a regime that had the ability to distort cross-border investment

by providing a more favourable regime to companies receiving domestic dividends as compared with those receiving overseas dividends. That feature was at odds with the aspirations of the EU dating back to 1973 and even earlier. It was for that reason that EU institutions had made various attempts prior to 1996 to harmonise the tax treatment of cross-border dividend flows without success.

61. The Appropriate Adviser would be aware of the "Parent/Subsidiary Directive" that was implemented in 1990. That required member states to apply one of two regimes when a parent company received a dividend from a subsidiary resident in a different member state but fell short of imposing a single harmonised system on all member states. The Appropriate Adviser would consider that to be a form of negotiated compromise that was, at least in 1990, acceptable to member states who were jealously guarding their competence to legislate on tax matters and to the European Commission which aspired to a more harmonised tax regime applicable to cross-border dividend flows.

62. The Appropriate Adviser would realise that the European Commission had not given up on efforts to impose greater harmonisation going beyond the Parent/Subsidiary Directive. It had established the Ruding Committee to examine the tax environment for companies in the EU and to make recommendations for further EU action in the company tax field. One of the Ruding Committee's recommendations when it reported in 1992 was that the existing discrimination between the tax treatment of dividends received within the same member state, as compared with dividends received from another member state, be dealt with by requiring member states, on a reciprocal basis, to give an imputation credit reflecting tax paid in the member state in which the dividend payer was established. However, there was little enthusiasm for taking forward the Ruding Committee's recommendations.

63. The Appropriate Adviser would not, however, believe that the UK was free to legislate entirely as it saw fit in relation to overseas dividends. Direct tax was not an enclave to which Treaty freedoms were inapplicable. That much was clear from as long ago as 1986 with the judgment of the CJEU in *Avoir Fiscal.* It had been reinforced in judgments of the CJEU in *Case (81/87) Daily Mail, R v Inland Revenue Commissioners ex p Commerzbank AG* (Case C-330/91) [1994] QB 219, and in *Halliburton Services BV v Staatssecretaris Financiën* (Case C-1/93) [1994] E.C.R I-1137. The fact that direct tax law was not a "no-go zone" for the purposes of Treaty freedoms was further emphasised by the publication in 1994 of the first edition of *EC Tax Law* by Farmer & Lyal ("*Farmer & Lyal*"). That textbook contained much discussion of principles of direct tax law, notwithstanding that this area was not harmonised within the EU, which would have emphasised to the Appropriate Adviser that EU law was of some relevance to direct tax matters that were ostensibly within the competence of individual member states.

64. The judgment of the CJEU in *Schumacker* would have been of real interest to the Appropriate Adviser since, as Mr Gammie accepted in cross-examination, it was a "sort of invitation" to probe the extent to which member states truly were exercising their competence in direct tax matters in a manner that was consistent with the Treaty.

65. Moreover, the Appropriate Adviser would be aware that multi-national groups were taking up the "invitation" to which Mr Gammie refers. Shortly after the CJEU gave judgment in *Schumacker*, Hoechst AG and its UK subsidiary Hoechst UK Limited ("Hoechst UK") commenced proceedings in the High Court challenging two features of the UK tax regime applicable to cross-border dividends:

i) By their first claim, Hoechst UK noted that domestic UK statute law precluded a UK resident subsidiary from making a group income election in relation to dividends payable to a non-UK EU resident parent. Because a group income election could not be made in these circumstances, the dividend paid by the UK resident subsidiary triggered an obligation to pay ACT which would not have arisen if the dividend had been paid to a UK resident parent under a group income election. Hoechst UK argued that this difference in treatment was discriminatory and contrary to Treaty freedoms.

ii) By their second claim, Hoechst AG noted that, had it been resident in the UK rather than in Germany, dividends paid by Hoechst UK would have carried a tax credit. It argued that it should be entitled to the same tax credit and, moreover, be entitled to recover that payment in cash from HMRC.

66. Despite both Mr Gammie and Professor Barnard performing a meticulous review of academic and professional literature, neither the Claimant nor HMRC invite me to conclude that there was any contemporaneous publication by July 1996 indicating with any precision that Relevant UK Law was, or was not, compatible with the freedoms set out in the Treaty. It follows that the Appropriate Adviser would not be aware of any academic or professional suggestion that Relevant UK Law was incompatible.

67. In her expert report, Professor Barnard set out a detailed survey of judgments of the CJEU in a variety of areas extending well beyond direct tax and including decisions relating to matters as diverse as employment rights and fishing quotas. In their closing submissions, HMRC placed little specific reliance on judgments of the CJEU falling outside the tax arena. They did, however, invite me to conclude that the Appropriate Adviser would approach matters in the same way as an EU lawyer by concluding that any difference between the tax treatment of a UK dividend and an overseas dividend would "look like a straightforward case of discrimination".

68. I will not make that finding. A general EU lawyer in July 1996 would appreciate that any treatment that "discriminated" between the situations of a resident of one member state and a resident of another would not inevitably infringe Treaty freedoms. That was because the applicable principle of EU law was that discrimination was only objectionable if it involved different treatment of <u>comparable</u> situations. That concept applied differently in cases of a breach of the Treaty freedom of establishment to the way it applied to a breach of the principle of free movement of capital, but no party suggests that the differences are material. Therefore, an Appropriate Adviser considering the difference between the UK tax treatment of UK dividends, as compared with the treatment of non-UK dividends, would not consider the difference in treatment to be conclusive of discrimination. Rather, the Appropriate Adviser would ask whether a UK-resident company paying a dividend to a UK resident parent was in a comparable situation to that of a non-UK resident paying a similar dividend.

69. In their closing submissions, HMRC point to the fact that Mr Verkooijen must have made his challenge to the Netherlands tax regime applicable to individuals receiving dividends from another member state some time in 1992 or 1993. They also observed paragraph 6 of the Advocate General's opinion in *Verkooijen* shows that a domestic court in the Netherlands (the Gerechsthof te 's-Gravenhage) had determined the challenge in Mr Verkooijen's favour. While I have found that the Appropriate Adviser would be aware of Hoechst's challenge to the UK tax system referred to in paragraph 65 above, I conclude that the Appropriate Adviser would not be aware of the Netherlands proceedings

instituted by Mr Verkooijen in July 1996. There was no suggestion in Mr Gammie's expert report that he personally was aware of domestic proceedings in the Netherlands. I do not consider that an Appropriate Adviser being asked to express a view on whether there was a "worthwhile claim" would conduct a survey of authorities from a non-UK jurisdiction.

