Neutral Citation Number: [2023] EWHC 944 (Ch)

Case No: RL-2003-000002

CFC AND DIVIDEND GLO

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

Rolls Building
Fetter Lane
London, EC4A 1NL

26 April 2023

Before:

MR JUSTICE RICHARDS

- -

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

- and –

(1) COMMISSIONERS OF INLAND REVENUE
(2) THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS

Defendants

- -
- -

Jonathan Bremner KC (instructed by **Joseph Hage Aaronson LLP**) for the **Claimants**
David Ewart KC, **Barbara Belgrano**, **Laura Ruxandu** and **Frederick Wilmot-Smith** instructed by the **General Counsel and Solicitor for HM Revenue & Customs** for the **Defendants**

Hearing dates: 15 to 17 February 2023
Further written submissions: 21 March 2023

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

This judgment was handed down remotely at 10.00 am on 26 April 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

Mr Justice Richards:

INTRODUCTION

Overview of the nature of the underlying claims of AXAIUK and GREA

1. C6 and C7 (together the "Claimants") appear on the register of the CFC and Dividend Group Litigation Order (the "CFC/Dividend GLO") which is discussed further below. C6 and C7 have very similar names. To avoid confusion, I will refer to C6 as "AXAIUK" and will refer to C7 as "GREA" (since its former name was Guardian Royal Exchange Assurance plc).

2. The CFC/Dividend GLO was established in 2003. Litigation on the issues it raises has thus been going on for nearly 20 years. I will not endeavour to provide a comprehensive summary of the history of the CFC/Dividend GLO or other group litigation orders under CPR 19.11 ("GLOs") by which taxpayers have sought to make claims against the Defendants (together "HMRC"). I will assume that any reader of this judgment has a good grounding in the general issues to which the CFC/Dividend GLO gives rise so far as relevant to this application.

3. I will also assume that any reader of this judgment has a secure grasp of the following concepts:

    i) the difference, in domestic law, between on the one hand, a claim for restitution of tax paid in consequence of a mistake of law and, on the other, a claim for tax paid or overpaid as a consequence of an unlawful demand (often referred to as a *Woolwich* claim); and

    ii) the difference, as a matter of EU law, between a claim for damages against a member state that has acted in breach of EU law obligations (often referred to as a *Francovich* claim) and a claim for refund of tax levied by in the UK in breach of EU law rules (often referred to as a *San Giorgio* claim).

4. Since the litigation concerning the UK's tax treatment of overseas dividends has been going on for so long, it has generated a number of judgments, both of the domestic courts and of the Court of Justice of the European Union and its predecessor, the European Court of Justice (together the "CJEU"). I will use the naming convention commonly used in cases of this kind of referring to the applicable group litigation order (or representative taxpayer), the court and the number of the judgment in that court. The principal judgments in GLO cases referred to in this judgment are as follows. Other cases will be introduced as the discussion in this judgment develops:

Abbreviation	**Citation**
Prudential HC	*Prudential Assurance Co Ltd v HMRC* [2013] EWHC 3249 (Ch)
Prudential CA	*Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376
Prudential SC	*Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39
FII CA1	*Test Claimants in the FII Group Litigation v HMRC* [2010] EWCA Civ 103

FII SC1	*Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners* [2012] UKSC 19
FII SC2	*Test Claimants in the Franked Investment Income GLO v HMRC* [2020] UKSC 47
FII SC3	*Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2021] UKSC 31
FII CJEU1	Case C-446/04 *Test Claimants in the FII Group Litigation v IRC* [2007] STC 326,
FII CJEU3	Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation*

5. The relevant issues to which the CFC/Dividend GLO gives rise can, very broadly, be summarised as follows:

   i) Members of the GLO were challenging (a) the UK corporation tax regime that dealt with the charge to corporation tax on dividends received from non-UK resident companies before the law changed in 2009 ("corporation tax claims") and (b) the way in which UK companies' obligations to account for advance corporation tax ("ACT") was determined prior to 1999 when ACT was abolished ("ACT claims").

   ii) Both corporation tax claims and ACT claims involved the proposition that the UK tax regime discriminated unfairly between the treatment of dividends received from other UK resident companies and dividends received from companies resident in the EU/EEA or in "third countries".

   iii) The nature of that discrimination insofar as relating to corporation tax claims is summarised in paragraphs [3] to [5] of the judgment in *Prudential SC*. It revolved around the amount of double taxation relief ("DTR") that was available to be set off against corporation tax chargeable on non-UK dividends. The nature of that discrimination insofar as relating to ACT claims is summarised in paragraphs [126] and [127] of *Prudential HC*.

