Neutral Citation Number: [2024] EWCA Civ 1430

Case No: CA-2023-001424
CA-2023-001435

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
[2023] EWHC 944 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

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Between:

(1) AXA SUN LIFE PLC **(2) AXA EQUITY & LAW ASSURANCE SOCIETY PLC** **(3) SUN LIFE ASSURANCE SOCIETY PLC** **(4) SUN LIFE UNIT ASSURANCE LIMITED** **(5) AXA GENERAL INSURANCE LIMITED** **(6) AXA INSURANCE UK PLC** **(7) AXA INSURANCE PLC** **(8) SUN LIFE PENSIONS MANAGEMENT LIMITED** **(9) WINTERTHUR UK LIMITED**	**Claimants/ Appellants**
- and –	
(1) COMMISSIONERS OF INLAND REVENUE **(2) THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS** **(together "HMRC")**	**Defendants/ Respondents**

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Jonathan Bremner KC (instructed by **Joseph Hage Aaronson LLP**) for the **Claimants/Appellants**

David Ewart KC, Barbara Belgrano, Frederick Wilmot-Smith and Laura Ruxandu (instructed by **HMRC Solicitor's Office and Legal Services**) for **HMRC**

Hearing dates: 15, 16 and 17 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 27 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison, Lord Justice Nugee and Lady Justice Falk:

Introduction

1. This is an appeal from a decision of Richards J ("the judge") on three preliminary issues affecting the Sixth and Seventh Claimants, AXA Insurance UK plc and AXA Insurance plc. We will refer to those claimants, as the judge did, as "AXAIUK" and "GREA" respectively (the latter reflecting the company's previous name, Guardian Royal Exchange Assurance plc), and together as the "Claimants".

2. The Claimants, together with certain other members of the AXA Sun Life group, have brought claims that are subject to a group litigation order ("GLO") known as the CFC and Dividend Group Litigation Order (the "CFC/Dividend GLO"). The CFC/Dividend GLO was originally established in 2003. The "CFC" aspects of the GLO, which relate to the controlled foreign companies regime, are not relevant to this appeal. So far as concerns dividends, the claims relate to (i) the UK corporation tax regime as it applied to dividends received from non-UK resident companies before the law changed in 2009, and (ii) the rules that required UK resident companies to account for advance corporation tax ("ACT") on dividends paid by them and then seek to set that ACT off against their liability to corporation tax. ACT ceased to be chargeable in 1999.

3. In each case it was claimed that the UK tax regime breached EU law by treating dividends received from non-UK resident companies less favourably than dividends received from UK resident companies. So far as concerns the corporation tax regime, the alleged discrimination related to limits on the amount and availability of double tax relief ("DTR") in respect of tax suffered on dividends from non-UK resident companies or on the profits from which they derived, in contrast to the straightforward non-taxation of dividends from UK resident companies. So far as concerns ACT, the alleged discrimination related to the fact that distributions received from UK resident companies generally carried a tax credit and were thereby treated as "franked investment income" ("FII"). FII receipts "franked" (that is, eliminated) the ACT liability on a corresponding amount of dividends paid on to the recipient company's own shareholders. In contrast, dividends from non-UK resident companies did not carry a tax credit and could not qualify as FII.

4. AXAIUK's claims relate to the corporation tax regime, and specifically to the tax treatment of dividends from "portfolio" investments, being those that represent less than 10% of the paying companies' share capital. During the relevant period foreign dividends were generally taxed under Schedule D Case V. In AXAIUK's case the dividends were instead brought into account in computing the profits of its trade as a general insurer under Case I of Schedule D, but it is not asserted that this makes any material difference to the issues we need to decide. AXAIUK's claims cover dividends paid as far back as 1992. The claims were first brought on 8 April 2003.

5. GREA's claims relate to the ACT regime. GREA was not joined as a claimant until 20 July 2009. Its claims go back to 1997.

6. Claims by the Prudential group were selected as the test case in the CFC/Dividend GLO for portfolio holdings. Those claims were resolved by litigation which culminated in a Supreme Court decision in 2018, *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39, [2019] AC 929 ("*Prudential SC*"). Of critical relevance to this appeal, however, is

the High Court decision of Henderson J in that case, *Prudential Assurance Co Ltd v HMRC* [2013] EWHC 3249 (Ch), [2014] STC 1236 ("*Prudential HC*"). We will also refer to the Court of Appeal's decision, *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376, [2017] 1 WLR 4031 ("*Prudential CA*").

7. In the meantime, significant litigation was proceeding in test cases under another GLO, the Franked Investment Income Group Litigation Order (the "FII GLO"). The claims in the FII GLO raised issues that overlap with those in the CFC/Dividend GLO, including as to the tax treatment of dividends from non-UK resident companies and the ACT regime. The FII GLO involved three references to the European Court of Justice (the "CJEU") and three Supreme Court decisions. Of particular relevance to this appeal are the second and third of those Supreme Court decisions, *Test Claimants in the FII Group Litigation v HMRC* [2020] UKSC 47, [2022] AC 1 ("*FII SC2*") and *Test Claimants in the FII Group Litigation v HMRC* [2021] UKSC 31, [2021] 1 WLR 4354 ("*FII SC3*").

8. In outline, the litigation to date has established that the corporation tax and ACT regimes were discriminatory in their treatment of dividends from non-UK resident companies, and that as a result claimants were entitled to a restitutionary remedy in respect of corporation tax and ACT that had been unlawfully levied. Claims could be brought either under the *Woolwich* principle (*Woolwich Equitable Building Society v IRC* [1993] AC 70) by way of restitution for tax exacted unlawfully, or on the basis of a mistake of law (a mistake-based claim), the tax having been paid in the mistaken belief that it was due. A mistake-based claim has the advantage for claimants of enabling them to rely on section 32(1)(c) of the Limitation Act 1980 so as to defer the commencement of the normal six year limitation period to the date when they discovered their mistake or "could with reasonable diligence have discovered it" (so-called constructive discovery).

9. This appeal largely concerns the impact of three significant developments in the case law that have occurred during the course of the litigation. We briefly summarise these here, and explain them in more detail below.

10. The first relates to the date of discovery for the purposes of section 32(1)(c). In *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] AC 558 ("*DMG*") the House of Lords held that the date of discovery of a mistake was the date of the judicial ruling that established the unlawfulness of the relevant UK tax provisions. *DMG* was overruled on that issue by the Supreme Court in *FII SC2*, in favour of a test that turns on discovery or constructive discovery of a "worthwhile claim". Importantly, the *Prudential* test case was determined after *DMG* and before *FII SC2*.

11. The second development relates to the interest that the court may award. In *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561 ("*Sempra Metals*") the House of Lords held that compound interest could be awarded in respect of money paid under a mistake, in that case for the period between the date that ACT was charged unlawfully and the date that it was subsequently set off against lawfully charged corporation tax. In *Prudential SC* the Supreme Court departed from the approach in *Sempra Metals*, instead awarding simple interest under section 35A of the Senior Courts Act 1981 in respect of unlawfully charged tax. However, an earlier concession by HMRC had the result that Prudential could still benefit from a restitutionary award of interest where, as in *Sempra Metals*, unlawfully charged ACT had already been set off.

12. The third development relates to the approach to be taken where what would otherwise have been unlawfully charged tax on dividends was initially relieved by tax losses or other reliefs in priority to the DTR that was or should have been available, but additional tax became chargeable in later years because those losses were no longer available. As discussed below, in *FII SC3* the Supreme Court followed the approach of the CJEU in *Österreichische Salinen* (Case C-437/08), reported as *Haribo Lakritzen Hans Rigel BetriebsgmbH* (Joined Cases C-436/08 and C-437/08) [2011] STC 917, [2011] ECR I-305 ("*Salinen*") in deciding that the later tax charge amounted to economic double taxation of the dividends and that the appropriate remedy was to disapply the domestic rules that prevented the DTR from being carried forward to offset the later tax.

The GLO regime

13. The GLO regime is now contained in Part III of CPR 19. A central feature of the regime is the provision for decisions in relation to "GLO issues" to be binding not only on the parties to the claim in question but on parties to other claims entered on the "group register" at the time when the decision was made. The Claimants' claims were on the CFC/Dividend GLO group register when the relevant decisions in the *Prudential* litigation were made, so the starting point is that decisions on "GLO issues" in *Prudential* are binding not only as between the Prudential claimants and HMRC but also as between the Claimants and HMRC.

14. The relevant CPR provisions are as follows. Rule 19.21 defines "GLO issues" as "common or related issues of fact or law". Rule 19.22(1) enables a GLO to be made where there are or are likely to be a number of claims giving rise to GLO issues. Rule 19.22(2) provides for the GLO to establish a register of claims (the group register), specify the GLO issues and identify the "management court" to manage the claims (in this case, the Chancery Division of the High Court).

15. Rule 19.23 provides as follows:

> "**Effect of the GLO**
>
> (1) Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues –
>
> > (a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and
> >
> > (b) the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.
>
> (2) Unless paragraph (3) applies, any party who is adversely affected by a judgment or order which is binding on them may seek permission to appeal the order.
>
> (3) A party to a claim which was entered on the group register after a judgment or order which is binding on them was given or made may not –

(a) apply for the judgment or order to be set aside, varied or stayed; or

(b) appeal the judgment or order,

but may apply to the court for an order that the judgment or order is not binding on them.

(4) Unless the court orders otherwise, disclosure of any document relating to the GLO issues by a party to a claim on the group register is disclosure of that document to all parties to claims –

(a) on the group register; and

(b) which are subsequently entered on the group register."

16. As can be seen from this, a "judgment or order…in relation to" a GLO issue is binding on parties to claims entered on the group register at the time "unless the court orders otherwise".

17. Rule 19.24 enables a test case or test cases to be identified and also enables the management court to vary the GLO issues. The identification of a test case is likely to lead to other claims being stayed. This is what happened in the Claimants' case. The stay was such that HMRC's defence to the AXA Sun Life group's claims was first served in January 2022, approaching 19 years after AXAIUK's claim was first issued in April 2003.

The GLO in this case

18. The original GLO order in the CFC/Dividend GLO was made on 30 July 2003 by Master Winegarten. It has gone through a number of iterations and, like the judge, we refer to it in its amended form. Paragraph 1 of the order stated that it applied "to claims in respect of the following common or related issues of law" which it set out at (a) to (f). Apart from issue (a) (which related to the correct legal forum) the issues all related to the compatibility of UK tax legislation with EU law. None of the issues identified in that paragraph addressed the specific issues with which we are concerned. But that paragraph went on to say that the common or related issues of law would be particularised in accordance with paragraph 11. Paragraph 11 said that without prejudice to the power of the management court to add and determine any further common issues of fact or law and/or to vary the common issues identified below, the parties were to seek to agree the wording of those issues by a specified date. The parties did agree the wording of the issues, and the agreed issues were set out in Schedule 3 to the order. Relevant parts of Schedule 3 are set out below.

19. On 12 December 2003 Park J designated the claim by the Prudential group as a test claim for all GLO issues. He directed HMRC to file their defence by a specified date; and also directed that the test claimants should serve any reply within 21 days thereafter. Management of the cases was subsequently allocated to Henderson J. The trial was originally scheduled to begin in late 2010, but for a number of reasons it was adjourned. At a case management conference on 20 December 2012 Henderson J ordered the trial to be resumed, and gave directions for the agreement of issues. That was duly done. The agreed issues were appended as Schedule 1 to Henderson J's order dated 28 January

2014, following the resumed trial. The recitals to that order defined them as "the GLO issues". As discussed below, the GLO issues as agreed differed from those identified in Schedule 3 to the GLO.

The issues

20. The three preliminary issues considered by the judge were:

    a) **The Limitation issue**: whether both Claimants' claims had been conclusively established to have been issued within the limitation period by reason of the orders and judgments in the *Prudential* test case, or whether they should instead be determined in accordance with *FII SC2*.

    b) **The Set-off issue**: whether GREA is entitled to a claim in restitution (whether by way of compound interest or otherwise) for unlawful ACT utilised against lawful tax before the issue of its claim, in accordance with the concession made in *Prudential*.

    c) **The Pleading issue**: whether AXAIUK had pleaded a claim in restitution for the recovery of unlawful tax which was paid as a result of its inability to offset unused DTR credits (as described at [12] above), and if so (i) how that claim should be assessed; (ii) whether claims in respect of 2017 and 2018 were ousted in favour of a statutory remedy by paragraph 51(6) of Schedule 18 to the Finance Act 1998; and (iii) whether AXAIUK is entitled to a claim in restitution in respect of income tax purportedly set off against corporation tax in 1995.