Would an Appropriate Adviser have advised that there was a "worthwhile claim" in July 1996?

70. In my judgment, an Appropriate Adviser would have advised in July 1996 that there was no worthwhile claim of the kind that the Claimants have pleaded.

71. That conclusion follows from the following opinions that Mr Gammie expressed as to the state of legal thinking which I accept and prefer to Professor Barnard's contrary analysis:

    i) There was a longstanding and accepted understanding, still extant at the start of 1996, that distortions created by cross-border dividend taxation systems could only be addressed by legislative action at Community level, or by member states taking action unilaterally or by negotiating (on an ad hoc basis) bilateral double taxation agreements with other member states. That understanding was reinforced by the introduction of the Parent/Subsidiary Directive with which the UK's tax regime was understood to comply.

    ii) Legal thinking at the time did not regard the situation of a non-UK EU resident subsidiary of a UK parent as "comparable" to the situation of a UK subsidiary of a UK parent when it came to evaluating whether a difference between the treatment of UK and overseas dividends amounted to impermissible discrimination.

    iii) In any event, legal thinking in 1996 was to the effect that the concept of the "cohesiveness" of the UK's tax system set out in *Bachmann* precluded the possibility of a challenge.

    iv) The judgment of the CJEU in *Schumacker* and the bringing of the claims by Hoechst AG and Hoechst UK in 1995 certainly caught the attention of advisers. However, by July 1996, professional legal thinking had not yet re-evaluated the propositions set out in paragraphs 71.i) to 71.iii) above.

72. Mr Gammie expressed his opinions summarised in paragraphs 71.i) to 71.iii) above by reference to the position "at the start of 1996". However, in my judgment there was no material difference between the position at the start of 1996 and the position as at 11 July 1996 (noting the points in paragraph 30 as to how HMRC came to alight on this date).

73. In the remainder of this section, I test the conclusion set out in paragraph 70 against various contra-indications on which HMRC rely.

Was the issue conceded in cross-examination?

74. HMRC suggested that Mr Gammie conceded in cross-examination that a worthwhile claim could be brought by the mid-1990s. Reliance was placed on a passage of cross-examination in the transcript for Day 3, page 82 lines 1 to 20. I do not consider that to be an accurate interpretation of what Mr Gammie accepted. Throughout his evidence, Mr Gammie used a metaphor of climbing a mountain shrouded in mist to represent the task

of making a successful DV Challenge or ACT Challenge. While the mist remained in place, he said that no one was aware that there was even a mountain to climb. Once the mist had cleared, the mountain could be identified, but it still remained uncertain whether it could be climbed. Mr Gammie certainly accepted that the mists began to clear in the mid-1990s, but he did not accept, continuing with his metaphor, that there was any worthwhile possibility of the mountain being climbed in the mid-1990s.

75. HMRC also relied on a passage of Mr Gammie's cross-examination in the transcript for Day 3 between pages 102 and 103. In that passage, Mr Gammie confirmed that (i) Hoechst UK brought its claim described in paragraph 65.i) above in 1995; (ii) in 1995, Mr Gammie thought that Hoechst UK's claim was likely to succeed; (iii) that principles of EU law as applicable to the Hoechst UK claim had not changed much since 1991 and therefore (iv) if Hoechst UK had made its claim in the years before 1995, he would similarly have thought at that stage that it was likely to succeed. However, HMRC's reliance on Mr Gammie's concession is misplaced since, as explained in paragraph 96 below, Hoechst UK's claim was very different from the Claimants' DV Challenge and ACT Challenge.

76. HMRC attach significance to Mr Gammie's acceptance in cross-examination that "it may be that out there, there was somebody who thought otherwise [than the consensus he put forward in his expert report]". I do not consider that to be significant. Mr Gammie had the expertise to describe a consensus, but could not reasonably confirm the views of everybody advising on the issue at the time.

77. In a similar vein, I do not accept HMRC's assertion that Dr Whitehead conceded the point in his cross-examination. He certainly accepted that it was conceptually possible that a far-sighted tax manager in a multi-national armed with a keen appreciation of matters of EU law could have spotted the possibility of making a DV Challenge or an ACT Challenge before the Big 4 accounting firms did when they started forming GLOs in the early 2000s. However, that was not an acceptance that a worthwhile claim could have been made in July 1996. Dr Whitehead also accepted in cross-examination that none of the factual evidence served by the Claimants asserted positively that they delayed issuing their claims pending the receipt of tax advice. However, that was simply an acceptance of what the witness evidence said. The question before the court is not what the Claimants actually did but what a well-advised multi-national could have done. Dr Whitehead's "acceptance" in cross-examination says nothing about the proper question that is before the court.

Whether the consensus to which Mr Gammie referred was unevidenced, misconceived or implausible

78. I have already explained above some general points that have led me to give greater weight to aspects of Mr Gammie's conclusions than I have to those of Professor Barnard. I also consider that Mr Gammie's conclusion is more consistent with the situation that both a well-advised multi-national, and the Appropriate Adviser, would have been in on 11 July 1996.

79. HMRC seek to characterise the consensus that I have described in paragraph 71 as being unevidenced because no contemporaneous document has been produced that sets out the consensus in terms. I disagree. Mr Gammie is an experienced tax adviser who was advising on both tax matters and EU law matters at all times relevant to the present proceedings. The evidence as to the existence and nature of the consensus comes from Mr Gammie's expert report which dealt with matters of which he had first-hand

knowledge. I have already explained why Professor Barnard was not well-placed to gainsay Mr Gammie's conclusions in this regard.

80. That said, the absence of contemporaneous material setting out the consensus is a relevant consideration. It could indicate that the consensus was so firm that it did not need documenting or that there was no consensus at all. I accept Mr Gammie's conclusion that the consensus was operative despite not being documented.

