



Neutral Citation Number: [2025] EWCA Civ 1392

Case No: CA-2024-001898

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)
MR JUSTICE RICHARDS
[2024] EWHC 1671 (Ch)
[2024] EWHC 2897 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2025

Before:

LORD JUSTICE POPPLEWELL
LORD JUSTICE PHILLIPS
and
LADY JUSTICE FALK

Between:

EVONIK UK HOLDINGS LIMITED

**Claimant/
Respondent**

- and -

**THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS**

**Defendants/
Appellants**

Frederick Wilmot-Smith (instructed by **HMRC Solicitor's Office and Legal Services**) for the
Appellants

Jonathan Bremner KC (instructed by **Joseph Hage Aaronson and Bremen LLP**) for the
Respondent

Hearing date: 28 October 2025

Approved Judgment

This judgment was handed down remotely at 2.00pm on Friday 7 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lady Justice Falk:

Introduction

1. This appeal concerns the correct approach to awards of interest under a final order in circumstances where a previous order in the claimant's favour for summary judgment in respect of part of their claim is set aside on appeal, but the overall claim as finally established exceeds the amount paid under the erroneous order. The appeal relates to a final order made by Richards J in favour of one taxpayer in the long-running *FII* group litigation.
2. We were significantly assisted by the submissions of Mr Frederick Wilmot-Smith for the appellants, HMRC, and Mr Jonathan Bremner KC for the respondent taxpayer, Evonik UK Holdings Limited ("Evonik"), for which we are most grateful.

The relevant background

3. The key relevant factual background can be outlined fairly briefly. In 2002 Evonik and other members of its corporate group brought claims against HMRC (then the Inland Revenue) alleging that certain aspects of the UK corporation tax regime infringed EU law, most relevantly for present purposes the rules that levied advance corporation tax ("ACT") on the payment of dividends and other distributions. The claims became part of the *FII* group litigation which was established by a group litigation order ("GLO") the following year, and were largely stayed pending the resolution of test cases.
4. There were various difficulties with the ACT regime from the perspective of corporate taxpayers. Two are most relevant here. First, and as the name indicates, it required amounts to be paid in advance of the normal payment dates for corporation tax, leading to cashflow costs. Secondly, although ACT could (within limits) be offset against UK corporation tax, multinational groups generating profits outside the UK frequently had insufficient domestic taxable profits for that purpose, leading to a build-up of so-called surplus ACT.
5. One category of ACT was that payable on foreign income dividends ("FIDs"). The FID regime had been introduced with the intention of ameliorating the problems that multinational groups had with surplus ACT. Under the regime, dividends could be specified as FIDs. ACT would still be payable on a FID but surplus ACT arising could be reclaimed to the extent that the FID could be "matched" with foreign profits which had been taxed at a rate exceeding the UK corporation tax rate.
6. In *Test Claimants in the FII Litigation v Revenue and Customs Comrs (No 2)* [2014] EWHC 4302 (Ch), [2015] STC 1471 ("*FII HC 2*"), Henderson J held that the unlawfulness of all of the ACT paid by the claimants on FIDs had been established by earlier decisions in the litigation, such that ACT on FIDs should be treated separately from ACT on other dividends (see at [174] and [181]-[186]). This led Evonik and six other groups to apply for summary judgment in respect of the FID elements of their overall claims. Henderson J's judgment in respect of those applications is reported as *Evonik Degussa UK Holdings Ltd v Revenue and Customs Comrs* [2016] EWHC 86 (Ch) ("*Evonik 2016*") and was given effect to by orders dated 22 January and 16 March 2016 (the "Summary Judgment Orders"). HMRC paid the amount due to Evonik on 23 March 2016.