21. The judge determined the Limitation and Set-off issues in favour of HMRC, finding that they had not been determined as "GLO issues" in the Claimants' favour and as a result should be determined in accordance with the law as it is now understood to be following the Supreme Court's departure from the reasoning on those issues in *DMG* and *Sempra Metals*. The judge determined the Pleading issue in favour of AXAIUK (although sub-issue (i) was not determined).

22. As a result of determining the Limitation and Set-off issues in favour of HMRC, the judge did not need to consider HMRC's alternative argument that the judge should have "ordered otherwise" under Rule 19.23(1)(a). For reasons that we will explain, it is an issue that we need to consider.

This appeal: summary

23. The Claimants appeal on the Limitation and Set-off issues and HMRC appeal on the Pleading issue. We heard submissions from Mr Bremner KC for the Claimants. Mr Ewart KC, leading Ms Belgrano and Mr Wilmot-Smith, made submissions for HMRC on the Limitation and Set-off issues. Mr Ewart and Mr Wilmot-Smith made submissions on different aspects of the Pleading issue, with Mr Ewart addressing sub-issue (iii) and Mr Wilmot-Smith addressing the other issues. We are grateful for Counsel's assistance.

24. In summary, our conclusions on the issues are as follows:

    a) The judge correctly concluded the Limitation issue in favour of HMRC, so the Claimants' appeal on that issue is dismissed.

b) While we consider that the Set-off issue had been determined as a GLO issue against HMRC in *Prudential* (contrary to the conclusion reached by the judge), it is appropriate in the exceptional circumstances of this case to "order otherwise", such that the result remains as the judge ordered and the Claimants' appeal on that issue is dismissed.

c) HMRC's appeal on the Pleading issue should be allowed.

25. It is convenient to consider the Set-off issue first.

The Set-off issue

26. The term "unlawful ACT" is a convenient shorthand to refer to ACT levied in excess of the amount that should have been charged if the UK tax regime had not discriminated against dividends from non-UK resident companies by allowing only UK source dividends to "frank" ACT liabilities on dividends paid on to shareholders (see [3] above). The Set-off issue concerns unlawful ACT that was "utilised" before the date of the claim, meaning that it had been set off against lawfully levied corporation tax (also referred to as "mainstream" corporation tax, or "MCT"). As such, by the time that the claim was made there was no outstanding debt in the form of unlawfully levied tax which could be the subject of a claim for recovery. Rather, what was sought was compensation for the time value of the ACT between the date that it was paid and the date it was set off.

The GLO

27. Schedule 3 to the CFC/Dividend GLO raised the issue of the lawfulness of the ACT system in respect of portfolio dividends and set out the following issue as to quantum:

> "(A) How should compensation or relief be assessed?"

It was common ground before the judge that this raised, as a GLO issue, the availability or otherwise of a restitutionary claim for utilised ACT.

28. In the list of GLO issues for the trial of Prudential's claims, appended as Schedule 1 to Henderson J's order dated 28 January 2014, the same point was formulated in more detail. Section II of Schedule 1 covered the lawfulness of the ACT charge on the onward distribution of non-UK source portfolio dividends and the lack of a tax credit. Section VII covered remedies, as follows:

> "**VII REMEDIES**
>
> 1. For each of the categories of claim covered by I to V above:
>
> i) Was there any unlawfully exacted tax so as to found a claim under *Woolwich*? If so what is the measure of the unlawfully exacted tax?
>
> ii) Did the claimant pay tax by mistake so as to found a claim in mistake? If so what is the measure of the restitution?

> iii) Is there a restitutionary defence available - e.g. defence of change of position, passing on, "fiscal chaos" and, if so, are the requirements of any such defence fulfilled and to what extent?
>
> 2. On what basis is interest payable?"

The Prudential test case

29. Before turning to *Prudential* it is necessary briefly to refer to *Sempra Metals*. That decision concerned the 2001 decision of the CJEU in *Metallgesellschaft Ltd v IRC*, *Hoechst AG v IRC* (Joined Cases C-397/98 and C-410/98) [2001] Ch 620. The CJEU had decided that the inability of UK resident subsidiaries of parent companies in other Member States to benefit from a rule which allowed dividends to be paid to UK resident parent companies without a liability for ACT under a "group income election" breached EU law and required an effective remedy to compensate for the advance payment of tax that resulted. In the absence of any applicable statutory remedy, the House of Lords held that the court had jurisdiction to award compound interest as a restitutionary remedy for the time value of money paid under a mistake, the enrichment comprising the payment of tax prematurely. The appropriate rates of interest were required to be determined by reference to government borrowing rates over the relevant period.

30. In the *Prudential* test case, the claimants sought to follow the approach taken in *Sempra Metals* and obtain an award of compound interest in relation to the following three categories and periods:

    a) unlawful ACT subsequently set off against lawful MCT, for the period from the date of payment to the date of set-off;

    b) all other unlawfully levied tax (including unlawful ACT), from the date of payment to the date of repayment by HMRC; and

    c) the time value of the utilised ACT (resulting from a) above), from the date of set-off to the date of payment by HMRC.

31. HMRC conceded before the trial in *Prudential HC* that compound interest was payable under category a), on the basis that that was what was decided in *Sempra Metals*. This was reflected in Henderson J's judgment at [242]:

    > "In relation to the claims for utilised ACT, it is common ground (as I have said) that the position is governed by *Sempra*. Accordingly, compound interest is payable on the amount of the ACT prematurely paid, from the date of its payment until the date of setting-off against MCT, at conventional government rates."

32. It was common ground before the judge that what Henderson J was referring back to was the following statement at [195]:

    > "The Revenue accept that compound interest is payable in respect of the utilised ACT claims, because that is what the House of Lords decided in *Sempra*."

33. Henderson J went on at [243] to say that he saw "no rational basis" to distinguish claims for wrongly paid and unutilised ACT (that is, ACT that had not been set off against lawful MCT) from the claims for utilised ACT. He rejected HMRC's submission that the claimants' only entitlement was to simple interest under section 35A of the Senior Courts Act 1981. At [244] he applied the same approach to unlawfully charged corporation tax.

34. Reflecting these points, declaration 8A of Henderson J's order dated 28 January 2014 recorded the following as "common ground" in relation to the issues of whether a *Woolwich* or a mistake-based claim was available in respect of unlawfully exacted tax, and its measure (emphasis supplied):

> "i) such claims are to be characterised as *San Giorgio* claims under EU law;
> ii) the overpaid tax (or its time value in the case of utilised ACT) is in principle recoverable by either a *Woolwich* claim or a mistake-based restitutionary claim, subject to defences and limitation;
> iii) the tax was in fact paid under an operative mistake, the mistake being that it was lawfully due and payable;
> iv) unlawful ACT which was utilised against lawful MCT is recoverable, on the same basis as in *Hoechst*;
> …"

35. Declaration 10 provided as follows:

> "Compound interest computed on the conventional government basis is payable is respect of all claims which are upheld, namely, overpaid corporation tax, unutilised ACT and ACT utilised against lawful MCT for the periods both before and after utilisation."

36. Consistently with this, paragraphs 3 and 4 of the order went on to provide as follows (emphasis supplied):

> "3. Subject to paragraphs 4, 5 and 6 below, the following claims are claims for restitution of the payment by mistake of taxes unlawfully exacted and are upheld:
> …
> d. Claims for the payment of ACT not due because the credit referred to in declarations 2(B) to (E) above [relating to the lack of an ACT credit on non-UK source dividends] was not available from the date of payment until:
> i. in the case of unlawfully levied ACT utilised against a lawfully levied MCT liability, the date of utilisation;
> ii. in the case of unutilised unlawfully levied ACT, judgment, namely the 24th October 2013; or
> iii. in the case of unlawfully levied ACT utilised against unlawfully levied MCT liabilities, judgment, namely, the 24th October 2013; …
>
> 4. The amounts of restitution are to be calculated on a compound interest basis computed on the conventional government rate for all periods including the period from payment to judgment or from payment to utilisation and therefrom to judgment."

Schedule 2 to the order contained the agreed interest rates, with interest to be compounded monthly (paragraph 7a. of the order).

37. The question of interest was not dealt with in any detail in the judgment in *Prudential CA*. Category a) referred to at [30] above did not fall for consideration because of HMRC's concession. As regards categories b) and c), the court was at that stage bound by its earlier decision in *Littlewoods Retail Ltd v HMRC* [2015] EWCA Civ 515, [2016] Ch 373 to award compound interest rather than simple interest under section 35A: see *Prudential CA* at [153]-[155]. The order following judgment dismissed the appeal on issue 16, which asked whether the claimants were:

> "… entitled to compound interest on their claims for unduly levied DV tax and/or ACT … (it being common ground that the restitution of the time value of unlawfully levied ACT repaid or utilised prior to the claim being brought should be measured by compound interest)?"

38. The case took a different turn in the Supreme Court, where interest was considered as issue II (set out in the judgment at [2]):

> "Is [Prudential] entitled to compound interest in respect of tax which was levied in breach of EU law, on the basis that HMRC were unjustly enriched by the opportunity to use the money in question?"

39. HMRC maintained their concession in relation to category a), since that was what *Sempra Metals* had decided. The Prudential group argued that the principles set out in *Sempra Metals* entailed the same approach being applied to categories b) and c). However, HMRC argued that the appropriate award for those categories was simple interest under section 35A.

40. The Supreme Court's judgment was given by Lord Mance, Lord Reed and Lord Hodge, with whom Lord Sumption and Lord Carnwath agreed. They first had to consider an objection to HMRC being permitted to advance their argument, because it challenged the reasoning in *Sempra Metals*, contrary to the concession in respect of category a). In rejecting that objection, their Lordships noted that it was Prudential (referred to in the judgment as "PAC") who were inviting the court "to extend the reasoning in *Sempra Metals* beyond the scope of that decision itself", and the appeal therefore "unavoidably" required the court to "consider whether that reasoning is consistent with the approach which it has more recently adopted, so as to form part of a coherent body of law" ([40]). In the same paragraph the court noted the GLO context as a relevant consideration.

41. After considering the reasoning in *Sempra Metals*, the judgment went on (at [55]-[67]) to describe significant developments that had occurred in the relatively short period since that case was decided. The CJEU's own jurisprudence had developed, and it was now clear that simple interest was sufficient to amount to an "adequate indemnity" for breach of EU law (*Littlewoods Ltd v HMRC* [2017] UKSC 70, [2018] AC 869). *Littlewoods v HMRC* had also revealed a conflict between *Sempra Metals* and statutory provisions that provided for recovery of overpaid tax (in that case VAT). Further, the problems caused by the application of an extended limitation period to mistakes of law, combined with the declaratory theory of adjudication (under which the law as altered by a judicial decision is deemed always to have applied), had become apparent, it having become clear that retrospective changes to time limits were incompatible with EU law. The claims to

compound interest were "potentially enormous". Finally, the law of unjust enrichment had also developed, most significantly in *Investment Trust Companies v HMRC* [2017] UKSC 29, [2018] AC 275, in a way that could not readily be reconciled with *Sempra Metals*.

42. At [68]-[80] their Lordships then applied the reasoning in *Investment Trust Companies v HMRC* that the law of unjust enrichment is designed to correct normatively defective transfers of value. Money paid by mistake was such a transfer, and the cause of action accrued when the money was paid: there was an immediate debt. Contrary to the reasoning in *Sempra Metals* there was no additional transfer of value comprising the opportunity to use the money. A claim to interest was based on a failure to pay a debt when it was due, and not on unjust enrichment, so that interest could be awarded under section 35A.

43. The reasoning in *Prudential SC* that touches specifically on category a) is as follows:

> "78. On a literal reading of section 35A, no such interest could have been awarded on the claims under category (a). That is because section 35A applies only where there are proceedings for the recovery of a debt (or damages), and therefore does not apply where the defendant has repaid the debt (or has set it off) before the creditor has commenced proceedings for its recovery. An award of interest is nevertheless required in such circumstances by EU law, if an effective restitutionary remedy is to be available under English law in respect of *San Giorgio* claims: that was the point decided in *Metallgesellschaft*. It is unnecessary to decide in this appeal how an award of interest should be made available in those circumstances (and the court has heard no argument on the point). But there are a number of potential solutions.
>
> 79. For the foregoing reasons, we therefore depart from the reasoning in *Sempra Metals* so far as it concerns the award of interest in the exercise of the court's jurisdiction to reverse unjust enrichment... Since the award of compound interest to PAC by the courts below was based on the application of the reasoning in *Sempra Metals* which we have disapproved, it follows that HMRC succeed on Issue II, and PAC's claims to compound interest under categories (b) and (c) must be rejected. PAC's claim to compound interest under category (a) would also have been rejected, if it had not been accepted by HMRC."