81. In any event, although I agree that the full extent of the consensus that Mr Gammie described was not set out in the contemporaneous material that I was shown, there were contemporaneous allusions to it. Chapter 6 of *Farmer & Lyal*, entitled "The Impact of the Fundamental Freedoms", contains just such an allusion. In that Chapter, the authors caution against precisely the broad approach to the *Avoir Fiscal* judgment that Professor Barnard, with the benefit of hindsight, advocates in her expert report saying:

> *It is important to appreciate that* [Avoir Fiscal] *was based on the fact that under French tax law the positions of the two types of taxpayer were substantially the same. The Court expressly left open the possibility that distinctions based on residence might in some cases be justified. That would, for example, probably apply to a refusal to grant tax credits on dividends paid by a resident subsidiary to its parent company resident in another Member State since the non-residence of the parent company would place it in a different tax position from a domestic parent company: the dividend income of the foreign parent company would not be taxable in the Member State of the subsidiary. The principle of non-discrimination, on which the judgment in Commission v. France is based, does not oblige a Member State to take account of the fact that a non-resident company may be subject to further taxation on certain income in its state of residence or elsewhere; double taxation arising from conflicts of tax jurisdiction must be resolved by convention or harmonization.*

82. HMRC argue that this passage contains a limited conclusion to the effect that Hoechst AG's claim for a payable tax credit (see paragraph 65.ii) above) was unlikely to succeed. I do not agree. The passage sets out a much broader conclusion that casts significant doubt on whether a UK company receiving a dividend from a non-UK EU resident subsidiary is in a comparable position to a UK company receiving a dividend from a UK subsidiary.

83. Next, HMRC argue that the point made in paragraph 71.i) was incapable of forming part of the consensus Mr Gammie describes since it was conceptually quite possible for "non-compliant" aspect of member states' tax regimes to be dealt with on a piecemeal basis by the CJEU without the need for Community-wide legislative action. However, that argument overlooks pertinent aspects of the DV Challenges and ACT Challenges. These were not just challenges to particular aspects of a member state's tax regime which could be seen, without any analysis of wider context, to discriminate unfairly between the treatment of residents and non-residents. Rather, the challenges struck right at the heart of the way in which the UK chose to deal (or not deal) with matters such as economic double taxation and so with the way in which the UK's tax regime interacted with the tax regimes applicable in other member states. I have already explained factors that would have indicated to the Appropriate Adviser that the UK was to have a high degree of freedom on matters such as this. Neither HMRC's submissions based on implausibility,

nor Professor Barnard's report, leads me to reject Mr Gammie's conclusion set out in paragraph 71.i).

84. In a similar vein, I also reject HMRC's arguments based on the implausibility of aspects of the consensus:

    i) HMRC are correct to say that compliance with the Parent/Subsidiary Directive could not of itself excuse UK legislation that breached Treaty freedoms. However, I accept Mr Gammie's conclusion that the Parent/Subsidiary Directive was instrumental in the formation of the consensus since it emphasised how little harmonisation there was as to the tax treatment of cross-border dividends and, correspondingly, suggested that member states enjoyed considerable latitude in this area.

    ii) HMRC argue that reliance on the report of the Ruding Committee is misplaced because the remit of that committee was to consider a Community-wide solution to the problem of distortions in member states' dividend taxation systems. Legal action on aspects of individual member states' systems that infringed could never achieve that aim as acknowledged by Dirk Witteveen in a 1995 article entitled *Taxation of Non-Residents in the European Union: Tax Equality or Patchwork Quilt*. HMRC argue that it is scarcely surprising that the Ruding Committee did not mention the possibility. However, in my judgment, this involves hindsight. Now that we know, following *Verkooijen*, *Manninen* and *FII CJEU1* that domestic measures addressing, or not addressing, double taxation issues arising on cross-border dividends could be challenged by reference to Treaty freedoms, the absence of any reference in the Ruding Committee's report to this possibility is less significant. However, in July 1996, an Appropriate Adviser would have been unaware of these developments. I am, therefore, satisfied that, looking at matters in 1996, the Ruding Committee's report could have supported the consensus Mr Gammie describes.

Whether the consensus that Mr Gammie describes was simply a "fixed mindset" without a secure foundation and which would not have been shared by others experienced in EU law

85. I do not accept HMRC's argument that the consensus that Mr Gammie describes was simply a "general understanding that a [DV Challenge or an ACT Challenge] would face difficulties." It was more than that: it was a consensus that such challenges would not be worthwhile.

86. HMRC also seek to downplay the significance of the professional consensus by describing it as an unduly "fixed mindset". They suggest that a well-advised multi-national would have looked beyond tax advisers with this mindset and have engaged the services of EU law generalists who, unburdened by their tax counterparts' mindset, would see the DV Challenges and ACT Challenges as obviously worthwhile claims for discrimination.

87. I do not accept that submission. The Appropriate Adviser would be aware (see paragraph 68 above) that a mere difference in treatment between persons based on their nationality did not necessarily result in a contravention of Treaty freedoms. There would be discrimination only if persons in comparable positions were treated differently. Accordingly, even if a well-advised multi-national consulted the kind of EU law generalist to whom HMRC refer in their submissions, that adviser would still need to consider whether the situations of a UK-resident dividend payer and dividend payer

resident in a non-UK member state were "comparable". That question could only be answered by discussing the matter with advisers with expertise in the detail of the UK tax regime. Those discussions would have engaged the professional consensus that I have described.

88. HMRC suggested that it was significant that Professor Barnard was not cross-examined on the statement in her expert report to the effect that *Avoir Fiscal* was a "turning point" judgment that "sent a clear message that the EU treaty provisions on the four freedoms could be used as a way of challenging potentially conflicting provisions of national tax law." Reference was made to the judgment of the Supreme Court in *TUI UK Ltd v Griffiths* [2023] UKSC 48 on the need for expert opinion to be challenged by way of cross-examination rather than by way of submission. I attach little significance to the absence of cross-examination on this issue. Professor Barnard clearly considers that the *Avoir Fiscal* judgment was a turning point in CJEU jurisprudence. With the benefit of hindsight that opinion may, or may not, be correct. However, the correctness or otherwise of that opinion as at the date of Professor Barnard's expert report sheds relatively little light on what an Appropriate Adviser would have thought at the time. That Professor Barnard holds her opinion on the implications of *Avoir Fiscal* falls far short of compelling the conclusion that, in July 1996, an Appropriate Adviser would consider the Relevant UK Law to give rise to what HMRC refer to as "a straightforward case of discrimination".

