Neutral Citation Number: [2019] EWHC 688 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

HC-2014-000553
ROLLS BUILDING
FETTER LANE
LONDON EC4A 1NL

20 March 2019

Before

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT

BETWEEN:

TEST CLAIMANTS IN CLASS 8 OF THE CFC & DIVIDEND GROUP LITIGATION

Claimants

-v-

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendants

GRAHAM AARONSON QC,
DAN MARGOLIN QC AND KATHERINE BLATCHFORD
(Instructed by **Joseph Hage Aaronson LLP**) appeared on behalf of the Claimant

DAVID EWART QC AND BARBARA BELGRANO (Instructed by **HMRC Solicitor's Office)** appeared on behalf of the Defendant

Hearing dates: 11-12 June 2018, 18 January, 20 February and 20 March 2019

JUDGMENT

THE CHANCELLOR:

1. On 20 February 2019 I dealt with all the applications for permission to appeal following my judgment of that date. I granted permission to the claimants to appeal my determinations on Issues 1, 3 and 4 and on the third disputed issue. This judgment should be read in the context of my main judgment dated 20 February 2019. I do not propose to redefine terms or provide the citations for cases mentioned in that judgment.

2. HMRC applied on that occasion for permission themselves to appeal Issue 4. That application was, however, hotly disputed by the claimants on the basis that it was not open to HMRC to raise an issue by way of appeal from Issue 4. As a result, I adjourned HMRC's application for permission to appeal Issue 4 until today, giving directions for the parties to file skeleton arguments. There have been three lengthy skeleton arguments filed and two fat bundles of documents. Even then in the course of argument today, I have had my attention drawn to yet further correspondence that was admittedly in the trial bundles but was not actually referred to in the course of the trial before me.

3. I need to bear in mind that this is an application for permission to appeal my decision on Issue 4 to the Court of Appeal. I have already given the claimants permission to appeal my decision on Issue 4 to the Court of Appeal; the question is only whether I should also give HMRC permission to appeal my decision on Issue 4 to the Court of Appeal.

4. The test for the grant of permission to appeal is whether there is a real prospect of the appeal succeeding or some other reason why an appeal should be heard. Both grounds are I think relied upon by HMRC.

5. In addition, Mr David Ewart QC, counsel for HMRC, submits that his preferred

option would be for me to adjourn his application for permission to appeal Issue 4 until after it is known whether he has obtained permission from the Supreme Court to appeal FII CA 2 on the question of limitation.

6. In outline HMRC submits, put very simply, that Issue 4 was an open issue, agreed to by the claimants, and they cannot now dictate what HMRC should argue or, more accurately, cannot argue, in relation to it. Issue 4 was "Is the date of constructive discovery of mistake either 8 March 2001, 12 December 2006, 13 November 2012 or some other date?" As the matter was argued before me the claimants contended for 13 November 2012 and HMRC accepted that because of the decision in FII CA II, the correct date had to be 12 December 2006.

7. That date of 12 December 2006 was the date of the decision in FII CJEU 1, and the date for which the claimants argued before me of 13 November 2012 was the date of the decision in FII CJEU 2 (see paragraphs 125 to 127 of my main judgment in this case). The claimants argued that 13 November 2012 was the first date on which they could have known how much to claim in respect of overpaid corporation tax. I determined, as is apparent from my judgment, that I was bound by the Court of Appeal in FII CA 2 to decide that the answer to Issue 4 was 12 December 2006.

8. In mounting its application for permission to appeal, however, HMRC relies on their skeleton argument for the trial before me (dated 25 May 2018) where they said at paragraph 77 that they would be arguing for 12 December 2016 in this court, because this court was bound by FII CA 2 but that they "reserved the right to argue in a higher court that the date of constructive discovery is 8 March 2001 pending consideration of their application to appeal [FII CA 2]".

9. In fact, however, Mr Ewart submits that HMRC was reserving their position in respect of a different argument to the effect that DMG, the case which underlies the decision in FII CA 2, was wrongly decided by the House of Lords so that no specific discovery date is appropriate to these cases. If that were correct, according to HMRC's argument now, the limitation period would begin to run once a claimant had good reason to believe that a mistake had been made. It is important to understand that HMRC wish to argue that Lord Brown's dissenting judgment in DMG (see in particular paragraphs 173 to 174 of that judgment) was correct and that the majority were wrong.

10. HMRC submit that the claimants' objection to their being granted permission to appeal on this ground is ill-founded because preliminary Issue 4 was agreed between the parties as a preliminary issue for the court to decide, and includes the option for "some other date". HMRC submit that all they are doing is providing some other date; namely, the date upon which a claimant has good reason to believe that a mistake has been made.

11. On the other side of the argument, the claimants submit that HMRC has vacillated as to which point it wishes to argue, saying from time to time that it wishes to argue for the 8 March 2001 date, and on other occasions that it wishes to argue for the limitation period only beginning to run once a claimant has good reason to believe that a mistake has been made.

12. In my judgment, that vacillation does not make much difference to what I have to decide, simply because Mr Ewart has now nailed his colours to the mast, saying that the only basis on which HMRC wish to appeal Issue 4 is on the basis that DMG was wrongly decided and that Lord Brown's dissenting judgment was

correct.

13. In these circumstances, therefore, I have to decide whether to grant permission to appeal, deny it, or adjourn the application to a date when the Supreme Court has decided the application for permission to appeal in FII CA 2.