44. It can be seen from this that the Supreme Court expressed the clear view that PAC's claim to compound interest under category a) "would have been rejected" had it been before the court. It also observed that a remedy would have been required but that it was unnecessary to decide how it should be achieved.

45. The Supreme Court's order following its judgment, dated 25 July 2018, does not on its face distinguish between categories a), b) and c). It simply provides that the appeal in relation to issue II (and another issue) "be allowed". However, neither party suggested that this should be read without the context provided by the judgment. In practice at least, HMRC's appeal on issue II was confined to categories b) and c).

46. As discussed in more detail below, in the subsequent decision in *FII SC3* the Supreme Court permitted HMRC to contest the FII GLO test claimants' claim to compound interest for tax paid prematurely (such as the ACT in category a)) and applied *Prudential SC* to hold that there was no restitutionary remedy in such a case.

What GREA claims: why it matters

47. The economic significance of the Set-off issue is not immediately obvious. As discussed below, section 85 of the Finance Act 2019 ("FA 2019") now provides a statutory remedy in the form of interest on unlawful ACT that has been set off. There is no dispute that section 85 is available to GREA. Further, although GREA maintains that it is entitled to compound interest we were informed that the figures have in fact been agreed with HMRC on a simple interest basis, because whether interest is awarded on a simple or compound basis makes no material difference to the outcome.

48. The explanation as to why it matters for GREA lies not in the availability of a remedy or in the difference between simple and compound interest. It relates instead to the applicable interest rates. Mr Bremner explained that there is a material difference between the rates that would apply for the purposes of section 85 FA 2019 and the rates set out in Schedule 2 to Henderson J's order, the latter being materially more beneficial for GREA.

What was decided as a GLO issue in Prudential

49. At [92]-[95] of his judgment the judge correctly rejected HMRC's argument that Henderson J did not make a conclusive determination of a GLO issue in relation to utilised ACT in *Prudential HC* (category a)). Apart from the operative orders in paragraphs 3 and 4 (set out at [36] above), the fact that something might be recorded as "common ground" does not prevent there being a determination of a GLO issue which other parties on the GLO register are entitled to seek to appeal under CPR 19.23(2). Mr Ewart did not seek to submit otherwise in his oral submissions.

50. Where we part company with the judge is the effect of the Supreme Court's decision. In our view the judge was wrong to accept HMRC's argument that Henderson J's decision on category a) was "superseded" by *Prudential SC*. As Mr Ewart ultimately accepted in oral submissions, there was no relevant "judgment or order" by the Supreme Court in relation to category a) which reversed Henderson J's earlier decision. As regards that category Henderson J's decision, and in particular paragraphs 3d.i. and 4 of his order of 28 January 2014 ([36] above), remained undisturbed by both *Prudential CA* and *Prudential SC*. The fact that the Supreme Court expressed the view that category a) could not qualify for a restitutionary award of interest does not affect this. On the contrary, the court made it clear that it "would" have decided category a) in that way if it had not been for the concession. The concession meant that the point was simply not regarded as being before the court for decision.

The power to "order otherwise": principles

51. By way of recap, CPR 19.23(1)(a) provides that a judgment or order in relation to a GLO issue:

> "… is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise…"

52. CPR 19 provides no express limit on the power to "order otherwise". Of course, as with any exercise of a power under the Rules, the court must seek to give effect to the overriding objective of dealing with cases justly and at proportionate cost, as explained in CPR 1. The court must act so as best to achieve justice between the parties. But while that is the ultimate guiding rule, the exercise of the power must also take account of the context and purpose of the provisions in question.

53. The GLO regime is clearly intended to facilitate the resolution of groups of claims without repeated litigation of the same issues. It is an important and useful mechanism. It can bring significant benefits for both litigants and the court in terms of cost and efficiency, and indeed access to justice for some litigants who might otherwise be deterred by the cost of an individual claim. Those benefits will only be available if it is clearly understood that the determination of GLO issues in test cases will bind other parties to claims on the group register unless there is a strong reason to depart from that important general rule. The principle of finality, and the need for efficiency and economy in the conduct of litigation, are as relevant in GLO litigation as elsewhere.

54. The only authority that the parties were able to identify that touches on the circumstances in which it might be appropriate to "order otherwise" was a comment in *AB v Ministry of Defence* [2012] UKSC 9, [2013] 1 AC 78 at [15], where Lord Wilson referred to the power being capable of addressing any "particular injustice" in visiting adverse judgments in the appeals under consideration on similar claims within the group. The appeals in that case raised fact specific issues as to the date of acquisition of knowledge under section 14 of the Limitation Act and also arose on a strike-out application, so it can readily be seen that the position – both as to individual facts and procedural fairness – could differ as between claimants.

55. The issues considered in *AB v Ministry of Defence* exemplify the point that there may be some cases where it will be immediately apparent that the facts or circumstances of different claims on the group register will or may warrant a different approach, such that it is appropriate to "order otherwise". In other cases it may become apparent subsequently.

56. In contrast, the Set-off issue is one of pure law. Factual differences between cases on the GLO register will make no difference to its determination.

57. Once a GLO issue is determined it would be quite wrong to "order otherwise" merely because a dissatisfied litigant in a different claim on the group register may have better or different arguments that could lead to a different result on the law. The proper avenue for such an objection is an appeal under CPR 19.23(2). In the absence of an appeal the issue would be finally determined both in the test case and for other claims on the group register. This will ordinarily be so even if the law subsequently develops in a way that casts doubt on the earlier decision.

58. In order to identify whether it may be appropriate to "order otherwise" in relation to an issue of law such as the Set-off issue, the principles of res judicata provide a helpful guide. In effect, a GLO extends aspects of res judicata beyond the parties to a claim and

their privies, to parties to other claims on the group register. To the extent that the principles of res judicata recognise an exception to the general rule, we consider that is instructive as to whether or not it would be appropriate to "order otherwise", and assists in providing a principled basis on which to decide that question.

59. The various forms of res judicata were authoritatively described by Lord Sumption in a well-known passage in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 ("*Virgin Atlantic Airways*") at [14]-[26]. They have also been considered by the Supreme Court in the *FII* litigation. In *FII SC2* the issue arose in relation to the challenge to *DMG* (and a broader challenge to the application of section 32(1)(c) of the Limitation Act to claims based on mistake of law). In *FII SC3* the point arose in relation to whether HMRC should be permitted to argue that no claim in restitution was available for tax paid prematurely. We will return to that but the following summary of the underlying policies in the judgment of Lord Reed and Lord Hodge in *FII SC3* bears repeating:

> "60. The various principles which the claimants invoke are underpinned by the same legal policies, 'that there should be finality in litigation and that a party should not be twice vexed in the same matter': *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31, per Lord Bingham of Cornhill. Those policies are reinforced by the need for efficiency and economy in the conduct of litigation. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160, para 55 Lord Neuberger of Abbotsbury PSC stated:
>
> > 'The purpose of res judicata is not to punish a party for failing to take a point, or for failing to take a point properly, any more than to punish a party because the court which tried its case may have gone wrong. It is … to support the good administration of justice, in the public interest in general and the parties' interest in particular.'…"

As already indicated, the requirements of finality, economy and efficiency apply just as much in the context of a GLO as elsewhere. Indeed, efficiency and economy are obvious aims of the GLO procedure.

60. The forms of res judicata that are potentially most relevant in this case are cause of action estoppel and issue estoppel. (The more general abuse of process principle formulated in *Henderson v Henderson* (1843) 3 Hare 100, which precludes a party raising in subsequent proceedings matters which were not raised, but could and should have been, in the earlier proceedings, is less directly relevant on the facts of this case.)

61. As explained by Lord Keith in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 ("*Arnold v NatWest*") at pp.104 and 105:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.
>
> …
>
> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause

> of action to which the same issue is relevant one of the parties seeks to reopen that issue."

62. Cause of action estoppel generally extends to all points essential to the existence or non-existence of a cause of action, whereas issue estoppel obviously applies to issues that form ingredients of a cause of action.

63. Rule 19.23(1) applies only to "GLO issues", being common or related issues of fact or law identified under Rules 19.22(2) and 19.24. The resolution of a test case will not itself resolve other claims on the group register. Those claims will require determination by fact finding in the normal way, albeit that the issues in dispute should have been narrowed by the resolution of GLO issues, and in many cases it would be hoped that settlement would be possible without a trial.

64. The closest analogy to the binding nature of GLO issues on other claims on the group register is an issue estoppel. The cause of action will not be identical as between different claims, not least because the factual subject matter will differ, but a common issue or issues arise for decision. The effect of the GLO is to render a determination of specific issues binding on parties to other claims on the group register. In contrast, where a test case is finally determined it will not only create issue estoppels as between the parties to that case in respect of GLO (and potentially other) issues, but will also create a cause of action estoppel as between those parties.

65. As Lord Sumption said in *Virgin Atlantic Airways* at [21], there is some greater flexibility in the operation of issue estoppel than cause of action estoppel, because it is possible to "reargue in materially altered circumstances an old point which had previously been rejected", as well as taking a new point which could not reasonably have been taken on the previous occasion (which may be possible under both forms of estoppel). Lord Keith had formulated the point as follows in *Arnold v NatWest* at p.109:

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result…"

66. The point was put pithily by Clarke LJ in *The Good Challenger* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep. 67 at [54]:

> "The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice."

67. In *Virgin Atlantic Airways* Lord Sumption summarised the position on issue estoppel as follows at [22]:

> "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were

> not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

Whether to order otherwise on the Set-off issue

68. HMRC have accepted that they are bound by the decision against them on category a) in relation to the claims by the Prudential group, in respect of which there is a cause of action estoppel. They seek the ability to revisit the point in other cases the subject of the CFC/Dividend GLO.

69. In our view the particular, and highly unusual, facts of this case make it appropriate to "order otherwise" because, by analogy with the principles applying to issue estoppel, there are special circumstances which would otherwise create injustice. Our reasons are as follows.

70. The first point relates to the history and timing of the *Prudential* litigation. Henderson J had decided that Prudential was entitled to a restitutionary award of compound interest in respect of category a) by his order dated 28 January 2014. It would have been pointless for HMRC to dispute that at the time because Henderson J was bound by *Sempra Metals* to so order. The only option available to HMRC would have been to seek to reserve their ability to argue that *Sempra Metals* was incorrect on an (ultimate) appeal to the Supreme Court.

71. It would have required a significant degree of prescience to have anticipated in 2014, when Henderson J made his order and HMRC would have formulated their grounds of appeal to the Court of Appeal, that there was a realistic chance of the relatively recent decision in *Sempra Metals* being overruled. The significant developments in *Littlewoods v HMRC* and *Investment Trust Companies v HMRC* described above occurred only in 2017, after the decision in *Prudential CA*, which in turn followed this court's decision in *Littlewoods*. HMRC cannot fairly be criticised for proceeding as they did either before Henderson J or this court, or for failing to attempt to pursue the point in the Supreme Court in circumstances where it had not been reserved before either court below.

72. In *FII SC3* there was found to be no cause of action or issue estoppel in relation to this issue on the facts, but what was said about the broader question of whether there was an abuse of process is instructive. Lord Reed and Lord Hodge said this:

> "76. It is not disputed that the doctrine of abuse of process can apply to separate stages within one litigation as well as to separate legal proceedings.
>
> 77. But for the court to uphold a plea of abuse of process as a bar to a claim or a defence it must be satisfied that the party against whom the bar is asserted is abusing the process of the court by oppressing the other party by repeated challenges relating to the same subject matter. It is not sufficient to establish abuse of process for a party to show that a challenge could have been raised in a prior litigation or at an earlier stage in the same proceedings. The party must go further and show that it should have been raised at that earlier stage and that it is abusive to raise the matter at the later stage.