7. As Henderson J recorded in *Evonik 2016* at [21], all of the ACT paid on Evonik's FIDs had been repaid by March 2014. The dispute before him concerned only interest, of which there were two components, namely: a) a claim for compound interest from the date the ACT was paid to the date it was repaid; and b) compound interest between that date and the date of judgment.
8. Henderson J rejected HMRC's arguments that summary judgment should not be awarded at all, reiterating his conclusion in *FII HC 2* about the unlawfulness of ACT paid on FIDs and concluding that it was open to him to grant summary judgment limited to the FID element of the claims. He granted summary judgment in respect of element a), following *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs* [2007] UKHL 34, [2008] 1 AC 561 ("*Sempra*"), but refused it in respect of element b). He noted at [82] that compound interest in respect of element a) was common ground between the parties, but that element b) could be affected by the then-pending appeal to the Supreme Court in what became *Littlewoods Ltd v Revenue and Customs Comrs* [2017] UKSC 70, [2017] 3 WLR 1401.
9. HMRC's appeal against the Summary Judgment Orders was dismissed by this court in 2016, in *Test Claimants in the FII Litigation v Revenue and Customs Comrs* [2016] EWCA Civ 1180, [2017] STC 696 ("*FII CA2*"). Issue 10 of the 19 issues before the Court of Appeal related to FIDs and was expressed more broadly than an appeal against the Summary Judgment Orders, but when permission to appeal came to be granted by the Supreme Court on issue 10 in 2019 it was expressed as limited to the "*Sempra* issue". The context for this was that the Supreme Court had by that stage departed from its approach in *Sempra*: see *Prudential Assurance Co Ltd v Revenue and Customs Comrs* [2018] UKSC 39, [2019] AC 929.
10. The remaining issue 10, together with the closely related issue 26(a) ("whether interest should be simple or compound") came before the Supreme Court in *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2021] UKSC 31, [2021] 1 WLR 4354 ("*FII SC3*"). HMRC prevailed. Lord Reed and Lord Hodge, with whom Lord Briggs, Lord Sales and Lord Hamblen agreed, concluded at [84] that HMRC were not procedurally barred from arguing that it was erroneous to award compound interest in the FID claims in respect of what they termed the period of prematurity (that is, the period between the date of payment and repayment or set off), and proceeded to consider and decide the substantive issue in HMRC's favour.
11. By the date that *FII SC3* was decided, s.85 of the Finance Act 2019 ("FA 2019") had been enacted (see further below). The Supreme Court held that it provided a statutory remedy in the form of interest on unlawful ACT for the period of prematurity (see at [100]) and dismissed the claimants' arguments against its application.
12. Lord Reed and Lord Hodge summarised their conclusion at [118] and [234] in the following terms:

"118. For these reasons, the Revenue's appeal on issues 10 and 26(a) ...should be allowed. The summary judgment should also be set aside, and the cases in question remitted to the High Court."

"234. Having upheld the Revenue's appeal in relation to issue 10 above, we would recall the summary judgment of 22 January 2016 pronounced by

Henderson J in *Evonik Degussa UK Holdings Ltd v Revenue and Customs Comrs* [2016] EWHC 86 (Ch)...”

13. The Supreme Court’s decision was reflected in an order dated 13 May 2024 (the “FII SC3 Order”) which relevantly provided as follows:

“HMRC’s appeal is allowed on issues 10 (limited to the Sempra Issue) and 26(a) of CA2.” (Para 2(i) of the order).

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

The schedule to the order defined “Issue 10 (limited to the Sempra Issue) and Issue 26(a) CA 2” as follows:

“Should interest be simple or compound? In particular, on what basis can the claimants recover for the periods of prematurity?”

14. Meanwhile, in *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2020] UKSC 47, [2022] AC 1 (“FII SC2”), the Supreme Court had also made a decision about the application of s.32(1)(c) of the Limitation Act 1980. That decision affected the correct approach to limitation in respect of the balance of Evonik’s claim, which related to surplus ACT on non-FID dividends, but not the FID element of the claim which was on any basis brought in time. The decision in *FII SC2* led to a fresh trial on the limitation issue before Richards J. Evonik was, alongside BAT Industries and others, one of the claimants that participated in that trial. The effect of Richards J’s decision on the limitation issue, *BAT Industries PLC & Ors v Commissioners of Inland Revenue* [2024] EWHC 195 (Ch), [2024] STC 305, was that Evonik was entitled to final judgment. (An appeal against that decision has recently been dismissed by this court, [2025] EWCA Civ 1271.)