6. It is now settled law that, in principle, taxpayers are entitled to a restitutionary remedy in relation to both corporation tax claims and ACT claims. Questions of both quantification and limitation remain with the following points being relevant:

   i) The limitation issue has given rise to conflicting decisions of the House of Lords and Supreme Court. It is now settled law that taxpayers seeking a restitutionary remedy in respect of ACT claims and corporation tax claims are entitled to take the benefit of s32(1)(c) of the Limitation Act 1980 (the "Limitation Act") with the result that the period of limitation would not begin to run until a claimant discovered the mistake or could with reasonable diligence have discovered it (referred to throughout this judgment as the date of "constructive discovery").

   ii) In *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49 ("*DMG*") the House of Lords held that the date of constructive discovery was the date of the judicial ruling that established the unlawfulness of the relevant UK tax provisions. That was a favourable position from claimants' perspectives as many had made their claims before there was any definitive ruling of the

CJEU that the UK's corporation tax system infringed principles of free movement of capital. On the basis of *DMG*, the limitation period for such taxpayers would not start to run until after they issued proceedings.

iii) *DMG* was overruled in November 2020 by the Supreme Court in *FII SC2*. Following *FII SC2*, very broadly, a limitation period under s32(1)(c) will start to run when a claimant discovered, or could with reasonable diligence have discovered, that there was a "worthwhile claim".

iv) *FII SC2* therefore effected a radical re-examination of the law on s32(1)(c). Before that judgment, many claimants could simply have assumed, given the dates on which they made their claims and the state of EU jurisprudence in the 6 years before, that they were obviously in time. Many claimants affected by *FII SC2* will no longer be in that position and now need to consider when a date of discovery arose under the new formulation of the law in *FII SC2*.

v) *DMG* was not the only judgment of the highest court in the UK to be overturned during the currency of this litigation. *Sempra Metals Ltd v IRC* [2007] UKHL 34 ("*Sempra Metals*") held that where tax was paid prematurely as a consequence of a mistake in law, the appropriate remedy in restitution required HMRC to pay compound interest for the applicable period. That was of relevance to, among others, claimants who had "unlawful ACT" (that is ACT levied in excess of the amount that should have been levied in accordance with EU law) which was carried forward and set off against a lawful obligation to pay mainstream corporation tax ("MCT"). *Sempra Metals* was overruled by the judgment of the Supreme Court in *FII SC3*.

The preliminary issues and the context in which they arise

7. AXAIUK has made corporation tax claims which it first brought on 8 April 2003. Its claims relate to "portfolio shareholdings", that is shareholdings in companies, both in the EU/EEA and in third countries, in which AXAIUK holds 10% or less of the voting power. AXAIUK's claims go back to its accounting period ended 31 December 1995, more than 6 years before it made its claims, so AXAIUK needs to rely on the extended limitation period in s32(1)(c) of the Limitation Act. AXAIUK makes no ACT claims.

8. GREA was added as a claimant in these proceedings on 20 July 2009. It makes ACT claims, but no corporation tax claims. Its ACT claims go back to 14 January 1997 and so, like AXAIUK, it needs to take the benefit of s32(1)(c) of the Limitation Act. Both AXAIUK and GREA have been enrolled in the CFC/Dividend GLO at all material times.

9. By an order of Falk J (as she then was) of 29 September 2022, this hearing has been listed to determine the following three preliminary issues:

i) The "Limitation Issue" namely:

> *Have the Claimants' claims been conclusively established to have been issued within the limitation period by reason of the orders and judgments in the Prudential test case or should they be determined in accordance with the law as declared by the Supreme Court in Test Claimants in [*FII SC2*] (and, accordingly, should the claims await the further determination of limitation issues in the Franked Investment Income Group Litigation)?*

ii) The "Set-Off Issue" namely:

> *Are the Claimants entitled to a claim in restitution for unlawful ACT utilised against lawful tax or repaid before the issue of their claim?*

iii) The "Pleading Issue" namely:

> *Have the Claimants pleaded a claim in restitution for the recovery of unlawful tax which was paid as a result of their inability to offset unused DTR credits?*

iv) Three sub-issues (Issues C(i), C(ii) and C(iii)) that arise only if the Pleading Issue is determined in the Claimants' favour namely:

> *i. How should that claim be assessed?*
>
> *ii. Is the claim in restitution for accounting periods ending on 31 December 2017 and 2018 ousted by paragraph 51(6) Schedule 18 to Finance Act 1998, or that provision read with the statutory provisions relating to interest?*
>
> *iii. Are the Claimants entitled to a claim in restitution for accounting periods ending on 31 December 1995 and 1996 in respect of Income Tax purportedly set off against Corporation Tax?*

10. The Limitation Issue is relevant to AXAIUK and GREA and concerns the determination of the date of constructive discovery for the purposes of s32(1)(c) of the Limitation Act. The Limitation Issue arises because of rules of procedure relating to GLOs set out in CPR 19. In essence, the Claimants assert that a judgment and order of Henderson J in 2014 in *Prudential HC*, a test case in the CFC/Dividend GLO, determined that their claims were all in time. The Claimants accept that Henderson J made his decision before *FII SC2* overruled *DMG* and that a more searching examination of the date of constructive discovery would be required applying *FII SC2* principles. However, they argue that Henderson J's order in *Prudential HC* was not successfully appealed and so is binding in accordance with the provisions of CPR 19.12 and is determinative of the Claimants' limitation position notwithstanding the change in the law in *FII SC2*.