> 78. We are satisfied that there is no such abuse on this issue. The FII GLO litigation and the related GLO litigations proceeded against a background in which both domestic and EU law were in a state of significant development and interacted with each other in this GLO litigation. Henderson J in *FII (HC) 2* [2015] STC 1471, para 468 correctly spoke of "a complex and evolving legal landscape". The three judgments of the CJEU on references in the FII GLO litigation in 2006, 2012 and 2013 together with judgments on references in other relevant proceedings, and the now three appeals to this court in the FII GLO litigation as well as the appeals to the House of Lords in *Sempra Metals* and to this court in *Littlewoods* and *Prudential*, are testimony to the evolving nature of that landscape. Issues which affect the FII GLO litigation have been decided in the other legal proceedings such as *Littlewoods* and the portfolio dividends GLO (including in *Prudential*) and vice versa. Against that background, it is unsurprising that questions that are of central importance to the claims in the FII GLO litigation have only recently been decided or are yet to be decided."

73. The second point relates to the impact of *Prudential SC*, as applied in *FII SC3*. In *FII SC3* at [90] the ratio of *Prudential SC* was described in the following terms:

> "In its judgment in *Prudential*, this court held that there was no common law claim to compound interest on unlawfully levied ACT on the basis of restitution."

74. The ratio of *Prudential SC* therefore draws no distinction between different categories of unlawful ACT. On the contrary, the Supreme Court expressly determined in *Prudential SC* that *Sempra Metals*, a decision specifically relating to interest in a category a) case, did not represent the law. What was obiter in *Prudential SC* was the court's discussion of the basis on which interest might nevertheless be awarded for the period covered by category a), that is in respect of tax paid prematurely: see *FII SC3* at [95].

75. By the time that *FII SC3* was decided, the difficulty identified in *Prudential* about applying section 35A to tax paid prematurely was avoided, because by that stage Parliament had enacted section 85 of the FA 2019. As explained in *FII SC3* at [100], this provided a statutory remedy in the form of interest on unlawful ACT for that period. The Supreme Court rejected the taxpayers' arguments that the introduction of section 85 had wrongly deprived them of an extended limitation period in respect of an existing right because such a right could only have related to a mistake-based claim, which *Prudential* had held could not be maintained. The Supreme Court also rejected other objections raised by the taxpayers, including an argument that section 35A should be given a conforming interpretation, which was rejected on the basis that section 85 met the requirements of EU law ([112]).

76. The effect of *FII SC3* is that parties to claims in the FII GLO are required to rely only on section 85 FA 2019 in respect of category a). This conclusion directly follows from the decision in *Prudential SC*. Other claims outside the CFC/Dividend GLO will also be determined in accordance with the decisions in *Prudential SC* and *FII SC3*, because the ratio of those cases is binding. In contrast, if GREA is correct then the ratio of *Prudential SC* may not be applied to it or other claimants on the CFC/Dividend GLO group register in respect of category a). Thus a decision of the highest court in a test case in the CFC/Dividend GLO as to the law will be a binding precedent in all claims not previously

determined, other than claims on the group register of that very GLO. Rather, claims in the latter category would benefit from a decision that is now known to be wrong in law, and further in circumstances where that has been established by the test case itself. That would be a somewhat extraordinary result. It would also arise from what the Supreme Court has referred to as the happenstance that the *Prudential* test case was determined before the equivalent issue was decided in the FII GLO (*FII SC3* at [83]).

77. The third, and linked, point relates to the stage in the litigation that GREA's claim has reached. In contrast to the Prudential group, the claims of which have been finally determined, GREA's claim has not been. As already mentioned, the lengthy stay has meant that HMRC's defence was only served in 2022. The claim remains to be tried. True it is that the stay followed from the selection of the Prudential group as the relevant test claimant, but the point remains that if GREA's submissions are preferred on this issue the court trying the claim in, say, 2025 would be required to decide the Set-off issue in a way that is known to be wrong. This is very different in nature to seeking to reopen an existing decision made on the basis of an incorrect understanding of the law. The court would be required to act in contravention of the basic principle that it should decide a case in accordance with its understanding of the law.

78. There is an analogy with the facts of *Arnold v NatWest*. That case concerned a rent review clause in a lease which referred to the position under a hypothetical lease for the remainder of the term. A dispute had arisen on the first rent review as to whether the hypothetical lease was to be regarded as itself containing rent review provisions. The dispute led to arbitration. On appeal from the arbitrator Walton J had held that it should not. Before the next rent review the tenants sought to re-litigate the issue in the light of later decisions. The landlords sought to strike out the claim on the basis of issue estoppel.

79. The House of Lords concluded that there were "special circumstances" such that the tenants should be permitted to reopen the issue. This was so even though Walton J's decision had not then been definitively determined to be wrong (Lord Keith referred at p.103 to "powerful grounds" for the view that Walton J had taken the wrong approach), and even though both the parties and the subject matter were exactly the same. The only difference was that the fresh dispute related to the second rent review rather than the first. Lord Keith explained the considerations that led to the conclusion that special circumstances existed at pp.110-111. They included not only the fact that Walton J's decision could not be appealed due to his incorrect refusal to certify that there was a point of law of general public importance, but the injustice of tenants being faced with a succession of future rent reviews on a basis which was "generally regarded as erroneous" and the unfairness of the landlords receiving a much higher rent than they were entitled to. Further:

> "The public interest in seeing an end to litigation is of little weight in circumstances under which, failing agreement, there must in any event be arbitration at each successive review date."

80. In this case, the litigation has not been resolved for claimants such as GREA. Their position is closer to the scenario of the second rent review than that of the first, the decision in which (like that in *Prudential*) remained undisturbed.

81. The fourth point relates to the practical implications of GREA's arguments. The effect of *Prudential SC* is that GREA is confined to simple interest under section 35A in respect

of categories b) and c), because a restitutionary remedy is not available. As Henderson J said and is clear from *Prudential SC* and *FII SC3*, there is no rational basis to distinguish category a) from the other categories as regards the availability or otherwise of such a remedy. Yet the consequence of GREA being permitted to rely on Henderson J's decision in respect of category a) is that they would be entitled to interest on a basis that is not only known to be wrong in law but is also logically inconsistent with the basis on which they are awarded interest under categories b) and c). The illogicality is made even more stark by the fact that the "principal" amount that forms the basis of the award under category c) is the amount derived from category a). The fact that the history of the litigation is such that the Prudential group is able to benefit from that illogicality should not necessarily mean that other claimants should also be permitted to do so.

82. In our view none of the reasons put forward by Mr Bremner for not ordering otherwise outweigh these points. We accept that Set-off was a GLO issue and that there is no relevant factual distinction between Prudential and GREA on this issue, but for the reasons given it does not follow that what is now understood to be an error of law in a test case should be applied to all other claims on the group register that remain to be resolved. We also accept that it should not generally be possible to have "two bites of the cherry", particularly in relation to a point that was determined as long ago as 2014. But the situation in this case, with a decision of the House of Lords taken only seven years earlier being overruled during the course of this complex litigation, is exceptional.

83. Further, we do not accept the submission that a decision to order otherwise in this case would adversely affect the conduct of other GLO litigation by inappropriately incentivising claimants to attempt to make their claims test cases, or otherwise causing unacceptable uncertainty. It so happens that the result of ordering otherwise in this case is to place GREA in a less favourable position than Prudential, but if the facts were different it could have been the test claimant that ended up in a worse position because they were unable to benefit from a subsequent legal development.

84. We also recognise that GREA's claim has been the subject of a very lengthy stay to permit the test case to be resolved, and that it was required to contribute to the costs of that litigation. However, as the power to order otherwise recognises, it does not follow that it is invariably in the interests of justice for all GLO issues determined by a test case to be applied to all other claims on the group register. It is also worth recalling that in this particular case it was the claimants in *Prudential* who were requiring the court to analyse *Sempra Metals* with a view to extending it to categories b) and c), no doubt for the benefit of the entire class, in circumstances where HMRC would have been prepared to accept that section 35A applied, as the court found.

85. More fundamentally, however, we would emphasise again that the facts are exceptional. In the ordinary course parties to claims on a group register should expect to be bound by decisions on GLO issues.

Conclusion

86. In conclusion on this issue, the Set-off issue was determined against HMRC as a GLO issue in *Prudential*, but it is appropriate to order otherwise such that the appeal is dismissed.

The Limitation issue

Introduction to the limitation issue

87. The primary limitation period for a claim in restitution is six years from the date when the cause of action accrued: Limitation Act 1980 section 5; *FII SC2* at [7] and [141]. But section 32(1) of the Limitation Act 1980 relevantly provides:

> "where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (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 fraud, concealment, or mistake (as the case may be) or could with reasonable diligence have discovered it."

88. Once the limitation period has begun to run, then the claimant has the usual six years in which to bring the claim.

89. This is not the first time that this litigation has been bedevilled by a lack of pleading: see *Prudential CA* at [12] to [28]. Underlying the questions about limitation is the fact that although the claimants in *Prudential* wished to rely on section 32(1)(c) of the Limitation Act 1980, and despite Park J's direction about the service of any reply, they never pleaded a case in response to HMRC's allegation made in the Defence that the claims were largely statute barred.

90. Mr Bremner accepts that once a limitation defence is raised the burden of proof lies on the claimant to show that the running of time is deferred under section 32(1)(c). But he argued, in reliance on a passage in *McGee on Limitation Periods* (9th ed) para 21.08, that the failure to plead a case does not matter, because a failure to traverse the contents of a Defence is not the same as admitting them; and that it would be sufficient to bring evidence to rebut the plea at trial. Although the author does not qualify this statement, it cannot be accepted at face value. Suppose that a cause of action arose more than 6 years before the issue of proceedings and a limitation defence is raised. The claimant wishes to rely on section 32(1). Which part of section 32 does he rely on? Is he proposing to allege that the defendant deliberately concealed a fact relevant to the claimant's cause of action? Or is he proposing to allege that he is seeking relief from the consequences of a mistake? In either case, when does the claimant say that the concealment or mistake could have been discovered? It cannot be right for the claimant to arrive at trial with evidence to make good one or other of those assertions without giving the defendant warning. As this court said in *Prudential CA* at [14] (citing Mummery LJ in *Boake Allen Ltd v HMRC* [2006] EWCA Civ 25, [2006] STC 606 at [131]):

> "Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an

impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action."

91. A similar question arose in the context of a summary judgment application in *Goldtrail Travel Ltd v Grumbridge* [2020] EWHC 1757 (Ch) where the claimant wished to rely on deliberate concealment so as to invoke section 32(1)(b) of the Limitation Act 1980 but had not pleaded a case on that issue. Chief Master Marsh dismissed the claim. He said at [51]:

> "No positive case about section 32(1)(b) has been put forward by the claimant. The claimant has not set out the facts it possessed and explained which essential facts it was missing. In a claim of this type, it is not just the facts that have to be considered but also what inferences may reasonably be drawn from them. The claimant has not explained why Mr Grumbridge, as a director of and indirect shareholder in BPI, was not made a party to the First Claim. It is not for the court to speculate why that decision was taken and whether there were objectively justifiable grounds for it. The absence of such a case makes it impossible to assess what essential facts the claimant did not possess that might trigger reliance on section 32(1)(b) of the 1980 Act. In my judgment, the absence of any positive case about limitation is fatal to the claimant because the real prospect of success test is being applied to an issue in relation to which the burden of proof rest[s] on the claimant. The burden is of course on the defendant to establish the grounds of the application, but where the claimant declines to explain its case on section 32(1)(b), the court is entitled to conclude that the usual limitation period applies. This suffices to determine the application in favour of Mr Grumbridge."

92. Adam Johnson J endorsed that conclusion on appeal: [2021] EWHC 1713 (Ch).

93. This case is a worse example because the test claimants' statements of case did not mention section 32(1) at all. The lack of a pleaded case under section 32(1)(c) in the present case has greatly complicated matters.

What did Henderson J decide?

94. The issues about limitation scheduled to the GLO originally agreed included:

> "**Limitation**
>
> (A) Can a claimant's claim properly be brought as a claim for restitution for mistake of law or must such claim be brought only as:
>
> (a) a claim for damages; and/or
>
> (b) a claim for restitution in respect of payment made pursuant to an unlawful demand?

(B) In either event, from what date does the applicable limitation period start to run?"