The relevant statutory provisions

15. Section 35A of the Senior Courts Act 1981 (“SCA 1981”) relevantly provides:

“35A Power of High Court to award interest on debts and damages.

(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—

(a) in the case of any sum paid before judgment, the date of the payment;
and

(b) in the case of the sum for which judgment is given, the date of the judgment.

...

(6) Interest under this section may be calculated at different rates in respect of different periods.”

16. Although s.35A SCA 1981 is expressed in discretionary terms, it is well established that interest is required to be awarded to claimants in order to provide an adequate remedy under EU law. Further, under the terms of the FII SC3 Order the interest rate payable under s.35A in respect of claims to surplus ACT has been fixed at a rate which is, from February 2009, bank base rate plus 2%.
17. Section 85 FA 2019 makes specific provision in respect of “unlawful ACT”. It relevantly provides:

“85 Interest in respect of unlawful ACT

(1) This section applies where—

- (a) on any date before 12 December 2012, a person started proceedings against the Commissioners in the High Court or the Court of Session,
- (b) the proceedings include a claim arising out of a relevant payment, and
- (c) the claim has not been settled, discontinued or finally determined.

(2) “Relevant payment” means a payment of unlawful ACT that—

- (a) was made by the person on or after 1 January 1996 or in the period of 6 years ending immediately before the date the proceedings were started, and
- (b) was set off or repaid (wholly or in part) before the proceedings were started.

(3) The person is entitled to an order requiring the Commissioners to pay to the person—

(a) an amount (“the principal amount”) equal to the amount of interest that would have accrued if simple interest had accrued on the relevant payment at the appropriate rate for the period beginning with the date the payment was made and ending with—

(i) the date as regards which the unlawful ACT was set off, or

(ii) the date the unlawful ACT was repaid, and

(b) simple interest at the appropriate rate on the principal amount for the period beginning with the day after the date mentioned in paragraph (a)(i) or (ii) and ending with the date the principal amount is paid.

(4) “The appropriate rate” is, in relation to any day, the rate specified in the following table in respect of that day

...

(7) In this section—

“the Commissioners” means the Commissioners for Her Majesty's Revenue and Customs (or, in relation to any time before the commencement of section 5 of the Commissioners for Revenue and Customs Act 2005, the Commissioners of Inland Revenue);

“set off or repaid”: references to a payment of unlawful ACT being set off or repaid are—

(a) to it being set against a liability to corporation tax of any person, or

(b) to it being repaid by the Commissioners;

“settled” means settled by agreement;

“unlawful ACT” means advance corporation tax that was unlawfully levied.”

18. The table that follows s.85(4) specifies a rate that, from 27 January 2009, has been 0.5% per annum. It is materially lower than the rate applicable under s.35A, but s.85 was held in *FII SC3* to provide an adequate remedy.
19. Following another judgment of Richards J in *Evonik UK Holdings Limited & Ors v Commissioners of Inland Revenue* [2024] EWHC 3239 (Ch), it is now established that s.85 FA 2019 governs the entirety of Evonik’s FID claim.

The amounts in issue

20. In the light of the subsequent determinations referred to above, it is common ground that Evonik’s overall claim as at 23 March 2016 (the date of payment by HMRC pursuant to the Summary Judgment Orders) can be broken down as follows:

	Tax	Section 35A interest	Section 85 interest	Total tax	Total interest
Surplus ACT	£8,835,287.36	£11,435,963.18		£8,835,287.36	£11,435,963.18
FID Claim			£2,324,320.89		£2,324,320.89
				£8,835,286.73	£13,760,284.07

21. Pursuant to the Summary Judgment Orders HMRC paid Evonik £6,379,879.54. This figure was computed by applying a 45% withholding tax under Part 8C of the Corporation Tax Act 2010 to a gross amount of £11,579,592.40. However, it was common ground both before the judge and us that for present purposes the withholding tax should be ignored and we should concentrate on the net figure, which for convenience I will refer to as £6.4m.
22. In economic terms the parties’ positions can be outlined in the following way. Evonik seeks to preserve the benefit of having received £6.4m on 23 March 2016. As discussed

below this might be achieved in more than one way, but Evonik's approach before the judge was to offset that figure against interest accrued (or, perhaps more accurately, now to be treated as accrued) in its favour as at that date. The effect would be that the full amount of surplus ACT (which for convenience I will refer to as £8.8m) continued to accrue interest under s.35A after 23 March 2016, up to the date of judgment. The amount of additional interest (up to May 2024) on the £8.8m is around £2.3m.