11. HMRC deny that Henderson J made any such determination of limitation issues as a GLO issue. To the extent he did, HMRC argue that the binding effect of his determination should be disapplied under CPR 19.12(1)(a).

12. The Set-Off Issue is relevant to GREA only as it relates to ACT claims rather than corporation tax claims. In *Prudential HC*, Henderson J determined (based on *Sempra Metals* which was good law at the time) that where unlawful ACT is set off against lawful MCT, there is a restitutionary remedy consisting of compound interest for the period during which HMRC have had, prematurely, the use of the unlawful ACT. GREA argues that this was a binding determination of a GLO issue to the effect that some restitutionary remedy is available in this situation. GREA does not assert that the remedy has to consist of compound interest.

13. On the Set-Off issue, HMRC deny that *Prudential HC* made a binding determination of a GLO issue, arguing that the relevant binding determination is instead found in *Prudential SC*, to the effect that no restitutionary remedy is available. Alternatively, if there was a binding determination in *Prudential HC*, HMRC argue that its binding effect should be disapplied under CPR 19.12(1)(a).

14. The Pleading Issue does not involve any consideration of procedural rules applicable to GLOs and will therefore be introduced later.

PART A – CPR 19 AND THE GLO MADE IN THIS CASE

CPR 19

15. Part III of CPR 19 makes provision for group litigation. CPR 19.11 deals with the establishment of a GLO as follows:

> ***19.11— Group Litigation Order***
>
> *(1) The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues.*
>
> *(Practice Direction 19B provides the procedure for applying for a GLO.)*
>
> *(2) A GLO must—*
>
> > *(a) contain directions about the establishment of a register (the "group register") on which the claims managed under the GLO will be entered;*
> >
> > *(b) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and*
> >
> > *(c) specify the court (the "management court") which will manage the claims on the group register.*

16. CPR 19.10 contains the following definitional provision:

> ***19.10 Definition***
>
> *19.10 A Group Litigation Order ("GLO") means an order made under rule 19.11 to provide for the case management of claims which*

give rise to common or related issues of fact or law (the "GLO issues").

17. CPR 19.12 sets out the effect of a GLO in the following terms, so far as material:

> ***19.12— 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 him 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 him 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 him.*

18. The following points emerge from these provisions:

    i) It follows from CPR 19.10 and 19.11 that the "GLO issues" are a set of "common or related issues of fact or law" to which a body of claims give rise which are specified by the court in the GLO itself.

    ii) It is not every judgment or order made in a claim on the group register that is binding on other parties. Only judgments or orders that are "given … in relation to one or more GLO issues" have that effect. In cases of doubt, it will be necessary to construe the judgment or order to determine whether it satisfies this requirement.

    iii) Even if a particular judgment or order is "given … in relation to one or more GLO issues", so that it ostensibly is binding on other parties to claims on the register, the court has a power pursuant to CPR 19.12(1)(a) to direct that it is not binding by ordering "otherwise".

The GLO in this case

19. The CFC/Dividend GLO was first established by an order of Master Winegarten on 30 July 2003. It has been amended many times since then and in this judgment, I will refer to the CFC/Dividend GLO in the form that it currently bears.

20. After various recitals, Paragraph 1 provided that "This Order applies to claims in respect of the following common or related issues of law: …". Six paragraphs (labelled (a) to (f)) followed. It is not necessary to quote those paragraphs in detail. It is sufficient to note that the issues identified were formulated at a high level and largely asked whether particular provisions of UK statute law that had a bearing on ACT claims and corporation tax claims were compatible with EU law.

21. In his oral submissions, I understood Mr Ewart KC to argue that only the matters specified in paragraphs 1(a) to 1(f) of the CFC/Dividend GLO were "GLO issues" specified for the purposes of CPR 19.10 and CPR 19.11 in that order. I do not accept that for the following reasons:

    i) Paragraph 1 of the CFC/Dividend GLO provided for the "common or related issues of law arising" to be "particularised in accordance with Paragraph 11 of the CFC/Dividend GLO".

    ii) Paragraph 11 preserved the power of the Management Court (i.e. the Chancery Division of the High Court) to add to or vary the common issues identified in CFC/Dividend GLO. It also set out a "procedure [that] will be applied for the determining the common issues of fact or law and for the selection of claims to proceed as test cases". That procedure provided for the claimants' solicitors to notify HMRC's solicitors of the common or related issues which the claimants considered to arise for determination. There was then to be a process by which the parties sought to agree "the appropriate wording of those issues" and once agreed, those issues were to take effect as Schedule 3 to the CFC/Dividend GLO.

    iii) Therefore, paragraph 1 of the CFC/Dividend GLO set out certain "common or related issues" at a reasonably high degree of generality. Paragraph 11 set out a process by which those issues could be formulated with more detail and precision. Indeed, paragraph 11(d) permitted the parties to agree on new "common or related issues" and to amend or delete existing ones.

    iv) Ultimately this process resulted in Schedule 3 of the CFC/Dividend GLO. The clear intention of the order was that Schedule 3 contained GLO issues for the purposes of CPR 19.10.