95. As we have said, at a case management conference on 20 December 2012 Henderson J gave directions for the agreement of issues. That was duly done. The agreed issues for trial about limitation differed from those identified in Schedule 3 to the GLO. The agreed issues included:

"**VIII. LIMITATION**

1 To what extent is the claim statute barred by a 6 year limitation period?

2 To what extent is the claim for recovery under a mistake of law barred by section 320 FA 2004?"

96. It will be noted that the specific question posed by the original definition of the GLO issues ("from what date does the applicable limitation period start to run") did not find its way into the issues for trial. The agreed issues asked a different question under VIII. 1 which is much more difficult to understand. The second of the limitation issues plainly relates only to the validity of section 320 of the Finance Act 2004. The first is more obscure. If one wants to be strictly accurate about the answer to issue 1, the answer is yes; because a claimant has six years in which to bring his claim. All that section 32(1)(c) achieves is a postponement of the start of that period. But that is not how the parties approached it. On one view it is simply asking whether in principle a claimant is entitled to rely on section 32(1)(c) to postpone the running of time, even though section 32(1 (c) is not mentioned in the question. In the absence of a pleaded case on section 32(1)(c) it is very unlikely that, in the context of a GLO issue, the judge was required to examine the granular details of a particular claim. Moreover, even on the basis that the law was as stated by the House of Lords in *DMG*, it would have been necessary for the test claimants to have pleaded the date of the relevant ruling by which the "truth" was revealed. The judge drew attention to the substitution of "*the* claim" (i.e. the specific claims of the test claimants) for the more general question originally posed: "*a* claimant's claim". This is certainly a tenable reading of the question posed at trial.

97. This case underlines the necessity of defining GLO issues with precision and in a way that means that they can be answered as GLO issues.

98. Henderson J set out the agreed limitation issues in his judgment at [248]. He went on to say that those questions "fall to be answered" in the light of the procedural history which he then set out. That procedural history concerned only the claims made by Prudential (and some of its subsidiaries) in the test case. It did not refer to the original limitation issues in the GLO at all. There are two relevant points that assist in understanding the judgment. The original claim form was issued on 8 April 2003. At that stage the only claimant was Prudential. It made claims for corporation tax in respect of dividends received from portfolio holdings in other EU/EEA states for accounting periods from 1995 to 2002. By an amendment made on 14 July 2004 two further claimants were added: Prudential Holborn Life Ltd ("PHL") and Scottish Amicable Life plc. Their claims were of a similar nature to those already pleaded by Prudential. Scottish Amicable subsequently dropped out of the proceedings.

99. Henderson J considered the question of limitation on two bases: first on the basis that section 320 of the Finance Act 2004 was compliant with EU law; and second on the basis that it was not. At [252] he said that:

> "Against this background, two questions were briefly argued before me. The first question was the extent to which the corporation tax claims of the second claimant ("PHL") are confined to a six year limitation period. The second was whether the ACT claims of both claimants (which were first introduced by amendment in October 2009) arise out of the same or substantially the same facts as their corporation tax claims. Neither question was argued in detail or at any length, from which I infer that the answers are not perceived on either side as having much practical significance."

100. Since section 320 was held by the CJEU in *Test Claimants in the FII Group Litigation v HMRC* (Case C-362/12) [2014] AC 1161 ("*FII CJEU3*") to be non-compliant, we are only concerned with the second basis. On that basis, he went on to say:

> "255. If, however, the section is invalid, the question arises whether it is open to PHL to pursue any claims in respect of payments of tax made by it before 14 July 1998. In principle, it seems to me that the answer to this question is Yes, because there would then be nothing to prevent PHL from relying on the extended limitation period for mistake-based claims in section 32(1)(c) of the Limitation Act 1980. I do not understand the Revenue to argue that PHL could with reasonable diligence have discovered its mistake before 14 July 1998. In practice, therefore, I can see no obstacle to PHL pursuing its mistake-based claims for periods before July 1998, always assuming that section 320 is invalid.
>
> 256. The claimants also suggested that it would in any event be possible for the claims of PHL to be related back to the date of issue of the original claim form by Prudential. I have no hesitation in rejecting that submission. The claim by PHL cannot be regarded as a claim made by Prudential. It is a claim made by a different company, relating to different dividends paid at different times. Even if the claim could be said to arise out of substantially the same facts as Prudential's claim, that would not avail PHL, because it is a different party.
>
> 257. The second question, assuming section 320 to be invalid, is whether the ACT claims can be related back to the dates of the respective claim forms. The question is probably academic, since it seems to me that the claimants would probably be able to rely on section 32(1)(c) on the ground that they could not have been aware of the invalidity of the ACT provisions before, at the earliest, the decision in *FII (ECJ) I* in December 2006: compare *FII (High Court)* at paragraph [267]. In case it matters, however, I will briefly state my views on the question."

101. 14 July 1998 is six years before the amendment by which PHL was added as a claimant.

102. Henderson J's order dealt with "the GLO issues not otherwise agreed" by means of a series of declarations. Declaration 11 was:

> "11. Issues VIII. 1-2 are answered in light of [*FII CJEU3*] as follows:
>
> The claims in mistake-based restitution (that is those successful claims listed in paragraph 8.A above) are not subject to the limitation period in section 320 of the Finance Act 2004 and are in time."

103. Henderson J refused HMRC permission to appeal against that declaration, although he granted permission to appeal on a number of other issues. When the matter came before this court, there was a discussion about what issues were open in the appeal. That discussion was caused largely by the inadequacy of the pleadings. HMRC renewed its application to appeal against part of declaration 11. The proposed appeal related only to ACT claims; it did not relate to corporation tax claims. But permission was refused. The judgment of the court said this:

> "158. The judge therefore had to decide (on the assumption that section 320 was valid) whether the amended claims relating to ACT arose out of the same or substantially the same facts as the claims already pleaded. He decided that they did. However, he said that his decision on that point was of little practical consequence because if section 320 was invalid, as was likely, Prudential would be entitled to rely on an extension of the limitation period under section 32(1)(c) of the Limitation Act 1980 which extends the limitation period in cases of relief from the consequences of a mistake. It was clear from the transcript that this was common ground. HMRC wished to appeal on the question whether the judge was right in what he decided; and also wished to argue that Prudential could with reasonable diligence have discovered the mistake earlier than it did. This was not an allegation that had been pleaded or raised before. Since the question of extending the limitation period under section 32(1)(c) was common ground before the judge, we refused to permit HMRC to argue the latter point. In the light of that an appeal against the judge's decision on the question whether the amended claims arose out of the same or substantially the same facts as the pleaded claims could have had no practical effect on the judge's order; so we excluded that issue from the appeal as well."

104. It is particularly to be noted that one of the reasons why this court refused permission to appeal was that there was no pleaded issue. What was common ground before Henderson J was that (if section 320 was invalid, as the CJEU ruled that it was) the claimants were entitled to rely on section 32(1)(c). The date of discoverability for the purposes of that section was simply not an issue. The fact that this court refused permission to appeal against those parts of Henderson J's order meant that it was impossible for HMRC to appeal further to the Supreme Court against those parts of the order. Moreover, as Mr Ewart said, the refusal of permission to appeal on certain issues by this court left undisturbed that part of the judgment and order of Henderson J relevant to those issues. The refusal of permission to appeal cannot be relied on as a separate substantive decision on those issues.

105. The first debate between the parties was whether Issue VIII was a GLO issue at all. Mr Ewart argued that the questions argued before Henderson J related to the specific position of Prudential and PHL. Since those issues were fact specific they could not have been GLO issues within the definition in CPR Part 19. The difficulty with this argument is that the order made by Henderson J did identify those issues as GLO issues. That was the

basis on which the trial before Henderson J took place. The judge rightly observed at [61] that with the benefit of hindsight those issues might not have been suitable for determination as GLO issues; and we agree.

106. The judge went on to consider what precise GLO limitation issues Henderson J actually decided. There are two aspects to consider. One is what Henderson J said in his judgment; and the other is what the order provided.

107. It is at this point necessary to remind ourselves that the meaning of the order is to be determined in the light of the reasons given for making it. Thus in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 the Court of Appeal of Jamaica remitted an arbitration award for reconsideration by the arbitrators. The order itself remitted the matter "to the Arbitrators to determine the issue of damages only." It was clear, however, from the reasons given by the court for remitting the award, that they were concerned with only one aspect of the claim for damages. Giving the advice of the Privy Council, Lord Sumption said at [13]:

> "…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

108. What Henderson J said in his judgment at [255] was that, if section 320 was disapplied as being in breach of EU law, then *in principle*, PHL was not prevented from relying on the extended limitation period for mistake-based claims in section 32(1)(c) of the Limitation Act 1980. That was and still is common ground. What he did not do, however, was to make a determination of when PHL's cause of action accrued. All that he said was that he did not understand HMRC to argue for a date of discoverability earlier than 14 July 1998. Why 14 July 1998? He referred to that date because it was 6 years before PHL was added as a claimant. Plainly, that date depended on the detailed procedural history of PHL's claim. Had a different claimant been added later, then on this basis a later date would have been in play. Although at [257] he referred to the decision in December 2006 in *Test Claimants in the FII Group Litigation v Inland Revenue Commrs* (Case C-446/04) [2012] 2 AC 436 ("*FII CJEU1*") he did not rule or declare that that was the date when the "truth" was revealed. His language in that paragraph was tentative on an issue that he regarded as academic. In addition, the date on which the CJEU gave its decision in *FII CJEU1* was not a pleaded date. As the judge rightly said, Henderson J did not make any determination in his judgment about when the mistake was discoverable.

109. As we have explained, the governing authority at the time of the trial was the decision of the House of Lords in *DMG*. The upshot of that decision, so far as relevant, was that the date of discovery of a mistake was the date of the judicial ruling that established the unlawfulness of the relevant UK tax provisions. In other words, had the date of discoverability been in issue at trial, the task for the court would have been to identify the judicial ruling which had that result. Necessarily the date of such a ruling is a single

date. Although there may be more than one candidate for the role, ultimately there is only one relevant ruling; and the date of the relevant ruling is in no way dependent on the procedural history of a particular claim which relies on that ruling to found a mistake-based claim. It follows, in our view, that if Henderson J had intended to answer the original GLO issue ("from what date does the applicable limitation period start to run") in accordance with the law as declared by *DMG*, he would have identified a single date applicable to all claimants on the group register, and incorporated that date in his order. But in our view that question was neither posed nor answered at the trial.

110. The order itself, however, declared:

> "11. Issues VIII. 1-2 are answered … as follows:
>
> The claims in mistake-based restitution (that is those successful claims listed in paragraph 8.A above) are …in time."

111. Issues VIII. 1-2 were, of course, designated by the order as GLO issues. But we do not consider that the answer given to those issues can be properly interpreted, in the light of Henderson J's judgment, as providing an answer that was intended to apply across the board. It is fact specific to the particular claims that Henderson J was trying. Nor is the declaration that "the claims … are… in time" an answer to the GLO issue posed by issue VIII. 1. It goes further than the question posed. For that reason also, we do not consider that HMRC are precluded from arguing that the date of discoverability is to be determined with the law as now declared by *FII SC2*.

112. Where GLO issues are decided in a test case, it is also necessary for the resulting order to make clear the extent to which the court has decided GLO issues and the extent to which it is then applying its decision on the GLO issues to the facts of a particular case. The bundling of both types of issues in declaration 11 has also complicated the case.

Otherwise order?

113. We add that, even if we are wrong about the meaning of Henderson J's order, for the same reasons as led the Supreme Court in *FII SC2* to permit HMRC to argue the limitation point, we would have ordered otherwise. It is also the case that because this court in *Prudential CA* refused HMRC permission to appeal on the limitation question HMRC were deprived of the opportunity to argue the point earlier, just as in *Arnold v NatWest* Walton J's refusal to certify a point of law deprived the tenants of the right to argue the point of interpretation in relation to the first rent review. As in the case of the Set-off Issue, it would not be right for the court to decide the cases remaining to be decided on a basis that is now known to be wrong in law.

The Pleading issue

Introduction to the Pleading Issue

114. As set out at [20 c)] above, the Pleading Issue comprised a main issue (whether AXAIUK had pleaded a claim in restitution for the recovery of unlawful tax which was paid as a result of its inability to offset unused DTR credits) and three sub-issues, of which the judge only resolved (ii) and (iii). The judge decided both the main issue and the two sub-issues in favour of AXAIUK, and HMRC appeal. We will address the main issue first.

115. To put it at its simplest, the main issue concerns a case where a company received foreign dividend income in Year 1, but the effect of the UK rules was that although it paid no more tax in Year 1 than if it had received UK dividend income, it did pay more tax in Year 2. It is now clear that its remedy is a claim in restitution for the excess tax paid in Year 2. The question is whether AXAIUK pleaded such a claim.