23. In contrast, HMRC maintain that *FII SC3* requires the order for payment of the £6.4m to be unwound with restitution, and accompanying interest, in their favour. They say that Evonik's approach wrongly treats a portion of the £6.4m as a partial discharge of its overall claim rather than a sum which Evonik has been found not to have been entitled to receive, because the relevant order has been set aside.
24. HMRC's fallback is that even if such an approach were not possible then the only allocation available in respect of the £6.4m would be to the principal amount of Evonik's claim, since there was no liquidated claim to interest in 2016. Thus, HMRC would allocate the £6.4m entirely to the surplus ACT of £8.8m. The effect would be that, from 23 March 2016, interest under s.35A would accrue not on £8.8m but on about £2.4m (£8.8m-£6.4m). This produces a figure of around £0.7m to May 2024.

The judge's judgments

25. There are two relevant judgments, dated 18 June and 1 August 2024 respectively, which I need to summarise in some detail.
26. In the first ([2024] EWHC 1671 (Ch)), the judge considered the effect of *FII SC3* and the *FII SC3* Order and then, at [18], rejected HMRC's argument that they became entitled to restitution when the *FII SC3* Order was made, on the basis that what needed to be determined was the meaning of the order. The judge observed at [19] that there was no claim for unjust enrichment and that:

“...it would be difficult to see how Evonik have been ‘unjustly’ enriched by receiving £6.4m of HMRC's money in 2016 when it is common ground that the value of Evonik's total claim against HMRC both in 2016 and today is much greater than this sum.”

27. The judge went on to observe that the Supreme Court could have ordered Evonik to repay the £6.4m and interest but had not done so, and there was no need for it to do so “since, taking into account the Supreme Court's judgment in *FII SC3*, HMRC are still debtors to Evonik in relation to Evonik's claim” (see at [20]). At [21] he concluded as follows as to the effect of the order:

“In my judgment, the true effect of the *FII SC3* Order is that it remits the matter back to the High Court to decide how much Evonik is owed based on the correct principles as to the quantification of its entire claim against HMRC. The Supreme Court was not saying that HMRC did not owe Evonik £6.4 million as it would have been well aware that that was just a payment of part of a wider claim.”

28. The judge then observed:

“22. Nor is there any need for me, sitting as a judge of the High Court, to make any order requiring Evonik to repay HMRC £6.4m plus interest. As I have said, it is common ground that HMRC owe Evonik a greater sum than this...

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

29. Turning to the topic of apportionment (which the judge also referred to as allocation), the judge directed himself that he was being asked to enter a final judgment in favour of Evonik, and that to do so he needed to determine first what Evonik was due, secondly how much had been paid and thirdly (and in the light of the £6.4m already paid) what interest was due ([24]). The judge observed at [32] and [33] that the “real battleground” lay in Evonik’s argument that the economics of HMRC’s approach were fundamentally unfair because it would receive interest on £2.4m rather than £8.8m (see [24] above); HMRC’s counter-argument that Evonik had had the use of £6.4m since 2016; and Evonik’s response that that was only part of the picture since it should have had over £13m of interest in 2016, which HMRC had had the use of.
30. The judge recognised that he had not received submissions from HMRC on this issue because they had approached the matter as one of set-off, and provided an opportunity for further written submissions. He also declined Evonik’s request to designate the question of allocation as a further GLO issue (meaning an issue which could bind parties to other claims on the GLO register, see CPR 19.23) on the basis that the utility of doing so had not been demonstrated and the question could be fact-sensitive.
31. The judge’s second judgment ([2024] EWHC 2897 (Ch)) determined the apportionment issue. The judge concluded that the £6.4m should be allocated entirely against interest accrued at the date of the Summary Judgment Orders. He rejected HMRC’s reasons for allocating that sum to principal (that is, the £8.8m of surplus ACT). The first of these, that Evonik had no liquidated right to interest in 2016, was essentially rejected on the basis that the position had to be assessed in the present rather than in 2016.
32. The second of HMRC’s arguments was that allocation to interest would result in Evonik receiving more than an “adequate” indemnity under EU law because it would enjoy a benefit in the nature of compound interest from having had use of the £6.4m from 2016. The judge observed that there was no guarantee that Evonik had enjoyed such an effect (there being no relevant evidence), but further any such effect was not “excessive”, bearing in mind that Evonik should never have been required to pay the £8.8m of ACT. While the law did not permit it to claim compound interest, the judge did not accept “that Evonik has somehow obtained an unprincipled windfall benefit simply because HMRC paid part of the sum due to it in 2016” ([6]).