22. The Schedule 3 that resulted from this process set out many more common issues of fact and law than had been set out in paragraph 1 of the CFC/Dividend GLO. Schedule 3 was divided into two parts. Part 1 dealt with "EU Issues" with a focus on the corporation tax treatment of dividends paid by companies established within the EU/EEA. Part 2 dealt with "Third Country Issues" with a focus on dividends paid by companies established outside the EU/EEA.

23. In Part 1 of Schedule 3, after setting out 11 detailed questions concerning the compatibility or otherwise of various UK statutory provisions relating to ACT and the corporation tax charge on dividends, and the effect of any incompatibility, the CFC/Dividend GLO set out the following issues:

    Quantum

    (A) How should compensation or relief be assessed?

    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?

24. Part 2 of Schedule 3, dealing with "Third Country Issues" contained an issue formulated in identical terms.

25. At points in his submissions on behalf of HMRC, I understood Mr Ewart to be arguing that the limitation issues set out in the above extract were not formulated with sufficient precision to be GLO issues. However, in my judgment limitation issues A and B <u>were</u> GLO issues by virtue of being designated as such in the CFC/Dividend GLO.

26. As well as setting out the GLO issues, the CFC/Dividend GLO provided for claimants on the register to be divided into "Classes". The existence of these classes did not effect any change to the binding nature of determinations of GLO issues set out in CPR 19.12. Therefore, it remained the case that a determination of a GLO issue would, absent an "otherwise" order by the court, be binding on all claimants on the register, irrespective of the Class or Classes of which they were members. The function of the Classes was, instead, to enable appropriate representative test cases to be selected and for claimants with an interest in the outcome of a particular issue to contribute to the costs of the litigant in the corresponding test case.

27. By paragraph 3.1(b) of an order of Park J made on 12 December 2003, the claim (reference HC03C01346) of The Prudential Assurance Company ("PAC") was designated as a test claim (for both EU and Third Country issues) for all of the issues set out in paragraph 23 above, namely "Quantum Issue A" (the only issue on quantum) and "Limitation Issues A and B" which are set out in paragraph 23 above.

PART B – CONSIDERATION OF THE LIMITATION ISSUE

What, if any, GLO issues did Henderson J determine in relation to limitation?

Background relevant to Prudential HC

28. *Prudential HC* was a judgment in the claim of PAC that Park J had designated as a test case (see paragraph 27 above). PAC's claim had a procedural history of its own which can, so far as material, be summarised as follows:

    i) PAC issued its claim on 8 April 2003 on the same day as AXAIUK issued its claim. Initially, PAC's claim was a corporation tax claim relating to dividends received on portfolio holdings in companies resident in EU/EEA states in accounting periods from 1995 to 2002.

    ii) By amendments made on 2 September 2003, PAC added corporation tax claims in respect of portfolio holdings from third countries also for accounting periods from 1995 to 2002.

    iii) By an amendment dated 14 July 2004, two further claimants were added to PAC's claim. These included Prudential Holborn Life Limited ("PHL"). PHL's claims were of a similar nature to those that PAC had already made.

    iv) By amendment dated 19 October 2009, both PHL and PAC made ACT claims (see also [258] of *Prudential HC*).

29. Both PAC and PHL were making claims in respect of tax paid more than six years before issuing those claims. HMRC had pleaded in their Defence that such claims were statute-barred by the Limitation Act. Perhaps surprisingly, PAC and PHL had not pleaded by way of reply that they were entitled to the extended limitation period set out in s32(1)(c) but all parties proceeded on the basis that they were.

30. At the time of *Prudential HC*, *DMG* remained good law. Even if all of the claims summarised in paragraph 28 that were made after the issue of the claim form were regarded as new claims, made for the first time on the date of the relevant amendment, there would have been good grounds for PAC and PHL to conclude that all of their claims based on mistake were in time by reference to the extended limitation period in s32(1)(c). Moreover, there was a possibility that successive amendments to the claim form or the addition of parties, did not even result in new claims being made for limitation purposes. That was because s35(4) and s35(5) of the Limitation Act ("Section 35") provided that any new claim that PAC and PHL made could be "related back" to the date of the original claim for limitation purposes if either (i) the new claim involved no new cause of action or (ii) if it did, the new cause of action arose out of the same facts, or substantially the same facts already in issue on the original claim.

31. However, there were potential issues associated with PAC and PHL's hope to be able to rely on the extended limitation period in s32(1)(c) of the Limitation Act. By s320 of the Finance Act 2004, Parliament sought to limit access to that extended period of limitation in relation to claims made on or after 8 September 2003. Section 320 also restricted the ability of taxpayers to amend an existing

claim on or after 20 November 2003 but PAC and PHL argued that their amendments could be "related back" to a claim originally made before 8 September 2003 so as to circumvent the restriction imposed by section 320.