14. The principles here are clear. I have decided questions already in my judgment about which disputed issues HMRC can run and which it cannot. I have done so on the basis that the whole substratum of a GLO provided for by CPR 19.12 is that decisions made will bind all the claimants. The idea, therefore, of the Prudential test case leading to the decisions of the High Court, Court of Appeal and Supreme Court in what are known as Portfolio Dividends cases, was that they would bind the claimants in this Class 8 GLO unless the facts were different in specific Class 8 GLO cases.

15. Unfortunately, however, the limitation questions decided in Portfolio Dividends HC 1 and Portfolio Dividends CA were not very clearly defined and eventually turned on a pleading point which led to HMRC being refused permission to appeal by the Court of Appeal in Portfolio Dividends CA.

16. I have looked at the orders made by Mr Justice Henderson in Portfolio Dividends HC 1 and by the Court of Appeal in Portfolio Dividends CA, and it appears that the limitation arguments decided there were on a somewhat different basis from the way they have been put before me. That is not surprising because the Portfolio Dividends litigation has run alongside the FII litigation and the decisions have been interspersed so that the formulation of issues and the way the cases have progressed has been incredibly complex.

17. The key point, as it seems to me, is that Prudential's claims in Portfolio Dividends

were issued in 2003, much earlier than the claims in the Class 8 GLO with which I am now dealing. Accordingly, Mr Ewart has been able to submit that even if DMG were wrong, and the limitation period began to run once a claimant had good reason to believe that a mistake had been made, it would have made no difference to the argument in Prudential (Portfolio Dividends CA). That is because, as I say, Prudential's claims were issued in 2003 and, as Mr Ewart put the argument to me, nobody, let alone HMRC, could have suggested that Prudential had good reason to believe that a mistake had been made before 1997. If that is the case, then it is hard to see how a point of law was decided in Prudential against HMRC on the issue that they now wish to run.

18. In those circumstances, it does not seem to me that there is an insuperable hurdle to HMRC seeking to argue in the Supreme Court in this case that DMG is wrong and that another date is applicable, namely, the date on which the claimants in this case had good reason to believe that a mistake had been made.

19. Mr Daniel Margolin QC, for the claimants, has argued persuasively in his skeleton that this is an unfortunate result in one way because much money has been expended on litigating Prudential and on litigating this case and because the claimants in this case paid a part of the cost of litigating Prudential and expected it to determine all legal issues that arose that were applicable.

20. He further submits, and I accept, that if HMRC are right about their new argument it will entail a factual enquiry in this case in respect of each claimant in the Class 8 GLO.

21. But as it seems to me those points do not affect the very limited question that I have to decide, which I repeat is simply whether there is a real prospect of

HMRC succeeding on an appeal from my decision on Issue 4 or whether there is some other reason for an appeal to be heard. Both sides accept that if I grant HMRC permission to appeal, the Court of Appeal cannot decide the point in HMRC's favour. Only the Supreme Court can do that, so some application will need to be made to the Court of Appeal to enable the appeal to be dismissed, and then for the Court of Appeal to consider whether permission should be granted to take the matter to the Supreme Court. Neither side, however, knows at this stage whether permission will be granted by the Supreme Court to HMRC to argue the same point on an appeal from FII CA 2. That may or may not happen.

22. In my judgment it is not desirable for me to adjourn this application for permission to appeal; rather, I must deal with it on the facts and the law as it exists now. It would be most undesirable to put a decision off on the basis that other decisions may be made in the future by higher courts which may affect it. I therefore have to decide the question today, doing the best I can. As I have said, no legal question has been decided in Portfolio Dividends CA which prevents HMRC seeking to argue that DMG is wrong. All that was decided in that case (and in Portfolio Dividends HC) was that Prudential's claims were not barred by limitation, and HMRC could not raise new points on appeal not having pleaded them. The question that the parties agreed in Issue 4 allowed such arguments to be run and HMRC reserved its position, not specifically in relation to this point, but reserved its position in relation to other decisions and other possible arguments, which does not make it wholly unmeritorious for them to wish to raise this point again in the circumstances that they have.

23. It seems to me, therefore, that since the facts are different in the Class 8 GLO and

the question of whether DMG is right or wrong may specifically lead to a different outcome in this GLO from the outcome in Portfolio Dividends, it is appropriate to grant permission to appeal. I will, however, limit HMRC to the argument that they have adumbrated before me, namely that DMG was wrongly decided, so that no discovery date was appropriate, but that limitation for these claimants began to run once that claimant had good reason to believe that a mistake has been made, as suggested by Lord Brown in his dissenting judgment in DMG. I am not limiting HMRC to the form of words that I have used to describe the point, since on my reading of Lord Brown's dissenting judgment he seems to me to approve several different formulations. Obviously the Supreme Court, if it decides in HMRC's favour on appeal from FII CA 2, will have its own view as to which, or indeed a different, formulation is appropriate.

24. For those reasons I grant permission, not on the basis that HMRC has a real prospect of success, which has not really been argued before me, but on the basis that there is some other good reason for an appeal to be heard, namely, to keep this point open for the parties to this Class 8 GLO. I do not think that HMRC is debarred, on the principles that I have applied in my judgment, from raising the point, notwithstanding that this case is part of the same GLO as the Portfolio Dividends decisions. The point will only become relevant if HMRC persuades the Supreme Court to give it permission to argue it on appeal from FII CA 2, and if HMRC is then successful at the substantive hearing.