89. HMRC also invite me to conclude that an Appropriate Adviser in July 1996 would conclude that the "general direction" of the CJEU's case law was in favour of finding member states' tax systems to be in breach of the Treaty. I will not make that finding either. As I have explained, an Appropriate Adviser considering whether a well-advised multi-national would have a "worthwhile claim" would not perform the kind of extensive analysis of CJEU authorities that Mr Gammie and Professor Barnard have undertaken. Rather, the Appropriate Adviser would approach the question at a much higher level of generality. As at July 1996, there was no obvious "general direction" in the CJEU's jurisprudence. Certainly, some provisions of member states' direct tax regimes were held to be incompatible with the freedoms set out in the Treaty. However, as Professor Tiley had noted in a case commentary prepared for the All England Law Reports in 1994, some cases were decided in member states' favour:

> *… while the Court was able to find a clear breach of EC law in* Halliburton*, they found no breach in* Bachmann v Belgian State *Case C-204/90 [1994] STC 855. The urgent need is to discover the difference. This difference may lie in the concept of the cohesion of the tax system; a tax system may provide different rules for residents and non-residents if the difference is necessary to protect the cohesion of its tax system…*

90. Professor Barnard's expert report drew together the strands of an extraordinary number of CJEU authorities spanning over 30 years. However, that exercise does not cause me to doubt Mr Gammie's opinion. That is because, in my judgment, Professor Barnard's report does not displace a central conclusion that Mr Gammie reaches namely that in July 1996, an Appropriate Adviser would not have considered the situation of a non-UK EU resident subsidiary paying a dividend to a UK parent as comparable to that of a UK subsidiary paying a similar dividend.

91. Even though Professor Barnard did not address head-on the question of comparability, she has expressed opinions on when a well-advised multi-national could, with reasonable diligence, have discovered that a DV Challenge and ACT Challenge would be

worthwhile. To a significant extent those opinions highlight the deficiency in her report that consists of a lack of detail on what appropriately qualified professional advisers were actually thinking at the relevant time:

i) I am quite unable to accept Professor Barnard's opinion at [486] of her report that "a case could be made that a well-advised multi-national company could have known since the date of the UK's accession to the EU in 1973 that [DV Challenges and ACT Challenges] were possible". That opinion, not grounded in what professional advisers were actually thinking in 1973, represents an application of hindsight.

ii) For similar reasons, I do not accept her opinion at [493] of her report that by the time of the *Avoir Fiscal* judgment in 1986 a well-advised multi-national could, with reasonable diligence have discovered that DV Challenges or ACT Challenges were worthwhile. This too represents a conclusion based on hindsight. Mr Gammie's expert evidence has satisfied me that an Appropriate Adviser would not have held this view in 1986. Indeed in 1994, *Farmer & Lyal* expressed a much more cautious view on the implications of *Avoir Fiscal* than the conclusion Professor Barnard expresses in her report.

iii) I also do not accept Professor Barnard's opinion, at [505] of her report, that a constructive discovery arose by 1995. Professor Barnard cited the judgment in *Bachmann* in support of that conclusion, but *Bachmann*, which decided that discriminatory tax provisions could be justified by reference to the need to preserve a "cohesive" tax system points against her conclusion rather than in favour of it. She also referred to the case of *Schumacker* (which I address in the section below). More generally, as I have explained, I prefer Mr Gammie's conclusions as to the state of legal thinking which suggests that practitioners at the time would not have thought that there was a worthwhile claim by 1996.

92. In written closing submissions, HMRC emphasised the significance of judgments of the CJEU in *Commerzbank* and *Halliburton*. I consider that significance to be overstated with the benefit of hindsight and to be at odds with what practitioners thought at the time, as explained in Mr Gammie's report.

Whether the consensus was undermined by *Schumacker* or the knowledge that Hoechst was bringing a claim

93. HMRC note that (i) it was well known since the *Avoir Fiscal* decision, and indeed before, that despite member states' competence to legislate on direct tax issues, tax provisions that breached fundamental freedoms could be challenged; (ii) Mr Gammie accepted that the judgment in *Schumacker* constituted an "open invitation" to hunt out non-compliant tax measures and (iii) Hoechst was known to be taking up that invitation before July 1996. I have considered these points carefully to test whether, since Hoechst had issued proceedings before July 1996 on matters concerning the UK's dividend tax regime, a well-advised multi-national could have done the same with a DV Challenge or an ACT Challenge.

94. The points summarised in paragraph 93 do not cause me to doubt Mr Gammie's opinion. First, although *Schumacker* came to be cited in later judgments of the CJEU as authority for the very general proposition that, although direct taxation falls within the competence of member states, those member states must nonetheless exercise their competence consistently with Community law, the full implications of that proposition were not

appreciated by July 1996. Moreover, the facts of *Schumacker* were stark. Mr Schumacker was a Belgian national, who lived in Belgium with his family. He earned no significant income in Belgium and derived all of his income from paid employment in Germany. When Germany taxed him as a non-resident, and thereby denied him benefits that would be available to resident taxpayers, there was an obvious force to the argument that he was in a comparable position to a German resident even if generally, residents and non-residents were not in comparable positions.

95. Contemporaneous writing on the *Schumacker* case emphasised that it set out an exception to the general rule, on the non-comparability of residents and non-residents for direct tax purposes, rather than a new and wide-ranging rule. It also emphasised Mr Schumacker's relatively unusual position of earning almost all his income from sources in a different member state from the one in which he resided. For example, in her annual review she prepared for the All England Law Reports on interesting EU law cases in 1995, Professor Barnard herself wrote as follows about *Schumacker*:

> *In respect of direct taxes [the CJEU] said that the situations of residents and non-residents in a given state were not generally comparable since there were objective differences between them from the point of view of the source of the income and the possibility of taking account of their ability to pay tax or their personal and family circumstances. Since [the applicable German rules] constituted different treatment of non-comparable situations this in itself did not constitute discrimination. However, on the facts of the case, a non-resident taxpayer who received all or almost all of his income in the state where he worked was objectively in the same situation as a resident in that state who did the same work there.*

96. I also accept Mr Gammie's opinion that, in July 1996, a DV Challenge and an ACT Challenge would be perceived as very different challenges to Hoechst UK's claim to be able to make a group income election with a non-UK EU-resident parent. At the heart of the Hoechst UK's claim was a simple proposition that, when it paid a dividend to a German resident parent, it was in a comparable position to that of a UK company paying a dividend to a UK parent. No question of "coherence" arose, because Hoechst UK's claim, as distinct from the more ambitious claim made by Hoechst AG, did not require the UK both to forgo charging ACT and to confer a tax credit on the recipient of the dividend. Moreover, Hoechst UK's claim did not raise any question touching on double taxation.

97. By contrast, both a DV Challenge and an ACT Challenge raised questions touching on the coherence of the UK's tax system and on double taxation matters. The DV Challenge sought to establish that the UK should refrain altogether from taxing dividends received from non-UK EU resident subsidiaries even though the UK had collected no tax on the profits out of which those dividends were paid. The ACT Challenge sought to establish that the UK should treat EU dividends as FII, with a consequent reduction in the amount of ACT collected, even though no UK tax was payable on the profits out of which the EU dividends were paid and no ACT had been paid when those dividends were paid.