33. The judge went on to observe that, while he had not found much assistance from authorities on the allocation of payments due under a contract, he was more attracted by arguments based on fairness and common-sense, using the following example at [8]:

“Suppose that a defendant owes a claimant £100 but having steadfastly refused to pay the sum due, interest of £100 has accrued on a simple interest basis so that the total amount due is £200. Suppose that the defendant then pays £100. In that case, the claimant may benefit from the ‘compounding effect’ to which HMRC refer. However, in my judgment it would make no sense to allocate the part payment of £100 to the principal amount of the debt. That would produce the anomalous result of excusing the defendant any further interest consequence from a continued refusal to pay the balance due since, in a simple interest environment, unpaid interest would not itself accrue interest.”

34. The judge noted the “rule of thumb” developed by the courts with this kind of example in mind that, where simple interest accrues, payments should be allocated against interest rather than principal (see, for example *In Re Morley’s Estate* [1937] 1 Ch 491 and *Parr’s Banking Company Ltd v Yates* (1898) 2 QB 460 (“*Parr’s Banking*”)) and concluded that HMRC had not provided a sufficiently good explanation of why that rule should not apply ([9] and [11]).

The grounds of appeal

35. There are two grounds of appeal. Ground 1 is that the judge was wrong to hold that HMRC had no entitlement to restitution in circumstances where the relevant order had been set aside. Ground 2 is that, in any event, it was incoherent to allocate the £6.4m payment to interest, since Evonik had no claim to a liquidated sum until 2024.
36. Evonik has also filed a Respondent’s Notice with a fallback position in the event that the judge’s decision is not upheld, namely that the £6.4m should be allocated first to the FID claim and the balance pro rata to principal and interest.

Discussion

The essential dispute

37. By the end of the hearing I understood that there was no disagreement about the effect of the FII SC3 Order on the Summary Judgment Orders, and in particular the impact of the words “to that extent only” (see [13] above). It was or at least became common ground that the effect of the FII SC3 Order was to maintain the Summary Judgment Orders insofar as they gave judgment on liability in respect of the FID claim, but set them aside insofar as they ordered money payment. In other words, summary judgment continued to be granted on the FID claims in respect of the time value of money for the period between the date of payment of the ACT and its repayment (which was the effect of the first order, dated 22 January 2016), but the obligation under the order dated 16 March 2016 to pay £6.4m to Evonik was set aside in its entirety. Neither party sought to maintain that the effect of the FII SC3 Order was that Henderson J’s order should be treated as varied to substitute the revised amount due under s.85 FA 2019 of (again using a rounded figure) £2.3m.