116. The judge explained the point in more detail by taking a hypothetical example (at [61]). This was as follows (we have slightly rearranged it but the substance is the same).

    a) Assume corporation tax is payable at 30%.

    b) In Year 1 a UK resident company ("A") receives a cash dividend of 70 from a non-UK company ("B"). It comes with a tax credit of 30. That is taxable at 100 (the dividend of 70 and the tax credit of 30). If A had no other income and no other losses, A's *prima facie* corporation tax liability would be 30, but A would be able to set off the credit of 30 leaving it with no tax to pay.

    c) Suppose however that A has a loss of 500 that can be set off against profits, and that the applicable corporation tax rules require 100 of this to be set off against the taxable income of 100 generated by the receipt of the dividend from B. The result is that A still has no tax to pay but only has 400 of the loss to carry forward instead of 500. Importantly however A cannot carry forward the 30 tax credit to future years, so it is effectively lost.

    d) In Year 2 A has taxable profits of 500. It sets off the 400 loss carried forward, leaving it with taxable profits of 100 on which it pays tax of 30.

    e) If however B had been a UK company, the dividend paid in Year 1 would have been exempt from corporation tax. So A would not have used 100 of the loss in Year 1, and would have had the whole 500 of loss to use in Year 2. It would therefore not have paid any tax in respect of Year 2.

    In such a case A's claim against HMRC is a claim in restitution to recover the 30 tax that it has paid in respect of Year 2 (which it would not have paid had the UK rules not been contrary to EU law).

117. It took some time for it to become clear that this was the taxpayer's claim, but as explained by the Supreme Court in *FII SC3*, this follows from the CJEU decision in *Salinen*. *Salinen* concerned the tax system in Austria which taxed certain non-Austrian dividends in much the same way as the UK taxed non-UK dividends, (referred to as "the imputation method"), whereas Austrian dividends were exempt from tax (referred to as "the exemption method"). One of the questions referred to the CJEU by the Austrian tax tribunal was whether EU law was infringed if the imputation method was used but a carrying-forward of credit in a loss year was not allowed (see the CJEU's judgment at [28]).

118. The answer given by the CJEU was Yes. As the CJEU referred to in *Salinen* at [156], the CJEU had already decided in *FII CJEU1* at [72] that "where a member state has a system for preventing or mitigating the imposition of a series of charges to tax or economic double taxation as regards dividends paid to residents by resident companies, it must treat dividends paid to residents by non-resident companies in the same way". This did not

preclude a system under which dividends from resident companies were exempt while dividends from non-resident companies were subject to taxation, so long as the latter came with the grant of an appropriate tax credit: see *FII CJEU1* at [73]-[74].

119. Now in *Salinen* the CJEU applied this to the case where the foreign dividend was received in a year where the receiving company made a loss but the tax credit could not be carried forward, as follows:

> "157. In the main proceedings, it is apparent from para 10(6) of the KStG [ie the Austrian tax legislation] that, under the imputation system concerned, dividends distributed by non-resident companies are included in the tax base of the company receiving them, thereby reducing, when a loss is recorded for the tax year in question, the amount of that loss by the amount of the dividends received. The amount of the loss that can be carried forward to subsequent tax years is thus reduced to the same extent. By contrast, dividends from resident companies, which are exempt, do not affect the tax base of the company receiving the dividends or, therefore, any losses that it may be able to carry forward.
>
> 158. It follows that, even if dividends distributed by a non-resident company and received by a resident company do not have corporation tax charged on them in the member state where the latter company is established in respect of the tax year in which those dividends have been received, the reduction of the losses of the company receiving the dividends is liable to result for that company, if the credit for the tax paid by the company making the distribution is not carried forward, in economic double taxation on the dividends in subsequent tax years when its results are positive (see, to this effect, *Belgium v NV Cobelfret* (Case C-138/07) [2009] STC 1127, [2009] ECR I-731, paras 39 and 40, and the order in *Belgium v KBC Bank NV* (Joined Cases C-439/07 and C-499/07) [2009] ECR I-4409, paras 39 and 40). By contrast, there is no risk of economic double taxation for nationally sourced dividends, because the exemption method is applied to them.
>
> 159. Where national legislation, such as that at issue in the main proceedings, does not provide for the credit for the corporation tax paid in the state where the company distributing the dividends is established to be carried forward, foreign-sourced dividends suffer, in a system such as that at issue in the main proceedings, higher taxation than that resulting from application of the exemption method for nationally sourced dividends.
>
> 160. In light of what is stated in para 156 of the present judgment, art 63 TFEU must be considered to preclude such legislation."

120. In its *dispositif* or formal ruling the CJEU therefore ruled:

> "Article 63 TFEU must be interpreted as:
>
> – precluding national legislation which grants resident companies the possibility of carrying losses suffered in a tax year forward to subsequent tax years and which prevents the economic double taxation of dividends by applying the exemption method to nationally sourced dividends, whereas it

> applies the imputation method to dividends distributed by companies established in another member state or in a non-member state, in so far as, when the imputation method is applied, such legislation does not allow the credit for the corporation tax paid in the state where the company distributing dividends is established to be carried forward to the following tax years if the recipient company has recorded an operating loss for the tax year in which it received the foreign-sourced dividends".

121. In *FII SC3* the Supreme Court applied this to the UK system of taxation: see the judgment of Lord Reed PSC and Lord Hodge DPSC (with whom Lords Briggs, Sales and Hamblen JJSC agreed) at [128]-[158]. In this passage they explained that dividends from UK resident companies were exempt from corporation tax, so that the underlying profits were only taxed once and "Economic double taxation was always avoided" [128]. By contrast dividends from non-resident companies were subject to corporation tax but with certain reliefs available either under domestic rules or double taxation treaties [129]. However this DTR relief was given against tax otherwise payable with the result that other reliefs which reduced taxable profits, such as management expenses or group relief, were taken account of first and the DTR might not be fully used [130]. The DTR could not however be carried forward and that gave rise to a problem under EU law [131]:

> "131. … As a result of the inability to carry forward unused credits, tax was liable to be paid in a subsequent year which would not have been payable if the unused credits had been carried forward. The consequence was indirect economic double taxation."

They then considered in some detail the CJEU decision in *Salinen*, summarising its reasoning as follows [138]:

> "138. In other words, the later tax liability arising from the failure of the Austrian tax system to enable the unused DTR credits to be carried forward amounted to indirect taxation of the earlier dividend income. It had not been directly taxed, but full relief had not been given for the foreign tax paid (or for the FNR [ie foreign nominal rate]). The result was unlawful economic double taxation, equivalent in effect to the postponement of an unlawful tax charge on the dividend income until a later year."

It followed that insofar as UK law prevented the carrying forward of unused DTR credits in full it was in breach of EU law [140].

122. They then considered the question of remedy [141]. They identified the solution to the problem as follows [145]:

> "145. … the problem can be resolved by disapplying the domestic rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income, to the extent that it prevents unused DTR credits from being carried forward and applied against tax liabilities arising in subsequent years, and giving effect instead to the EU rule that unused DTR credits (calculated on a FNR basis) can be carried forward for use against tax liabilities arising in subsequent years.…

> Looking to the future, therefore, any unused DTR credits (calculated on a FNR basis) must in principle be regarded as remaining available to be applied against other income in subsequent years, notwithstanding any statutory provisions or other domestic rules of law to the contrary effect."

123. At [146] they considered the situation where tax had already been paid, as follows:

> "146. What, however, of the situation where tax has already been paid as a result of the inability under domestic law to carry forward unused DTR? In that situation, the continued availability of the unused DTR credits cannot be considered to meet the EU requirement of "effective legal protection", since the state has received a payment of unlawfully levied tax at some point in the past and has had the use of the money since then, while the claimants have been out of pocket. Such circumstances fall within the *San Giorgio* principle, and call under EU law for the restitution of the tax, together with an award of interest: see, for example, the CJEU's judgment in *Littlewoods* [2012] STC 1714, paras 25-26."

124. After considering and rejecting some other arguments, they reverted to this point at [155] as follows:

> "155. … it is clear that a *San Giorgio* claim lies for the recovery of tax which was paid as a result of the impossibility of carrying forward unused DTR credits. The levying of the tax in question was unlawful under EU law, because it involved the less favourable treatment of foreign-sourced dividends than domestic-sourced dividends. It was for that very reason – because it would result in taxation which was incompatible with EU law – that the inability to carry forward the DTR credits was held in *Salinen* to be contrary to article 63 TFEU."

In domestic law, claims based on the *San Giorgio* principle should be classified as claims for restitution (either *Woolwich* claims or claims for the recovery of money paid under a mistake of law) [156].

125. Their conclusion was expressed as follows [158]:

> "158. Accordingly, we conclude that, in so far as tax was paid as a result of the inability to carry forward unused DTR credits, calculated at the higher of the FNR rate and the tax paid, a claim lies in restitution to recover that tax, together with interest, subject to the law of limitation."

126. We have set out the reasoning in *Salinen* and *FII SC3* at some length in the light of the arguments addressed to us, but we do not think there is any doubt as to the effect of the Supreme Court judgment. In terms of the judge's example set out at [116] above, the claim on those facts would be a claim in restitution (either a *Woolwich* claim, or a claim for money paid as a result of mistake) to recover the 30 paid in respect of Year 2. In the words of the Supreme Court at [146], it is that 30 that "has already been paid as a result of the inability under domestic law to carry forward unused DTR"; it is that 30 that has been received by the state at some point in the past; and it is that 30 in respect of which the taxpayer has been out of pocket since it paid it. EU law therefore requires a restitution claim for that tax in accordance with the *San Giorgio* principle. Hence as the Supreme

Court says in [158] a claim lies in domestic law in restitution to recover *that tax*, being tax that "was paid as a result of the inability to carry forward unused DTR credits".

AXAIUK's claims

127. For the purposes of the hearing before the judge, the parties were directed to serve statements of case. AXAIUK identified in its statement of case the payments that it claimed as a result of the inability to offset unused DTR credits. They fall into two groups:

    a) Payments of tax in respect of the accounting periods ending 1995 to 1998. These were paid on the 1 October after the end of each period (so that the payments were actually made on 1 October in each of the years 1996 to 1999). We were shown figures indicating that the total came to some £285,000.

    b) Payments of tax in respect of the accounting periods ending 2016 and 2017. These were paid on 1 October 2017 and 1 October 2018 respectively. They totalled some £8.3million.

    We will refer to these as "the 1996-1999 claims" and "the 2017-2018 claims" respectively.

128. For reasons explained below under the heading "Ouster", the relevant question is whether AXAIUK had pleaded these claims by 1 April 2010. We were for this purpose taken to two iterations of AXAIUK's pleadings, namely the claim as originally brought in 2003, and the claim as amended on 20 July 2009, which was the last amendment before 1 April 2010.

129. The claim form was originally issued on 8 April 2003. The Brief details of claim on the claim form included the following:

    > "1. Claims for declarations that sections 208 and 18 Schedule D Case V of the Income and Corporation Taxes Act 1988 in so far as they concern the payment of dividends and distributions from a company resident in another Member State of the European Union or the European Economic Area to a company resident in the United Kingdom and the Defendant's application of those sections to the Claimant are contrary to the articles of the European Economic Community Treaty referred to in the Particulars of Claim;
    >
    > 2. Claims for restitution of (and/or compensation for) monies paid or liable to be paid, loss, expense and damage suffered by the Claimant pursuant to a mistake of law and/or demands by the Defendant under the provisions referred to, those demands being contrary to the articles of the Treaty referred to above."

130. The claim form also contained the Particulars of Claim. Paragraph 2 pleaded that the claimant companies received dividends over the accounting periods referred to in the Schedule ("the Dividend Income") from companies in the EU/EEA. For AXAIUK the periods concerned were from 1990 to 31 December 2002. Paragraph 3 pleaded as follows:

> "The receipt of the Dividend Income gave rise to an immediate tax charge on the Claimant receiving it as it amounted to taxable income within the terms of s.18 Schedule D Case V of the Income and Corporation Taxes Act 1988 ("ICTA"). Had the Portfolio Companies been UK resident companies, the Claimants would not have been chargeable to corporation tax upon the Dividend Income by reason of section 208 of ICTA. The approximate liability to corporation tax for each Claimant is also set out in the Schedule."