98. This distinction, which Mr Gammie highlighted in his expert report, is not an after-the-event rationalisation. Professor Tiley's commentary on *Bachmann* written in 1994 (referred to in paragraph 89 above) was indicative of a contemporaneous view that the concept of the "cohesiveness" of a tax system could be invoked to justify the difference in treatment to which the Relevant UK Law gave rise.

99. The distinction was alluded to in an article that Mr Gammie wrote together with Mr Guy Brannan of Linklaters in 1995 entitled "*EC Law Strikes at the UK Corporation Tax – The Death Knell of UK Imputation*?" That article analysed the claims of both Hoechst UK and Hoechst AG. It explained in detail the authors' view that Hoechst UK's claim should succeed as it did not involve propositions materially different from those that the CJEU had accepted in *Avoir Fiscal* but that of Hoechst AG was "speculative". Moreover, the conclusion of the article was muted, falling short of suggesting that multi-nationals had any worthwhile claims that the UK's dividend regime breached Treaty freedoms:

> *THE FUTURE DIRECTION OF EC CORPORATE TAX POLICY*
>
> *What seems clear is that, at the moment, the initiative in corporate tax matters has moved from the Commission and Member States to the hands of the taxpayers and their advisers and the European Court of Justice. Time will tell how far this process will go and whether governments will prove able to take individual or collective measures to deal with the corporate tax issues that European economic and business integration presents.*

100. The significance in this article is not whether it does, or does not, correctly foresee the direction of travel in subsequent CJEU cases. Rather, what is significant is its conclusion (correct in the event) that Hoechst UK's claim would succeed for reasons similar to those adopted by the CJEU in *Avoir Fiscal*, that Hoechst AG's claim was "speculative" and the absence of any suggestion that the UK's wider system of dividend taxation was likely to contravene Treaty freedoms. It provides contemporaneous support for the opinions that Mr Gammie expresses in his expert report as to how Hoechst's claims would have been perceived in July 1996.

101. I have considered the matter carefully but conclude that neither the judgment in *Schumacker* nor Hoechst bringing a claim in 1995 calls into question the conclusion that I have expressed in paragraph 70 above.

The significance or otherwise of the Claimants' decision not to waive privilege

102. The Claimants have received extensive professional advice over the years. They have not waived their privilege in that advice and so I have not been shown it. HMRC do not invite me to draw any adverse inference from the Claimants' stance but suggest that it makes it difficult for the Claimants to discharge their burden of proof.

103. I will consider this issue afresh when I address, later in this judgment, whether a constructive discovery was made after July 1996. However, I regard the matter as being of no significance as regards the situation in July 1996. The Claimants have, in my judgment, discharged their burden of proof by reference to Mr Gammie's expert report.

The significance or otherwise of Henderson J's criticisms of HMRC in *FII HC1*

104. HMRC referred me to certain observations of Henderson J at [399] and [400] of *FII HC1*. Those passages formed part of Henderson J's analysis of whether HMRC or another organ of the UK government had committed a "sufficiently serious breach" of EU law to justify the award of damages under "Francovich" principles. At [399], Henderson J criticised HMRC for failing to give any serious consideration to potential EU law issues arising from the Case V charge after commencement of the Hoechst litigation in 1995. Henderson J went further at [400] indicating that he would have expected HMRC to have

initiated a detailed review and "health check" of all of the UK's tax legislation with a significant cross-border element soon after the judgment of the CJEU in *Avoir Fiscal*.

105. However, I consider that those observations shed little light on the state of legal thinking as at July 1996. Henderson J was examining the actual conduct of HMRC and the UK Government rather than the hypothetical conduct of a "well-advised multi-national". It follows that Henderson J had none of the expert evidence on the state of legal thinking that I have had. Moreover, at [401], Henderson J concluded that the criticisms that he made did not count for very much on an objective appraisal of the situation. I conclude that his observations do not call into question the expert opinion that Mr Gammie has advanced.

Was there a constructive discovery by July 1996?

106. My conclusions in the section above lead me to determine that there was no constructive discovery by July 1996. If a well-advised multi-national had consulted an Appropriate Adviser in July 1996, the advice would have been that there was no worthwhile claim.

107. In their closing submissions, HMRC made a number of points about how advisers actually behaved at or around the time that GLOs challenging aspects of the UK's tax system were established from 2002 onwards. It was suggested, for example, that advisers viewed those GLOs as a source of revenue, and so were incentivised to keep confidential the basis on which challenges to the UK's regime could be brought in order to prevent other advisers from establishing competing GLOs. However, to the extent that this or similar behaviour took place at all, it would have been after 2002 and, accordingly, does not call into question the conclusion that I have expressed in paragraph 106.

108. HMRC also referred me to witness statements made earlier in these proceedings, which they submitted showed that employees of certain of the Claimants realised that the UK's ACT system was potentially discriminatory before professional advisers did. For example, I was referred to paragraph 23 of a witness statement of Mr Bilton, who was a tax manager at BAT, given in 2008 and to paragraph 73 of a witness statement given in 2008 by Mr Hardman, who also worked at BAT. However, neither witness statement demonstrates HMRC's proposition. Both Mr Bilton and Mr Hardman clearly thought that the UK's ACT system operated unfairly in the mid-1990s (as it resulted in BAT having a large amount of surplus ACT that it could not use). However, I am not satisfied that these individuals realised that there was a worthwhile claim that UK tax law contravened EU law.

THE PERIOD FROM 1996 TO 2000

109. As I have noted in paragraph 30, in his oral submissions on behalf of the Claimants, Mr Aaronson accepted that there was a constructive discovery in relation to the DV Challenge on 6 June 2000, the date of the CJEU's judgment in *Verkooijen*. The question addressed in this section is whether there was a constructive discovery relating to either the DV Challenge or the ACT Challenge in the period between 11 July 1996 and 6 June 2000.

The judgment of the CJEU in *Verkooijen* in June 2000

110. The *Verkooijen* case dealt with the Netherlands rules that charged an income tax on dividends received by individuals (as opposed to companies). Under the then applicable Netherlands tax regime, if a company resident in the Netherlands paid a dividend to an

individual resident in the Netherlands, the dividend paid was subject to a withholding tax. Where the dividend was paid to a Netherlands resident individual, the amount withheld was treated as a payment on account of the Netherlands income tax (the "dividend tax") to which Netherlands resident individuals were liable.