32. Therefore, s320 had the potential to dent PAC and PHL's strong limitation position, based on the then authoritative judgment in *DMG*. The claims summarised in paragraph 28.i) and 28.ii) could not be affected by s320 because they were made before 8 September 2003, the date from which s320 took effect. However, s320 could prevent the later claims summarised in paragraphs 28.iii) and 28.iv) benefiting from the extended limitation period set out in s32(1)(c) of the Limitation Act. That would not make the entirety of those later claims statute-barred, but could have meant that PAC and PHL could only recover tax paid in the six years before making them, whereas PAC and PHL were hoping to recover tax paid much earlier than that. Moreover, s320(2) would have prevented PAC and PHL from using the provisions of Section 35 to "relate back" these later claims to the pre-8 September 2003 claim so as to retain the benefit of the extended limitation period in s32(1)(c).

33. That said, viewing matters at the time of *Prudential HC*, the validity of s320 was doubtful. On 23 May 2012, the Supreme Court handed down judgment in *FII SC1* holding, among other matters, that s320 was invalid as it deprived taxpayers of remedies in contravention of EU law. Since that conclusion was reached by a majority judgment of their Lordships, the Supreme Court referred the question to the CJEU. (As will be seen, after the hearing in *Prudential HC*, but before the order giving effect to that judgment, the CJEU gave judgment in *FII CJEU3* holding that s320 was invalid).

<u>The List of GLO Issues that was before Henderson J and the argument on those issues</u>

34. In the run up to the trial in *Prudential HC* the parties agreed a "List of GLO Issues" to be determined at the trial. That List of GLO Issues was referred to at [248] of *Prudential HC* and was annexed to the order that Henderson J made (see paragraph 57 below). The following items are listed on the List of GLO Issues:

> ***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?*

35. It will be seen that there were material differences between the way in which the limitation issue was described in the List of GLO Issues referred to above and the way in which it was described in Schedule 3 of the CFC/Dividend GLO (see paragraph 23 above). In particular:

    i) The CFC/Dividend GLO raised questions about "<u>a</u> claimant's" claims, a formulation that was capable of covering all claimants on the CFC/Dividend GLO register. The List of GLO Issues asked whether "<u>the</u> claim" was statute barred by a 6-year limitation period or by s320, a reference to specific claims of the test claimants.

ii) The CFC/Dividend GLO asked "from what date does the applicable limitation period start to run". The List of GLO Issues did not raise a question of the start of the limitation period but asked only whether "the claim" was statute barred.

36. In his oral submissions before me, Mr Bremner KC described issues VIII.1 and VIII.2 as "giving a more precise formulation" of the GLO limitation issue that had been set out in the original CFC/Dividend GLO (see paragraph 23 above). I do not accept that description. The issues raised were both different and formulated differently. The absence of a question relating to the start of a limitation period was consistent with a perception that this question had largely been settled by *DMG*. With hindsight, it can also be seen that issues VIII.1 and VIII.2 reduced precision by blurring the distinction between issues particular to PAC and PHL and GLO issues that would be binding in all claims in the CFC/Dividend GLO.

37. The list of issues came about because, at a case management conference on 20 December 2012, Henderson J required the parties to agree a "List of Issues of the matters to be decided at the resumed trial". He did not specifically order that the list was to be a revised list of <u>GLO issues</u>. It is not clear precisely what process led to the parties' agreed list of issues becoming a list of GLO issues as described in paragraph 57 below. It is, therefore, not clear how much thought the parties gave to the suitability of issues VIII.1 and VIII.2 for determination as GLO issues. The end result, however, is clear. By describing the list as a list of "GLO Issues" in his order of 28 January 2014 discussed below, Henderson J made them GLO issues as he had power to do given his inherent jurisdiction and the power of the Management Court (reserved by paragraph 11 of the CFC/Dividend GLO itself) to vary GLO issues. Moreover, issues VIII.1 and VIII.2 replaced the previous formulation of the GLO issues relevant to limitation set out in paragraph 23 above because Henderson J made determinations of issues VIII.1 and VIII.2 but made no determination of the previous formulation of those issues.

38. I was shown extracts from the transcript of the oral submissions before Henderson J. It is clear from that transcript that neither side made any detailed submissions on the issues VIII.1 and VIII.2. It is also clear that both sides shared a common understanding that the two limitation issues were of theoretical interest if s320 was invalid (as the Supreme Court had held in *FII SC1*). The basis of that common understanding was not spelled out in any of the materials to which I was referred. It must have been based on the following general propositions: (i) if s320 was invalid, then PAC and PHL would have access to the extended limitation period in s32(1)(c); (ii) *DMG* demonstrated that the extended time limit would start to run only from the date of a judicial ruling of the CJEU demonstrating the unlawfulness of the relevant UK statutory provisions; (iii) no such judicial ruling had been made more than 6 years before PAC and PHL made any of the claims summarised in paragraph 28.

39. Apart from indicating the common understanding to which I have referred, the submissions of the parties on the issues VIII.1 and VIII.2 proceeded largely at cross-purposes. The history of PAC's and PHL's claims to which Henderson J referred at [249] was based on material from the taxpayers' skeleton argument. However Mr Aaronson KC (then QC), who appeared for the taxpayers made no

oral submissions as to conclusions that should be drawn from that history. He simply asserted that the answer to issue VIII.1 was "no" and the answer to issue VIII.2 was that it was necessary to wait and see what the CJEU said in *FII CJEU 3* following the reference to the CJEU in *FII SC1*.