Paragraph 4 pleaded that a UK resident company that invested in a company resident in another Member State was discriminated against and/or treated unequally as compared with a UK resident company investing in another UK resident company; Paragraph 5 that the provisions therefore impeded and discouraged the free movement of capital; and Paragraph 6 that the obligations imposed on the Claimant to pay tax on the dividends were contrary to various articles of the relevant European Treaty.

131. Paragraph 7 contained a prayer for relief. After a claim in Paragraph 7(a) for a declaration that the relevant dividend provisions were contrary to the Treaty and illegal, it continued:

> "(b) A declaration that the Claimants are not chargeable to corporation tax in respect of the dividends referred to in paragraph 2 above and restitution of (and/or compensation for) monies paid or liable to be paid, losses, expense or damage suffered by the Claimants in the circumstances referred to in paragraph 3 above pursuant to a mistake of law and/or demands by the Defendant, those demands being contrary to the Articles of the Treaty."

132. As amended on 20 July 2009 the relevant pleadings consisted of a re-amended claim form and a Second Amended Particulars of Claim. The brief details of claim included on the claim form slightly expanded on the original and included the following:

> "3. Claims for restitution of (and/or compensation for) monies paid or liable to be paid, reliefs used, loss, expense and damage suffered by the Claimants pursuant to a mistake of law and/or demands by the Defendant under the provisions referred to, those demands being contrary to the articles of the Treaty referred to above."

133. The Particulars of Claim were also somewhat expanded. Paragraph 2 now included dividends from companies in non-EU/EEA countries. The relevant prayer for relief was that in Paragraph 23(b) as follows:

> "(b) A declaration that the Claimants are not chargeable to corporation tax in respect of the dividends referred to in paragraph 2 above and restitution of (and/or compensation or damages for) monies paid or liable to be paid, reliefs used, losses, expense or damage suffered by the Claimants in the circumstances referred to above pursuant to a mistake of law and/or demands by the Defendants, those demands being contrary to the Articles of the Treaty."

That was effectively repeated in Paragraph 23(e) as follows:

> "(e) Restitution of (and/or compensation or damages for) monies paid or liable to be paid, reliefs used, losses, expense or damage suffered by the

> Claimants in the circumstances referred to in these Particulars pursuant to a mistake of law and/or demands by the Defendants, those demands being contrary to the Articles of the Treaty."

The 2017-2018 claims: the futurity point

134. Mr Wilmot-Smith, who argued this point for HMRC, had in effect two arguments. The first was applicable only to the 2017-2018 claims. It was that these claims had not been pleaded in 2003 or 2009 for the simple reason that one cannot plead a cause of action that has not yet arisen.

135. We accept this argument which is in our view well-founded. The 2017-2018 claims are claims in restitution (either *Woolwich* claims, or claims based on a mistake, although Mr Bremner in fact accepted that they would be the former). Like other claims in restitution they are money claims, that is they claim a specific sum of money from the defendant, in this case HMRC. We agree with Mr Wilmot-Smith that as a general proposition what is needed to plead a money claim is to plead the set of facts which is said to entitle the claimant to judgment for the amount claimed; and that one cannot plead a fact until it has happened. As he put it, one cannot plead a future fact.

136. Neither counsel adduced any relevant authority either for or against this proposition. But it seems to us to follow from basic principles. First, the purpose of pleading is to identify the facts alleged by the claimant which are said to justify the claim that he makes. This has long been the case and is now to be found stated in CPR r 16.4(1)(a) which provides:

> "16.4 (1) Particulars of claim must include–
>
> (a) a concise statement of the facts on which the claimant relies."

137. Second, this requires the claimant to plead the facts which constitute the particular cause of action relied on. In the well-known words of Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at 242G:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

Thus for example to plead a claim for money due under a contract, one has to plead the contract, the relevant term of the contract and the other facts which make the payment due. This all seems to us fairly elementary.

138. Indeed, save where a pleading refers to a point of law or gives the name of a witness (as in each case permitted by Practice Direction 16 para 12.2), a pleading should strictly speaking *only* plead material facts, that is those that are necessary for formulating a cause of action or defence as the case may be. See *Civil Procedure (The White Book) 2024* §16.0.1, *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) at [1] per Leggatt J (as he then was).

139. Third, there is no real doubt what a claim in restitution in general requires. Such a claim is a claim in unjust enrichment and has three central elements which the claimant must prove: (i) that the defendant has been enriched; (ii) that the enrichment was at the expense of the claimant; and (iii) that the enrichment was unjust. See eg *Capital Insurance Co Ltd v Samsoondar* [2020] UKPC 33, [2021] 2 All ER 1105 ("*Samsoondar*") at [18] per

Lord Burrows. Mr Bremner pointed out that Lord Burrows here refers to what an "ideal pleading" should contain, but as we read this passage he only meant that it was desirable but not essential to indicate that the claim was a claim in restitution for unjust enrichment; it remains necessary for the claimant to identify the facts which satisfy each of the three elements.

140. Fourth, the cause of action for recovery of money by way of a claim in restitution accrues at the time of payment: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 386F per Lord Goff. Hence where there is a series of payments, the claim to recover each such payment constitutes a separate cause of action which accrues on the date when that particular payment was made: *ibid* at 386G per Lord Goff, *Deutsche Morgan Grenfell Group plc v IRC* [2005] EWCA Civ 78 at [252] per Rix LJ, [293] per Buxton LJ.

141. From these propositions, none of which was, or could reasonably be, disputed, it seems to us to follow that the pleading of a claim to recover a payment in restitution requires the pleading of the fact that the payment has been made as this is a necessary ingredient of the cause of action, and until the particular payment has been made, the cause of action is not complete. To put it more simply, you cannot plead in 2003 or 2009 that you have made a payment in 2017 or 2018; but unless you can plead that, you have not pleaded what you need to in order to recover a payment made in 2017 or 2018.

142. The judge took a different view. He said:

> "121. I also consider that the pleadings summarised in paragraphs 116 and 117 above [ie the 2003 brief details of claim and Particulars of Claim] comply, albeit in a brief way, with Lord Burrows' guidance set out in paragraph 119.iii) above [ie in *Samsoondar*]. It is asserted that HMRC were enriched at the expense of the Claimants because the Claimants made actual payments of tax to HMRC. It is said that the enrichment was "unjust" because the payments were made as a consequence of a mistake of law, namely that the UK's corporation tax system complied with EU law, when it did not.
>
> 122. HMRC's argument that the Claimants' pleadings did not comply with CPR 16.4 is based on the proposition that they failed to identify the precise payments that "enriched" HMRC. It is true that the Particulars of Claim do not set out specific amounts of tax that were overpaid as a consequence of the Claimants' inability to carry forward unused DTR credits. That was, when the Particulars of Claim were served, a failure in particularisation. HMRC could, therefore, at the time have applied for further particulars and if no such particulars were forthcoming, have applied to strike out the relevant aspects of the Particulars of Claim as embarrassing.
>
> 123. However, a failure to provide full particulars does not mean that the Claimants failed to make any claim at all as regards the recovery of unlawful tax paid as a result of an inability to offset unused DTR credits. Moreover, any failure of particularisation has now been cured as the Claimants have sent HMRC detailed schedules of the tax they claim to have overpaid in this regard. Indeed, some of the debate before me was concerned with the granular detail of those schedules."

He then addressed a different point and continued at [126]:

> "126. That, I consider, also deals with HMRC's objection to the effect that the tax that is the subject of the Pleading Issue might have been paid only in accounting periods subsequent to that in which AXAIUK made its corporation tax claims. The parties were agreed that a claim in restitution can succeed only if an actual payment has been made which unjustly enriches the recipient. Therefore, if at the time AXAIUK made its corporation tax claims, HMRC had asked for full particulars of the payments said to have resulted in unjust enrichment, AXAIUK would not have been able to substantiate its claim by reference to payments which had not yet been made. To that extent, therefore, its claim might have failed. However, in my judgment for the reasons I have given it had still <u>pleaded</u> a claim based in unjust enrichment."

143. The difficulty we have with this analysis is that when the judge says in [121] that the 2003 pleadings complied, albeit briefly, with Lord Burrows' guidance in *Samsoondar*, he refers to the pleading as asserting that HMRC were enriched at the expense of the Claimants because "the Claimants made actual payments of tax to HMRC". But that could only be true of the payments that had already been made before 2003. It could not be the case of payments not made until 2017 or 2018. Similarly we agree with the judge in [126] that if HMRC had in 2003 (or 2009) asked for particulars of the payments AXAIUK would not have been able to particularise payments that had not yet been made and hence its claim to that extent might (and in our view would) have failed. But that seems inconsistent with his conclusion that AXAIUK had still pleaded (sufficiently) a claim in unjust enrichment. The question is not whether it had pleaded *a* claim, but whether it had pleaded the claims it now relies on. The fact that AXAIUK if asked in 2003 or 2009 would have been unable to give particulars of the payments made in 2017 and 2018 in our view demonstrates that it had not yet pleaded claims to recover those payments in unjust enrichment.

144. Before us Mr Bremner advanced a slightly different argument which was that both in 2003 and in 2009 the pleadings advanced a claim to restitution not only of "monies paid" but also of "monies … liable to be paid". That was, he said, sufficient to plead a claim in restitution, although he accepted that the appropriate relief that the Court could grant would be different at different points in time.

145. That raises the question whether a claim is sufficiently pleaded if the claimant says, in effect, (i) I have not yet made a payment of unlawfully demanded tax but I anticipate that I will; (ii) if I do in the future, I will claim it back.

146. We think the answer to that is No, and that this is not sufficient to plead a claim in restitution.

147. We can illustrate why by taking a simple analogy. Suppose a contract under which regular payments are due but where there is a dispute between the parties as to the amount due, for example a lease where the rent payable is reviewed by a formula which the landlord contends results in a rent of £100,000 per quarter and the tenant only £80,000. If the tenant pays £80,000 in each of the March and June quarters, the landlord can of course issue a claim form in July claiming payment of the two alleged underpayments of £20,000. That would be a claim in debt. Equally obviously the landlord could not include in the claim form a claim in debt for the anticipated underpayments of £20,000 in

September and successive quarters for the simple reason that they had not yet happened and might never do so; put another way there is no complete cause of action in debt until the due date for payment has passed, however likely it is that the tenant will indeed continue to underpay. If, as expected, the tenant does underpay in September, the landlord could no doubt then amend its claim to add a claim for a further £20,000 in debt. (Formerly the landlord might have had difficulty amending its existing claim and might well have had to issue a new one, as there was historically a general principle that the Court would not permit an amendment to add a claim that had accrued since the date of the writ: *Eshelby v Federated European Bank Ltd* [1932] 1 KB 263. But this was never an absolute rule (see *Alfred C Toepfer v Peter Cremer* [1975] 2 LLR 118 at 125 per Lord Denning MR, giving the examples of claims for mesne profits and interest); and the modern practice is that the Court has a discretion to permit such amendments to be made: see *Maridive & Oil Services (SAE) v CAN Insurance Co (Europe) Ltd* [2002] EWCA Civ 369, [2002] 1 All ER (Comm) 653 where the history is all set out.) So if the claim came to trial a year later, one would expect the landlord to have little difficulty in bringing the claim up to date by amending to include any further underpayments which had taken place between issue of the claim form and trial. In this way the landlord could, if successful on the point in issue, expect to obtain a money judgment for all the outstanding payments up to the date of trial (or indeed judgment).

148. But suppose the landlord does not do that. Instead it pleads at the outset that if the tenant pays £80,000 in any future quarter that will be an underpayment and entitle the landlord to payment. That would be a slightly odd way to plead its claim, but in principle we do not see why the landlord could not ask the Court for a declaration along those lines; the Court has ample power to declare the parties' rights. But we do not think that by itself would constitute a claim in debt or technically entitle the landlord to a money judgment, even in respect of underpayments between the date of the claim form and the date of judgment. It would in our view technically still be necessary – if the point were ever taken, which of course in practice it might not be – for the claim to be amended to add claims in debt before a money judgment could be entered.

149. The same in our view applies here to AXAIUK's claims for restitution of "monies … liable to be paid". We do not think that sufficed to enable AXAIUK to obtain judgment on the 2017-2018 claims. No doubt it would have been possible for AXAIUK to add the 2017-2018 claims by amendment once the payments had been made. But, as already referred to, in the present case the question is not whether such claims could be added but whether such claims had already been pleaded in 2003 or 2009. For the reasons we have given we do not think that they had, or indeed that they ever could have been.