111. Netherlands income tax provided that the first 2,000 Guilders of dividend income received by a Netherlands resident individual was exempt from the dividend tax. However, that exemption was expressed to apply only to dividends from which tax had been withheld on account of the dividend tax. As the CJEU noted in its judgment, this meant that individual investors who received dividends totalling less than 2000 Guilders from Netherlands resident companies escaped the double taxation that would otherwise arise as a consequence of (i) the profits out of which the dividend was paid being subjected to Netherlands tax in the hands of the paying company and (ii) the dividend representing those profits also being subject to dividend tax in the hands of the individual recipient. Netherlands resident individuals receiving larger dividends from Netherlands resident companies suffered a measure of double taxation because the Netherlands operated a "classical" system of dividend taxation for individuals. Its tax rules did not "impute" any of the tax paid by the corporate payer to the individual recipient and did not confer any credit for tax paid at the level of the corporate payer of the dividend.

112. The formulation of the exemption set out in paragraph 111 above meant that the exemption could not apply to dividends that a Netherlands resident individual received from companies resident outside the Netherlands.

113. Mr Verkooijen had received dividends to the value of 2,337 Guilders from a company resident in Belgium. Because those dividends had not been subjected to any deduction of Netherlands tax, Mr Verkooijen was not entitled under Netherlands tax law to exemption for the first 2000 Guilders of dividends received. He argued that EU law nevertheless required that he be granted this exemption.

114. The CJEU agreed with the judgment of the domestic court in the Netherlands that Mr Verkooijen was entitled to the exemption he claimed. The CJEU's reasoning struck right at the heart of the professional consensus that is described in paragraph 71 above.

115. Both the UK and the Netherlands made representations based on Article 73d(1)(a) of the Treaty, arguing that although not in force at the time Mr Verkooijen received his dividends, it represented a codification of EU law previously in force. The UK and the Netherlands therefore argued that the Netherlands tax provisions distinguished in a permissible way between taxpayers according to their place of residence. The CJEU rejected that argument holding that, since Article 73d(1)(a) was not in force at the relevant time, the question had to be determined by reference to the general jurisprudence of the CJEU. The CJEU concluded, by reference to *Schumacker*, that Mr Verkooijen was in a comparable position to an individual who received dividends from a Netherlands resident company. It concluded that, even if Article 73d(1)(a) had been relevant, it would not have altered the outcome since the Netherlands rules amounted to an arbitrary discrimination or a disguised restriction on the free movement of capital. It rejected arguments based on *Bachmann*.

116. The Claimants were clearly right to accept that there must have been a constructive discovery relevant to the DV Challenge by the time of *Verkooijen*. In my judgment, the significance of *Verkooijen* was not that it established "the truth" that a successful DV Challenge could be made (since it dealt with the Netherlands taxation system rather than that applicable in the UK and, moreover, dealt with the receipt of dividends by

individuals rather than companies). Rather, *Verkooijen*'s significance was that it dismantled the consensus referred to in paragraph 71.

Whether constructive discovery relating to a DV Challenge took place earlier than 6 June 2000

117. There was, therefore, a constructive discovery relating to a DV Challenge by 6 June 2000 at the latest. The next relevant question is whether the Claimants can discharge their burden of proving that there was no such constructive discovery before 6 June 2000. That involves an analysis of whether something happened before 6 June 2000 to displace the consensus that I have referred to in paragraph 71.

118. Mr Gammie said at [154] of his expert report that, between 1994 and 2000 there was considerable change to the applicable UK tax regime. In particular, in 1999, ACT was abolished and replaced with a system of quarterly instalment payments of corporation tax. Mr Gammie said that professional attention in this period focused on the changes to the UK tax regime and he had been able to identify no published material with a bearing on the state of legal thinking on whether Relevant UK Law was compatible with EU law.

119. That absence is significant. If there was a material body of opinion that was starting to question the consensus after 11 July 1996, that could reasonably be expected to generate some written material. Academics doubting the consensus would have reason to publish their views to write an article to give the issue prominence and to stimulate debate. Practitioners starting to doubt the consensus might be expected to write something that would bring the point to the attention of their clients with a view to generating instructions. The absence of any such written material containing a clear challenge to the consensus suggests that the consensus remained operative until 6 June 2000.

120. However, I have considered whether there was nevertheless a partial dismantling of the consensus, unreflected in professional and academic literature, that would have caused an Appropriate Adviser to advise that there was a worthwhile DV Challenge if asked that question sometime between 11 July 1996 and 6 June 2000.

121. One way to test that is by considering what academics <u>were</u> writing in that period even though that fell short of an express challenge to the consensus. One such article was entitled, "*The imputation systems and cross-border dividends – the need for new solutions*," written by Sven-Olof Lodin in the *EC Tax Review* in 1998. This article considered many of the issues that the CJEU would come to consider in *Verkooijen*. However, it provides little support for the proposition that the consensus was unravelling. The conclusion expressed at the end of a lengthy article is that discriminatory tax rules, such as those dealing with cross-border dividends, should be amended in the interests of ongoing European economic integration. The article does not suggest that dividend taxation systems such as those of the UK were already in breach of Treaty obligations.

122. In a similar vein, in comments on the CJEU's judgment in *Gilly v Directeur des Services Fiscaux du Bas-Rhin* (C - 336/96) published in 1999 in the All England Annual Review for 1998, Professor Tiley commented that the CJEU had "backed off from a challenge to the system of double tax credit relief". He went on to suggest that, had the CJEU decided *Gilly* differently, there might well have been a push by member states to remove the CJEU's jurisdiction in direct tax matters.

123. Another way to test whether the consensus was unravelling in a way that was not reflected in contemporaneous literature is to consider the professional and academic responses in

the immediate aftermath of *Verkooijen* itself. If those responses suggested that *Verkooijen* had confirmed something that people had started to suspect, namely that DV Challenges or ACT Challenges were worthwhile, that might suggest that the consensus had unravelled even before the judgment in *Verkooijen* itself.

124. In that connection I was shown an article entitled, "*Tax credits and exemptions for all*," written by "Mr David Oliver in the 2000 British Tax Review. That article considered the CJEU's judgment in *Verkooijen* in some detail. Mr Oliver's treatment of *Verkooijen* was muted, stressing that it was a judgment on the tax treatment of natural persons and saying, "do not think therefore that the decision in this case automatically applies to corporates".