38. A further, important, point was also helpfully clarified during submissions. Mr Bremner confirmed that his substantive objection to HMRC's argument that the judge was wrong to hold that HMRC had no entitlement to restitution related not so much to the principle of restoration (although he maintained his written submissions to that effect). Rather, the key point was HMRC's argument that they were entitled not only to restitution of the £6.4m but to interest on that sum.
39. This exposes the real dispute. HMRC's primary argument (ground 1) is that the setting aside of the order to pay £6.4m gave rise not only to a right to restitution of that amount but to an entitlement to interest from 23 March 2016, which HMRC also say should be calculated at the same rate as interest payable to Evonik under s.35A SCA 1981, namely bank base rate plus 2%. On the assumption that the rate is indeed the same, setting the resultant sum against the amount due to Evonik in 2024 (or today) would have the same economic result as HMRC's fallback approach of treating the £6.4m payment as having discharged part of the £8.8m of surplus ACT in 2016. Effectively, interest on that element would be cancelled out as from March 2016 by interest owed in the opposite direction.
40. It is not obvious that much ultimately turns on the precise nature of HMRC's rights in respect of the £6.4m, which is the subject of ground 1. Both parties accept that the payment was validly made and remained so until that element of the Summary Judgment Orders was set aside in May 2024. Both parties accept that, once set aside, the legal basis on which it was made no longer exists and that credit in some form should be given for it. The only issue is whether HMRC should benefit from some kind of interest element.
41. Nevertheless, in order to answer that question and so determine whether the judge made a material error as HMRC maintain he did, I should make some observations about the legal effect of setting aside Henderson J's order to pay the £6.4m.
42. Before doing so, I should clarify that Mr Wilmot-Smith accepted in oral argument that the notion of "entitlement" to interest should not be taken to connote an absolute right, but rather a policy objective in favour of awarding interest, departure from which would require very strong countervailing reasons.

The effect of setting aside an order

43. It cannot seriously be disputed that, where a payment is made pursuant to a court order that is subsequently set aside, there is at least a prima facie entitlement to recovery of that sum. As Mr Wilmot-Smith pointed out, the existence of such a right was sufficiently established to have been referred to by Sir Edward Coke without question: *Dr Drury's Case* (1610) 8 Coke Reports 141b, 143a, 77 ER 688, 691. There is however scope for debate about the juridical basis for the entitlement: see for example C Mitchell, P Mitchell and S Watterson (eds) *Goff & Jones* (10th edition), which refers at 26-05 to unjust enrichment, mistake or failure of basis before going on to suggest at 26-06 that a better explanation is found in broader policy considerations, and specifically that a necessary concomitant of a right of appeal is the right to recover money paid if the appeal is successful. As the editors point out, that approach is consistent with the approach of Lord Nicholls in the House of Lords decision in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] UKHL 53, [1997] 1 WLR 1627 ("*Nykredit*"), in the passage set out below at [49].

44. It is not necessary to reach a final decision as to the precise nature of the entitlement, about which some aspects remain obscure and unsettled (see for example D.M. Gordon QC, “Effect of Reversal of Judgment on Acts Done Between Pronouncement and Reversal” (1958) 74 LQR 517), but I would tend to agree with the editors of *Goff & Jones* that the form of restitution required following an order being set aside is *sui generis*, based on the simple fact that an appellate court has decided that the order should not have been made. This was certainly the approach of Lord Leggatt in the *Delta Petroleum* case discussed below. On that basis it would not, for example, necessarily require the normal elements of an unjust enrichment claim to be established (being a) enrichment, b) at the expense of the claimant, and c) the enrichment being unjust – although in many cases these would no doubt be satisfied in any event), or mean that the defences available to an unjust enrichment claim, such as change of position, are necessarily available.
45. What the authorities do not support, however, is HMRC’s claim that it is “entitled” to the benefit of interest on the £6.4m it paid (or at least that there is a very strong presumption in favour of that: see above). Rather, the question to be asked is what justice requires in the particular case.
46. The starting point is that it is well established that an order remains valid until it is set aside: see, for example, *Gibbs v Lakeside Developments Ltd* [2018] EWCA Civ 2874, [2019] 4 WLR 6 at [12]-[18], per David Richards LJ. Once it is set aside, one would ordinarily expect the relevant appellate court to make orders consequential upon that, or to remit that question to the court below. Failing that, it would obviously be open to a litigant who has succeeded on an appeal either to make an application for the appropriate order or indeed to bring a fresh claim to recover the sum paid.
47. In *Rodger v The Comptoir d’Escompte de Paris* (1871) LR 3 PC 465 (“*Rodger*”) the Privy Council had previously allowed an appeal against a judgment of the Supreme Court of Hong Kong that had been satisfied. The Supreme Court of Hong Kong was required to give effect to the decision. It ordered repayment but considered that it had no power to award interest. That decision was also reversed by the Privy Council.
48. Lord Cairns observed at pp.475-476 that if interest could not be recovered then it was:

“...obvious... that injury, and very grave injury, will be done to the Petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the Petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.”