40. Mr Aaronson's answers to questions from Henderson J suggested that the taxpayers were approaching issue VIII.1 as relating to time limits for *Woolwich* claims which did not need to be considered if s32(1)(c) applied to the taxpayers' claims in mistake. That approach was obviously informed by the common understanding summarised in paragraph 38 but it glossed over an issue of potential importance. If s320 was valid, then the taxpayers' later claims summarised in paragraphs 28.iii) and 28.iv), would not benefit from the limitation period in s32(1)(c). In that case, there might have been some benefit for PAC and PHL in seeking to "relate back" those later claims to PAC's original claim (made on 8 April 2003) because, even if those later claims could only recover tax paid in the 6 years prior to making them, the later claims would be treated as made on 8 April 2003 so that ostensibly tax paid after 8 April 1997 would be in scope. That was a possible point for the taxpayers, but Mr Aaronson did not advance it in oral submissions.

41. In his oral submissions before me, Mr Bremner argued that the extended definition in s320(6) meant that s320 was capable of applying both to *Woolwich* claims and to claims in mistake. Mr Ewart did not agree. I do not need to determine this dispute on the interpretation of s320 because it did not feature before Henderson J and so does not advance the debate as to the proper construction of either his judgment or order in *Prudential HC*. It appears as though both parties approached s320 as applying only to claims brought in mistake in the hearing before Henderson J. After all, limitation issue VIII.2 referred to in paragraph 34 above was whether a claim for recovery <u>under a mistake of law</u> was barred by s320.

42. Mr Ewart appeared for HMRC before Henderson J. He made fuller submissions on limitation issues than did Mr Aaronson. Mr Ewart engaged with the history of the proceedings set out in the taxpayers' skeleton argument and his submission suggested that HMRC were alive to the point, which Mr Aaronson had not made, summarised in paragraph 40. Mr Ewart submitted that (i) PHL's claims could not be "related back" under Section 35 to PAC's earlier claims because PAC and PHL were different parties and (ii) both PAC's and PHL's ACT claims could not be "related back" to PAC's corporation tax claim because the ACT claims relied on establishing different facts and circumstances (namely the onward payment of dividends that generated an ACT obligation) which were not necessary to establish the corporation tax claim. However, his submissions confirmed that HMRC shared the common understanding set out in paragraph 38 as he said:

> *Of course, all of this is only relevant if s320 is valid. If it is not then it doesn't matter. These points are academic.*

<u>The Judgment of Henderson J on limitation issues</u>

43. Henderson J's judgment on limitation issues is found at [248] to [259] of *Prudential HC*. Paragraph [248] sets the scene by referring to limitation issues

VIII.1 and VIII.2. Paragraph [249] sets out the history of the various claims (which was derived from paragraph 173 of the taxpayers' skeleton argument to which I have already referred). Paragraph [250] quoted s320 of Finance Act 2004. Paragraph [251] quoted a matter of practice in GLOs as to the procedure for determining whether amendments should be treated as "relating back" to earlier claims.

44. At [252], Henderson J introduced two issues as follows:

> *[252] 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.*

These two issues reflected points that Mr Ewart had raised in his submissions summarised in paragraph 42 above.

45. At [253], Henderson J noted that s320's validity was doubtful and that, therefore, he would address the issues on two hypotheses: first that s320 was valid and second that it was invalid.

46. At [254], Henderson J dealt with the position under the first hypothesis, that s320 was valid, saying:

> *[254] On that assumption, the section has no effect on Prudential's original claims, or on the amendments made on 2 September 2003, because the retrospective effect of sub-s (1) goes back only to 8 September 2003. On the other hand, the section would in my view apply to all the subsequent amendments, each of which would (by virtue of sub-s (2)) be treated as introducing new claims which could not be related back to the date of the original claim form. The result would therefore be to confine Prudential, in respect of all its claims introduced by amendment after September 2003, to a six year limitation period, whether the claim is mistake-based or founded on the Woolwich cause of action. The section would also apply in the same way to the claims of PHL, which was added as a claimant only after s 320 had come into force*

47. At [255], Henderson J introduced issues arising on the hypothesis that s320 was invalid:

> *[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 [i.e. the date falling 6 years before PHL was added as a claimant]. 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 s 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-base claims for periods before July 1998, always assuming that s 320 is invalid.*

48. Paragraph [255] introduced the first issue that Henderson J had summarised at [252] which was also the first issue that Mr Ewart had raised in his submissions summarised in paragraph 42 above. I was not shown any formal concession, whether in pleadings, written or oral submissions or otherwise to which Henderson J could have been referring when he said that he "did not understand the Revenue to argue that PHL could with reasonable diligence have discovered its mistake before 14 July 1998". I infer that HMRC made no express concession to this effect. Since PAC and PHL had not even asserted in their pleadings that s32(1)(c) applied and still less had they set out their case as to a date of constructive discovery, there was no pleaded case on this matter that HMRC could accept. Moreover, limitation issue VIII.1 and VIII.2 did not explicitly require the court to determine any date, or earliest date, of constructive discovery. All of these matters point against HMRC making an express concession as to any date of constructive discovery.