150. We will therefore allow the appeal in relation to the 2017-2018 claims.

The 1996-1999 claims

151. The futurity problem does not affect the other group of claims, namely the 1996-1999 claims. All the 1996-1999 payments had been made before the claim form was issued and each of the pleadings in 2003 and 2009 included a claim for "restitution of monies paid". The only question therefore is whether the way in which AXAIUK's claims were articulated in 2003 or 2009 was sufficient to include a claim for repayment of those amounts.

152. We can start with the Brief details of claim pleaded on the original claim form in 2003 (see [129] above). This pleads in paragraph 2 a claim for "monies paid … pursuant to demands by the Defendant under the provisions referred to". That is a reference back to the provisions referred to in paragraph 1, namely "sections 208 and 18 Schedule D Case V ICTA 1988" which are said to have been contrary to articles of the Treaty. Those are the provisions which respectively taxed income arising from non-UK possessions (s.18, Schedule D Case V – although in fact AXAIUK was taxed under Schedule D Case I, which had been added by 2009) and exempted dividends and other distributions from UK-resident companies (s.208). On a natural reading of this paragraph therefore the claim is for monies paid under those provisions (in other words Year 1 payments), and not monies paid under other provisions in subsequent years (Year 2 payments).

153. Paragraph 2 of the Brief details also pleads a claim for "monies paid … pursuant to a mistake of law". The mistake is not here identified but in context the obvious meaning is that it refers to the mistake that the sums required to be paid under the provisions referred to were lawfully due.

154. The Brief details should be read together with the Particulars of Claim endorsed on the claim form ([130] and [131] above). Here paragraph 3 pleads that the receipt of the Dividend Income gave rise to an immediate tax charge; paragraph 6 pleads that the obligations imposed on the Claimants to pay tax upon the dividends were contrary to various Articles of the Treaty; and paragraph 7(b) claims a declaration that the Claimants are not chargeable to corporation tax in respect of the dividends, and restitution of "monies paid … in the circumstances referred to in paragraph 3 above pursuant to a mistake of law and/or demands made by the Defendant, those demands being contrary to the Articles of the Treaty".

155. The natural way to understand these paragraphs together is that it is the immediate tax charge (that is, the Year 1 charge) and the obligation to pay it that is contrary to the Treaty; that the Claimants are therefore not chargeable to that tax; and that they seek repayment of the tax they have paid in those circumstances. That seems to us to plead a claim for repayment of the Year 1 taxes, not of the Year 2 taxes.

156. Mr Bremner said that this was to take too strict a view. He pointed out that paragraph 7(b) refers to "tax in respect of the dividends" and that the analysis adopted by the CJEU in *Salinen*, and applied by the Supreme Court in *FII SC3*, was that the Year 2 taxes were a form of economic double taxation of the dividends: see *Salinen* at [158] (see [119] above), *FII SC3* at [131] and [138] (see [121] above). In his submission therefore the claim in paragraph 7(b) of the Particulars of Claim was wide enough to include restitution of monies paid in Year 2 as such monies did constitute tax in respect of the dividends in Year 1.

157. This is an ingenious attempt to squeeze the Year 2 claims into the words of paragraph 7(b). But pleadings are intended to give fair notice to the other party of the claims that are made. We do not consider that anyone reading the Particulars of Claim served in 2003 would have understood that the claim extended any further than a claim to recover any payments of corporation tax charged on the dividends in Year 1. It is that tax which is referred to in paragraph 3 ("the immediate tax charge"); and it is that tax ("tax upon the dividends") which is said in paragraph 6 to be contrary to the Articles of the Treaty. When therefore paragraph 7(b) seeks a declaration that the Claimants "are not chargeable to corporation tax in respect of the dividends" we consider that no-one would reasonably

understand that as intended to include tax chargeable in Year 2 on other income. That is so even though it can now be seen that the basis for claiming back tax paid in Year 2 is to prevent what would otherwise amount to indirect economic double taxation of the dividends in Year 1. This explains why in economic terms the UK regime as a whole was contrary to the Treaty. But it does not mean that the tax paid in Year 2 is in legal terms "tax in respect of the dividends".

158. The judge took a different view. He said at [125]:

> "125. The flaw in [Mr Ewart's] submission is that, as has been made clear in both *Salinen* and *FII SC3*, a claim for restitution of tax overpaid in the example set out in paragraph 108 is in effect a claim for restitution of tax overpaid on the overseas dividends themselves, rather than a claim for restitution of "other tax" as Mr Ewart submitted."

But in our view the fact that the tax paid in Year 2 is "in effect" tax overpaid on the dividends themselves (or as Mr Bremner put it is "in substance rather than form") is not enough to mean that a claim for repayment of corporation tax paid in respect of the dividends is to be reasonably understood as including a claim for repayment of the Year 2 tax.

159. And when paragraph 7(b) then refers to a claim in restitution for monies paid pursuant to a mistake of law and/or demands by HMRC contrary to the Articles of the Treaty, that too, as with the Brief details of claim, is in our view to be understood as referring to monies paid by way of corporation tax levied under s. 18 Schedule D Case V on the dividends in Year 1, as it is that charge to tax which is said to be contrary to the Articles of the Treaty and the mistake of law in context is to be understood as a mistaken belief that that charge was lawful. Again we do not consider that anyone reading the Particulars of Claim in 2003 would have understood that this claim went any wider, or was to be read as including a claim for restitution of monies paid in Year 2.

160. Indeed Mr Bremner took us through some of the very lengthy history of the successive development of thinking on this issue both at CJEU level and in the UK courts, all of which served to demonstrate that no-one in 2003 understood that the true analysis in the case of unused DTR relief was that the Year 2 tax was unlawfully exacted because it amounted to indirect double taxation in respect of the Year 1 dividends. It is not therefore surprising that the pleading should be read as not including such claims, which had not then been thought of.

161. As for the 2009 iteration of the claim, the Brief details of the claim, although expanded slightly, do not take the matter any further (see [132] above). Here too paragraph 1 seeks a declaration that s.208 and s.18 Schedule D Cases I and V were contrary to articles of the Treaty; and paragraph 3 claims restitution of monies paid pursuant to a mistake of law and/or demands by HMRC contrary to the articles of the Treaty. As with the 2003 claim form, this seems to us, read naturally, to refer to demands by HMRC for payment of tax under the provisions which are said to be contrary to the Treaty, and to a mistake of law in believing that such payments were lawfully due.

162. The relief sought in the 2009 Particulars of Claim (see [133] above) also slightly expands on the 2003 pleading but we again consider that it is naturally read as limited to a claim for restitution of monies paid by way of tax charged on the dividends in Year 1 for the

same reasons as with the 2003 pleading. It is true that it refers in paragraph 23(b) to "monies paid … in the circumstances referred to above" and in paragraph 23(e) to "monies paid … in the circumstances referred to in these Particulars", and the Particulars themselves are considerably expanded from what they were in 2003. But in each case the monies are said to have been paid pursuant to a mistake of law or demands by HMRC contrary to the Articles of the Treaty, and it remains the case that the provisions that are said to be contrary to the Articles of the Treaty are the provisions charging tax in Year 1. Nowhere in the pleading is there any pleading of the case now made that it is the inability to carry forward unused DTR relief that is contrary to the Treaty and the consequential payment of tax in Year 2 that is sought to be reclaimed.

163. It is also true that both paragraphs 23(b) and (e), unlike the claim in 2003, refer to "reliefs used". But read naturally this refers to either a claim for "restitution of … reliefs used" or "compensation for … reliefs used". We are not concerned with the latter, and the former cannot in our view be understood as including a claim for restitution of taxes paid in Year 2 because of reliefs used in Year 1. It is, rather, a claim for restitution of the value of the reliefs used themselves. A claim along these lines was in fact argued in the *FII* litigation, but rejected by this Court: see *Test Claimants in the FII Group Litigation v HMRC* [2010] EWCA Civ 103 at [149], [151].

164. We therefore conclude that the 1996-1999 claims were not pleaded in either 2003 or 2009. Mr Bremner submitted that AXAIUK had done enough to challenge the lawfulness of the UK system, and claim back monies paid as a result. He said that it cannot be right that a litigant has to predict the precise basis on which a domestic court might ultimately arrive at a conforming construction of the UK provisions. But for the reasons we have given we do not think that on a fair reading of what was pleaded in 2003 or 2009 the claims now made were encompassed within their terms. It is no doubt right that a litigant should not normally be penalised for failing to predict quite how the law in a complex and constantly changing area like this would evolve over what has been an unusually protracted period. In most cases the solution is to permit amendment of the way in which a claim is framed, so long as it is based on substantially the same facts. But in the present case the question is not whether the claims as now understood can now be pleaded; the question is whether they were pleaded before 2010. We do not consider that they were.

165. We therefore allow the appeal in relation to the 1996-1999 claims as well.

The first sub-issue: ouster

166. Our conclusions on the main issue mean that there is no separate issue for us to resolve under either of the two sub-issues. But we should briefly explain why that is so, starting with the first sub-issue.

167. Paragraph 51 of Schedule 18 to the Finance Act 1998 as enacted contained provisions enabling companies to claim repayment of overpayments of tax paid by mistake. By section 100 and Schedule 52 paragraphs 12 and 13 of the Finance Act 2009, new paragraphs 51 to 51G were substituted for the existing paragraph 51. By section 100(2) FA 2009 the amendments made by Schedule 52 had effect in relation to claims made on or after 1 April 2010.

168. The new paragraph 51 as substituted provided, among other things, as follows:

> "51(1) This paragraph applies where—
>
> (a) a person has paid an amount by way of tax but believes that the tax was not due, or
>
> (b) a person has been assessed as liable to pay an amount by way of tax, or there has been a determination or direction to that effect, but the person believes that the tax is not due.
>
> (2) The person may make a claim to the Commissioners for Her Majesty's Revenue and Customs for repayment or discharge of the amount.
>
> …
>
> (6) The Commissioners for Her Majesty's Revenue and Customs are not liable to give relief in respect of a case described in sub-paragraph (1)(a) or (b) except as provided—
>
> (a) by this Schedule and Schedule 1A to the Taxes Management Act 1970 (following a claim under this paragraph), or
>
> (b) by or under another provision of the Corporation Tax Acts."

169. It is common ground that paragraph 51(6) effects an ouster under which a claim for repayment falling within paragraph 51(1)(a) or (b) can only be pursued under the provisions there referred to; but that the effect of section 100(2) is that this does not apply if the claim had already been made before 1 April 2010.

170. Since we have decided the pleading issue, both in respect of the 2017-2018 claims and in respect of the 1996-1999 claims, in favour of HMRC it follows that these claims had not already been made before 1 April 2010 and are therefore precluded by paragraph 51(6).

171. Mr Wilmot-Smith also advanced an argument that the 2017-2018 claims would have been ousted even if we had held that they had been pleaded before 1 April 2010, but it is not necessary for us to consider it.

The second sub-issue: income tax set-off

172. We also do not need to resolve the second sub-issue. This concerns the interaction of income tax deducted at source and the carry forward of unused DTR.

173. The judge explained the point using rounded figures. The detail is given in his judgment but for present purposes, we can simplify the point by saying that in its 1995 accounting period AXAIUK calculated its corporation tax liability at c. £6.2m, against which it set some £6m of income tax. This was income tax that had been deducted from payments it had received in the year and that could either be set against a liability for corporation tax or claimed by way of repayment. But unknown to AXAIUK it is now clear that it also had c. £500,000 of unused DTR relief carried forward from previous years.

174. HMRC's case was that the DTR relief was all used in reducing the corporation tax liability of AXAIUK for its 1995 accounting period before the application of the income

tax set-off, and therefore there was nothing available by way of DTR relief to carry forward into future years. On that view HMRC accepted that some of the income tax could have been claimed by way of repayment, but AXAIUK were out of time to do that. AXAIUK's case was that the DTR relief continued to be carried forward until there was an actual payment of corporation tax which could then be reclaimed in accordance with the analysis in *Salinen* and *FII SC3*.

175. The judge preferred AXAIUK's case. But as can be seen the point does not arise unless the claims were duly pleaded and for the reasons we have given above in our view they were not. In those circumstances it is not necessary to resolve the quite complex issues that arise on the income tax set-off, and we do not propose to do so. We will simply say therefore that we should not be taken to either endorse or disapprove of the judge's decision – there are undoubtedly points to be made on both sides.

Conclusion

176. We dismiss the Claimants' appeal on the Limitation issue and Set-off issue, and we allow HMRC's appeal on the Pleading issue.