In concluding that interest should have been awarded, Lord Cairns again emphasised “what the justice of such a case demands” (p.476).

49. The question of whether there was jurisdiction to award interest also arose in *Nykredit*, where *Rodger* appears not to have been drawn to their Lordships' attention. Lord Nicholls, with whom Lord Goff, Lord Jauncey, Lord Slynn and Lord Hoffmann agreed, had no doubt that there was power to do so, on the following basis (p.1637):

“...when ordering repayment the House is unravelling the practical consequences of orders made by the courts below and duly carried out by the unsuccessful party. The result of the appeal to this House was that, to the extent indicated, orders made in the courts below should not have been made. This result could, in some cases, be an idle exercise unless the House were able to make consequential orders which achieve, as nearly as is reasonably practicable, the restitution which this result requires. This requires that the House should have power to order repayment of money paid over pursuant to an order which is subsequently set aside. It also requires that in suitable cases the House should have power to award interest on amounts ordered to be repaid. Otherwise the unravelling would be partial only.

This power seems to me to fall squarely within that range of powers which are necessarily implicit if a court of law possessed of appellate functions is to carry out its prescribed functions properly. It is, as such, a power derived from what is usually referred to as the inherent jurisdiction of the court...”

50. Both *Nykredit* and *Rodger* were considered by Lord Leggatt in *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corp* [2020] UKPC 23, [2021] 1 WLR 5741 (“*Delta Petroleum*”) at [47]-[51]. He referred at [47] to the appellate court’s inherent jurisdiction to direct the respondent to restore money paid or property transferred under an order which is reversed on appeal, and clarified at [49] that the references by Lord Cairns to “mistake” and “wrong” should not be taken to indicate wrongdoing or that the basis for the right of repayment is money paid under a mistake: rather it was the judgment of the lower court that was wrong. Further:

“50. Although such an order for repayment is restitutionary, there is no need to look for any reason to justify restitution beyond the fact that the appellate court has decided that, on a true view of the law and the facts, the order appealed from should not have been made. To give practical effect to that decision, it is necessary to reverse transfers of money or other property which have been made pursuant to the order set aside on appeal. The position is analogous to that which obtains where, for example, a contract is rescinded and there is required to be a giving back and a taking back on both sides.

51. Such restitution may not compensate the successful appellant for all the loss which it has suffered as a result of complying with the order of the lower court. There is in the Board’s view no injustice in that. On the one hand, the process of appeal would be nugatory if the losing party was not required to return money or property transferred under the judgment set aside on appeal...”

51. Lord Leggatt went on to observe that the reversal of an order of specific performance in that case “would not be complete unless interest is also awarded on the principal sum payable” ([54]).

52. I draw the following conclusions from these authorities:
- a) If money is paid pursuant to an order that is set aside, the payer is in principle entitled to restitution of that amount (*Delta Petroleum* at [50]).
 - b) The court also has power under its inherent jurisdiction to award interest on that amount (*Rodger* and *Nykredit*).
 - c) There is however no entitlement to interest as HMRC maintain. Interest will be awarded “in suitable cases” (*Nykredit*), but it all depends on what justice requires (*Rodger*).
53. It may also be worth clarifying that it is the court’s inherent jurisdiction that is relied on, rather than s.35A SCA 1981, as the source of the power to award interest. I would observe that it is not obvious that the wording of s.35A(1) is apt to cover a situation where an order is set aside and no fresh proceedings are instituted for the recovery of the amount paid under the order.