49. Henderson J had, by the time of *Prudential HC*, acquired a deep knowledge of the CFC/Dividend GLO not least since he was the docketed judge case managing that GLO. His understanding set out at [255] was, in my judgment, based on his impression of the common understanding between HMRC and the taxpayers to which I refer at paragraph 38 above and his experience of case-managing the GLO generally. It was not based on any formal concession by HMRC that the date of constructive discovery of a corporation tax claim was 14 July 1998 at the earliest. Therefore, Henderson J's conclusion at [255] was that "in principle" it was unlikely to matter whether PHL's later claims could be "related back" to PAC's earlier claims since the worst case scenario, so far as PHL was concerned, was that all its claims were treated as made on 14 July 2004. Even in that scenario, because of Henderson J's understanding that HMRC did not suggest that the limitation period had started earlier than 14 July 1998, he reasoned that PHL's claims would be in time.

50. Nevertheless, in paragraph [256], Henderson J considered whether PHL's later claims could be treated as "relating back" to PAC's earlier claims. He concluded that PHL's claims could not be "related back" to those of PAC broadly because PHL was a different person and was basing its claims on different dividends that it had received.

51. At [257] to [259] Henderson J dealt with the "relating back" issue relating to the ACT claims of PAC and PHL on which Mr Ewart had also made submissions but Mr Aaronson had not. He introduced that issue as follows:

> *[257] The second question, assuming s 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 s 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) [2009] STC 254 at [267]. In case it matters, however, I will briefly state my views on the question.*

52. For reasons similar to those set out in paragraph 48 and 49, I have concluded that HMRC made no formal concession that a date of constructive discovery in an ACT claim was the date of *FII CJEU 1*. The statement that the claimants would "probably" be able to rely on section 32(1)(c) by reference to that date was Henderson J's explanation of his own initial view rather than reflecting an express concession that HMRC had made.

53. At [258] and [259], the Judge concluded that PAC and PHL could "relate back" their ACT claims to their respective earlier corporation tax claims concluding, at [259]:

> *I consider that the ACT claims may fairly be regarded as arising out of substantially the same facts as the original corporation tax claims, and I would hold accordingly. It follows that the ACT claims are deemed to have been commenced on the same date as the original claims, and (leaving aside s 32(1)(c)) they are not time barred if s 320 is invalid.*

54. In his oral submissions before me, Mr Ewart submitted that Henderson J had got matters the wrong way round. He argued that the question of "relating back" PHL's corporation tax claims (and indeed PAC's and PHL's ACT claims) would be a live issue if s320 was <u>valid</u> because of the point I have made in paragraph 40 above. Yet Henderson J dealt with the issue of "relating back" in the part of his judgment dealing with the position if s320 was <u>invalid</u>.

55. There is something in that point, but it contributes little to an understanding of Henderson J's judgment. As I have noted, the submissions of Mr Aaronson and of Mr Ewart proceeded at cross-purposes on this issue because Mr Aaronson, representing the taxpayers who had the most interest in making a "relating back" argument, made no detailed submissions on the point. Because of that, even if HMRC thought that the question of "relating back" was most likely to be relevant if s320 was valid, Henderson J did not approach matters in that way. Instead, Henderson J considered "relating back" on the footing that s320 was invalid, expressed a conclusion on that issue at [256] and [259], but noted that his conclusion did not matter greatly because his impression of the parties' common understanding set out at [255] meant that all PAC's and PHL's corporation tax and ACT claims benefited from the extended limitation period afforded by s32(1)(c) of the Limitation Act and were in-time by reference to that extended period.

<u>The Order of Henderson J on limitation issues</u>

56. Henderson J made his order (the "2014 Order") following *Prudential HC* on 28 January 2014. By that time the CJEU had given judgment in *FII CJEU3* confirming that s320 was invalid.

57. The 2014 Order recited the parties as having agreed the "List of GLO Issues" to be determined at the trial. That list was annexed to the Order at Schedule 1. The list contained issues which were quite clearly intended to be GLO issues binding on all claims in the GLO. For example, Issue II.1 was whether UK law imposing an ACT charge was contrary to Article 63 of the Treaty on the Functioning of the European Union ("TFEU"). The List of GLO Issues included issues VIII.1 and VIII.2 dealing with limitation which are set out in paragraph 34.

58. The 2014 Order contained the following sections:

    i) Recitals: Various recitals, some of which recorded agreements on various of the GLO Issues that had been reached during the trial.

    ii) Declarations: A section, commencing with the words "IT IS HEREBY DECLARED that the GLO Issues not otherwise agreed as set out above are answered as follows". As the introduction indicated, this section proceeded to give, in 11 numbered paragraphs, answers to various of the GLO issues.

    iii) Orders: A section commencing with the words "IT IS HEREBY ORDERED THAT:" which, among other matters, determined specific outcomes for various of the claims that PAC and PHL had made.