125. Moreover, that article expressly considered the situation of a UK resident company investing in shares in a subsidiary incorporated elsewhere in the EU, canvassing the question whether the principles in *Verkooijen* would compel the UK to exempt dividends received from the subsidiary from corporation tax. The author considered that it might be instructive to consider an alternative structure under which the UK resident company established a branch in the EU member state instead. Since the tax treatment of a dividend would not be significantly different from the UK tax treatment of profits earned by an overseas branch, the author wrote:

> *[The comparison with the situation of a branch] could be sufficient reason to reject an argument that the exemption method applicable to domestic dividends should be extended to dividends on direct investment in companies established in other European Community states at present relieved by the credit method. Exemption for all? We shall have to wait and see.*

126. In my judgment, this article supports the proposition that the consensus referred to in paragraph 71 had not been eroded to a significant extent before the judgment in *Verkooijen.* If it had been, the article might have been expected to allude to that unravelling, rather than make a relatively downbeat assessment of the prospect of challenging the UK regime applicable to cross-border dividends received by companies.

127. I recognise that I have referred to just a few contemporaneous articles in this section. However, because of what I consider to be the importance of contemporaneous material, I asked the parties to refer to their "best" academic articles in closing. I was not referred to much more contemporaneous material beyond the articles I have mentioned and the opinions set out in the expert reports of Mr Gammie and Professor Barnard. Moreover, little of Mr Gammie's cross-examination focused on the period between 1996 to 2000. It was not suggested to Mr Gammie that, contrary to [154] of his expert report, to which I refer in paragraph 118 above, there was significant discussion relevant to whether DV Challenges or ACT Challenges were worthwhile between 1996 and 2000.

128. I note the point made in *FII SC2*, referred to in paragraph 22 above, to the effect that judicial decisions are not made in a vacuum. I have, therefore, considered whether a well-advised multi-national exercising reasonable diligence could have realised, even before the CJEU gave judgment in *Verkooijen*, that it might reach a conclusion along those lines. However, I have concluded that is not the case. The proceedings in *Verkooijen* were taking place in the Netherlands, rather than the UK. Moreover, they related to a "classical" system of dividend taxation rather than the "imputation" system that the UK favoured as would have been apparent from examination of the text of the questions referred to the CJEU in *Verkooijen*. As I have concluded in paragraph 69, an Appropriate Adviser would not have known that the proceedings were current in the Netherlands until

the judgment of the CJEU (or perhaps the opinion of the Advocate General) was given. Moreover, the *Verkooijen* proceedings took place in the context of legal thinking that was developing in the Netherlands, rather than in the UK. I accept the opinion that Mr Gammie expressed at [124] of his expert report to the effect that thinking in mainland Europe on the potential for CJEU decisions on Treaty freedoms to influence domestic direct tax systems was, at the time, well ahead of thinking in the UK. I have had no evidence as to the state of legal thinking in the Netherlands from the time that Mr Verkooijen brought his claim. However, even if practitioners in the Netherlands would have thought that Mr Verkooijen had a worthwhile claim before the CJEU gave its judgment, I do not consider that an Appropriate Adviser in the UK would have thought the same.

129. There was, therefore, no constructive discovery of a DV Challenge earlier than 6 June 2000. The Claimants have succeeded in establishing that by reference to the expert evidence of Mr Gammie. The Claimants' decision not to waive privilege does not, therefore, prevent them from discharging their burden of proof.

THE PERIOD AFTER 6 JUNE 2000: CONSTRUCTIVE DISCOVERY IN RELATION TO THE ACT CHALLENGE

130. Thus far I have concluded that the date of constructive discovery in relation to a DV Challenge was 6 June 2000 and that there was no constructive discovery in relation to an ACT Challenge before that date. Therefore, the final issue that I need to determine is the date of constructive discovery in relation to the ACT Challenge. The Claimants put their case on this issue in the following way:

    i) Their primary case as advanced in their closing submissions was that the date of constructive discovery as regards an ACT Challenge was in September 2004, the date on which the CJEU gave judgment in *Manninen*.

    ii) Conscious of a difficulty with this argument, namely that the averred date of constructive discovery took place after Evonik had actually made an ACT Challenge on 11 July 2002, the Claimants' first fall-back position was that constructive discovery took place only on 6 November 2003, the date of publication of the FII GLO, on the basis that only then could a well-advised multi-national have known that Evonik had brought an ACT Challenge.

    iii) As a further fall-back, the Claimants argued that constructive discovery of an ACT Challenge could not have taken place earlier than 8 March 2001, the date on which the CJEU gave judgment in *Hoechst.* The justification for that position was that only in *Hoechst* was an essential building block of an ACT Challenge established, namely that ACT should be regarded as a prepayment of corporation tax and so as equivalent to foreign corporation tax.

131. It is appropriate to start at the earliest part of the period and work forward. If, at any point, a date of constructive discovery is crystallised it is correspondingly less necessary to consider developments later on in the period. That said, later developments are capable of shedding a light on whether there truly was a constructive discovery earlier in the period.

132. I have largely based my conclusion that there was no constructive discovery of an ACT Challenge before 6 June 2000 on my acceptance of Mr Gammie's expert opinion as to

the existence up to then of a consensus among appropriately qualified advisers as to fundamental difficulties facing such a challenge.

133. The judgment in *Verkooijen* would significantly have undermined the professional consensus that Mr Gammie described. In particular:

    i) Despite the aspect of the consensus described in paragraph 71.i), the CJEU felt able to declare the way in which the Netherlands had decided to address issues of double taxation on cross-border dividend flows to be incompatible with Treaty freedoms even in the absence of harmonised action throughout the EU.

    ii) Despite an express invitation by the governments of the UK and the Netherlands, the CJEU declined to conclude that the situation where Mr Verkooijen received a dividend from a Netherlands company was not comparable with the situation where he received a dividend from a company resident in Belgium. That clearly called into question the aspect of the consensus described in paragraph 71.ii).

    iii) The CJEU expressly rejected arguments based on the "cohesion of the tax system". In their closing submissions, the Claimants characterised the CJEU's reasoning as "short and a little wooden" but, whatever the quality of its reasoning, the judgment clearly dented the aspect of the consensus described in paragraph 71.iii).

134. The judgment in *Verkooijen* therefore called into question central propositions on which the consensus was based. In those circucmstances, I would have needed some clear basis, grounded in contemporaneous evidence as to the state of legal thinking, for concluding that, despite the clear dent to the professional consensus that must have arisen following the *Verkooijen* judgment, a well-advised multi-national would have concluded that there was no worthwhile ACT Challenge on 6 June 2000. The Claimants' evidence is insufficient for me to reach that conclusion.