Application to this case

54. It follows from what I have said, and the point that it is now common ground that the order to pay £6.4m was set aside by the FII SC3 Order, that I do not agree with the judge that HMRC obtained no entitlement to restitution as a result of that order. In principle there was such an entitlement.
55. I would also interpret the FII SC3 Order as having remitted to the High Court the claims that form the subject of the summary judgments for determination in accordance with the Supreme Court’s findings. I would respectfully disagree with the judge insofar as he suggested that what was remitted was the resolution of Evonik’s entire claim. The appeal to the Supreme Court concerned only the FID element of the claim, and at that stage the remainder of Evonik’s claim remained stayed. In Evonik’s case the stay was only lifted in order for Evonik to participate in the limitation trial referred to at [14] above.
56. Further, HMRC were not prevented from relying on an entitlement to restitution because they had not made a formal claim (a claim which could in any event only have been brought once the relevant order was set aside in May 2024, shortly before the hearing before the judge). The remittal was intended to deal with matters consequential upon the setting aside, and HMRC made their position clear.
57. However, ultimately none of this is material. What is critical is not whether HMRC had some entitlement to restitution, but the position in relation to interest. The judge’s approach was to determine what he considered to be the fair outcome, taking account of the fact that it had by that stage become clear that the £6.4m had been paid at a time when Evonik was owed a considerably larger sum by HMRC, totalling around £22.6m.
58. The judge was entitled to take the approach that he did. As already discussed, an entitlement to restitution following the setting aside of an order does not carry with it any automatic right to interest. It all depends on what justice requires. The (implicit) premise of ground 1 of HMRC’s appeal, which is that there was such an entitlement, is therefore not made out.

59. The judge was entitled to take a realistic approach. By the time he made his decision it was established that Evonik's overall claim had succeeded to a far greater extent than the £6.4m paid in 2016. Evonik had also achieved complete success in the limitation trial – the last major hurdle from its perspective – such that none of its claim was time barred. Further, its claim related to events many years ago. ACT was abolished in 1999. On any basis Evonik had therefore been waiting a long time for its money. True it is that, if it had been understood that *Sempre* might be departed from, Henderson J would not have granted summary judgment and Evonik would not have had the benefit of any payment in 2016, but it does not follow that the court is required to attempt to put Evonik in the same position as if it had had to wait until 2024 for judgment on any part of its claim.
60. In essence, HMRC's position is that Evonik is confined to simple interest under statutory provisions that have been found to provide an adequate remedy under EU law, and the effect of the judge's order would be to provide Evonik with more than its entitlement, in effect by allowing an element of compounding from 2016. The judge was entitled not to be persuaded by this argument. While it is correct that Evonik is confined to simple interest on its claim, it was also entitled to have its claim met. The fact that it has taken so long for its overall claim to be finally established is a matter of regret rather than a reason to depart from the judge's approach.
61. In the circumstances the judge's approach was both fair and reasonable. He was entitled to treat the £6.4m as a credit against, or part payment towards, the claim as it is now established to have been at the time that payment was made. Having done so he was also entitled to have regard to the "rule of thumb" that the credit should be made against interest in priority to principal (see [34] above). That rule is itself a rule of obvious fairness, as the example used by the judge well illustrates. As Rigby LJ observed in *Parr's Banking* at p.466, it is "only common justice" to allocate payments to simple interest in priority to principal.
62. One way of testing the position is this. Suppose A has an outstanding claim against B and, before it is determined, B makes a payment to A in an amount less than the amount of the claim. The payment is made in error. It is by no means obvious that a court would have ordered that sum to be repaid by A in circumstances where A's overall claim remained to be resolved, but in any event the closer analogy with this case is that B appreciates its mistake and seeks credit for the amount only when the final amount of A's claim is established. At that stage, the court must do its best to achieve justice between the parties. The obvious way of doing so is to do what the judge did here, namely to treat the amount as a partial satisfaction of the entire claim.
63. I am also not persuaded by ground 2 of the appeal, that there was no liquidated claim to interest until 2024. HMRC's argument is based on the fact that both s.35A SCA 1981 and s.85 FA 2019 require an order to be made. However, the judge was conducting his appraisal when making his order in 2024, by which time the entitlement to interest was clearly established, and not in 2016. In my view that is a complete answer, but in any event it is worth recalling that interest under those provisions is required to be awarded to Evonik in order to provide it with an adequate remedy under EU law. It is not a matter of simple judicial discretion.
64. I therefore conclude that neither ground 1 nor ground 2 of the appeal are made out, such that it is unnecessary to consider the Respondent's Notice.

Conclusion

65. I would dismiss the appeal.

Lord Justice Phillips:

66. I agree.

Lord Justice Popplewell:

67. I also agree.