135. Mr Gammie's expert report provided relatively little support for such a conclusion. While Mr Gammie had been forthright in his articulation of the state of professional thinking in early 1996 and had also explained why that had not materially changed prior to the judgment in *Verkooijen*, he was much less forthright about the state of legal thinking following *Verkooijen*. He did not say that the former consensus survived the *Verkooijen* judgment or that the relatively downbeat view of Mr Oliver in the article referred to in paragraph 124 above represented a "new" consensus on the position following *Verkooijen*.

136. It follows that much of the Claimants' case to the effect that there was no constructive discovery in relation to the ACT Challenge at the time of the *Verkooijen* judgment is based, not on the state of legal thinking at the time, but rather on a process of reasoning, performed after the event, as to "hurdles" that needed to be overcome for an ACT Challenge to be successful. I have already explained in paragraph 31 why I consider this process of reasoning to be of much less value in determining a date of constructive discovery.

137. The Claimants' argument summarised in paragraph 130.iii) is a specific instance of an argument based on a process of reasoning conducted after the event. The Claimants submit that the CJEU's conclusion that ACT should be characterised simply as a payment of corporation tax, rather than as having any link to the availability of a tax credit, was absolutely necessary in order for an ACT Challenge to succeed. They argue that the necessary building block was present only following the CJEU's judgment in *Hoechst*

and so submit that there can have been no constructive discovery until the CJEU's judgment in *Hoechst*.

138. There are two flaws in that argument. The first is that it was not the CJEU in *Hoechst* that decided that ACT was in the nature of corporation tax. That was a conclusion on the meaning of UK statute law which Neuberger J determined in a judgment given on 2 October 1998 in proceedings settling the terms of the order for reference to the CJEU in *Hoechst*. Neuberger J determined in his judgment that the matter was put beyond doubt by s14(1) of the Income and Corporation Taxes Act 1988 which, as in force at the relevant time, provided that:

> *Subject to s.247 where a company resident in the United Kingdom makes a qualifying distribution it shall be liable to pay an amount of corporation tax ("advance corporation tax") in accordance with sub-section (3) below.*

139. The second flaw in the argument follows on from the first. The Claimants' argument is, on closer inspection, an assertion that, before the CJEU's judgment in *Hoechst* a well-advised multi-national would not have realised the significance that the CJEU would give to ACT's status as corporation tax. That is little more than an assertion that a well-advised multi-national on 6 June 2000 would not have been able to foresee the precise basis on which the CJEU would ultimately determine the ACT Challenge in the Claimants' favour in 2006. However, the test for the discovery of a mistake under s32(1)(c) of the Limitation Act does not require potential claimants to foresee in advance all the ways in which a court might ultimately determine a claim in their favour. Rather, as I have explained in paragraph 21.iv)a) a relevant aspect of the enquiry is when, having exercised reasonable diligence, a well-advised multi-national would have had sufficient confidence to justify embarking on the preliminaries to the issue of proceedings such as submitting a claim to HMRC, taking advice and collecting evidence. It is quite possible for that threshold to be crossed without foresight of the precise way in which the claim will succeed.

140. The Claimants argue, by reference to [127] to [131] of the judgments of Newey LJ and Sir Launcelot Henderson in *Jazztel plc v HMRC* [2022] EWCA Civ 232 that merely having "grounds for questioning" the compatibility of Relevant UK Law with the Treaty freedoms is insufficient to constitute a constructive discovery. I will assume, without deciding, that this submission is correct. However, I do not agree with the Claimants that the judgment in *Verkooijen* merely gave rise to "grounds for questioning". The reason there was no constructive discovery prior to 6 June 2000 was because of the professional consensus that Mr Gammie described. The judgment in *Verkooijen* was inconsistent with a substantial proportion of that consensus. That in itself would have given a well-advised multi-national sufficient confidence to embark on the preliminaries referred to in paragraph 21.iv)a) above.

141. Overall, therefore, I have concluded that the professional consensus on which the Claimants successfully relied prior to 6 June 2000, did not survive the judgment of the CJEU in *Verkooijen*. I see no other secure basis in the evidence for a conclusion that constructive discovery in relation to an ACT Challenge was postponed beyond 6 June 2000. The date of constructive discovery in relation to the ACT Challenge was, accordingly, 6 June 2000, the same date as the date of constructive discovery for a DV Challenge.

142. In those circumstances, I do not need to address the Claimants' arguments that are summarised in paragraphs 130.i) and 130.ii) above. However, in case the matter goes further I will give reasons why I do not in any event accept those arguments.

143. I am quite unable to accept that constructive discovery in relation to an ACT Challenge took place as late as September 2004, following the release of the CJEU's judgment in *Manninen*. Such a conclusion would result in the very paradox that the Supreme Court identified in *FII SC2* since it would result in the limitation period starting to run after the point at which some Claimants had actually commenced proceedings.

144. The Claimants sought to avoid the force of this objection by submitting that the early ACT Challenges brought by, among others, Evonik, were so speculative as not to be "worthwhile" at the point they were made. However, that submission is at odds with the facts. Evonik obtained professional advice before it brought its ACT Challenge. There has been no waiver of privilege in relation to that professional advice. However, there was evidence from Dr Whitehead as to the procedure he would follow when assisting his clients to bring claims. Dr Whitehead quite properly accepted in cross-examination that he would not advise a client to bring a claim unless he considered the claim was worthwhile. From that I conclude that an Appropriate Adviser would, in 2002, have regarded Evonik's ACT Challenge as "worthwhile". Otherwise it would not have been made.

145. Evonik, therefore was able to make a worthwhile ACT Challenge on 11 July 2002. I do not consider that Evonik was in any materially different position, as regards its ability to bring an ACT Challenge, from other Claimants. Nor do I consider that Evonik had particular relevant attributes that an ordinary well-advised multi-national would not have had. Since Evonik was able to bring a worthwhile ACT Challenge on 11 July 2002, I conclude that a well-advised multi-national exercising reasonable diligence would similarly have realised by 11 July 2002 that it had a worthwhile ACT Challenge.

146. That conclusion means that I also reject the Claimants' argument summarised in paragraph 130.ii) above. A well-advised multi-national would not need to wait until it was told about the existence of the FII GLO on 6 November 2003. Rather, exercising reasonable diligence, it would like Evonik have realised that there was a worthwhile ACT Challenge by 11 July 2002 at the latest.

CONCLUSION

147. Constructive discovery of both a DV Challenge and an ACT Challenge took place on 6 June 2000.