59. Paragraph 11 of the Declarations section read:

    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.

60. In paragraph 3 of the Orders section, it was ordered that certain claims were upheld. Paragraph 5 upheld claims relating to tax liabilities paid after 1 July 1990 (in relation to dividend income received from EU resident companies) and after 1 January 1994 for dividend income received from companies resident in the EEA or "third countries" outside the EU or EEA. Those dates reflected the differing dates on which EU law provisions relating to free movement of capital took effect for movements between member states, and between member states and the EEA or third countries, respectively.

<u>Conclusions on Prudential HC and the 2014 Order</u>

61. With the hindsight that comes with knowledge of the judgment in *FII SC2*, there is a clear question whether issues VIII.1 and VIII.2 were suitable for determination as GLO issues at all. I have carefully considered HMRC's argument that the very formulation of those issues meant that Henderson J simply could not have determined them as GLO issues and that, when he gave his judgment and order on issues VIII.1 and VIII.2, he was necessarily determining only issues relevant to PAC and PHL without any "GLO dimension".

62. However, I have concluded that while this might be an entirely sensible approach that might be followed if *Prudential HC* were being determined today, it is not the approach that Henderson J followed in 2014 when he did not have the benefit

of the judgment in *FII SC2*. Henderson J was well aware that limitation issues were GLO Issues in the CFC/Dividend GLO. He made it clear that he was determining issues VIII.1 and VIII.2 as GLO issues, by including them in the list of issues in Schedule 1 and making it clear that Schedule 1 contained a list of GLO issues. Schedule 1 contained many other issues that clearly needed to be determined as GLO issues. Paragraph 11 of the Declarations section of the Order declared explicitly that the claims of PAC and PHL were "in time" and did so with an explicit cross-reference to issues VIII.1 and VIII.2 which were GLO issues appearing on the list in Schedule 1.

63. Therefore, in my judgment, *Prudential HC* and the 2014 Order did determine limitation issues as GLO issues. The more difficult question is what precise GLO limitation issues Henderson J determined. The Claimants argue that he determined, as a GLO issue, that the date of constructive discovery for the purposes of their corporation tax claims was no earlier than 14 July 1998 and that the date of constructive discovery for the purposes of their ACT claims was no earlier than 12 December 2006.

64. The Claimants' submission runs into the obvious difficulty that neither *Prudential HC* nor the 2014 Order sets out any date of constructive discovery for the purposes of s32(1)(c). That is scarcely surprising since Henderson J was not asked by issues VIII.1 or 2 to determine any such specific date (see paragraph 36 above). The closest that there is to any express determination of a date of constructive discovery is to be found in Henderson J's statement at [255] that he "did not understand the Revenue to argue" that the date of constructive discovery was before 14 July 1998 for corporation tax claims and his statement at [257] that the date of constructive discovery for the ACT claims was "unlikely" to be before December 2006. Recognising that these somewhat equivocal statements do not obviously amount to determinations read in isolation, the Claimants base their argument on a close reading of both Henderson J's judgment and the 2014 Order, submitting that once regard is had to their totality, the only conclusion is that Henderson J did make these determinations as GLO issues.

65. Before considering those arguments, I observe that the task is not simply to identify a plausible, or even highly plausible, basis on which Henderson J might have given the judgment he did or made the order that he did. A determination of a GLO issue is, on the face of it, binding on other claims in the GLO at the relevant time. GLO members need to know whether decisions are binding on them so that, if adversely affected, they can exercise their right in CPR 19.12(2) to request permission to appeal.

66. I do not accept HMRC's general submission that Henderson J's reasoning as set out in *Prudential HC* was so wrapped up in a consideration of the particular facts of PAC and PHL and the issue of "relating back" that it had nothing to say on GLO issues. That submission is at odds with the fact that the 2014 Order makes it clear that Henderson J was determining limitation as a GLO issue. It is also at odds with the way that all parties approached the hearing before Henderson J. They were agreed that a detailed analysis of the "relating back" issue was not necessary if s320 was invalid and had good reason to be agreed on that because, in that case, PAC's and PHL's claims all looked to be in time by reference to the law as it then stood in *DMG*. It would be counter-intuitive to conclude that, once

FII CJEU3 determined that s320 was indeed invalid the 2014 Order should be based on the kind of detailed factual analysis of "relating back" that all parties thought was unnecessary.

67. Moreover, Henderson J rejected PHL's argument that it could relate back its corporation tax claims (first made in 2004) to the date on which PAC had issued proceedings (8 April 2003). Fact-specific determinations on a "relating back" case that Henderson J had rejected could not support the conclusion, reached in the order, that PHL's corporation tax claims were "in time". In paragraph 5 of the "Orders" section of the Order, Henderson J upheld claims going back to 1 July 1990 (in the case of dividends received from EU companies) and to 1 January 1994 (in the case of dividends received from companies resident in the EEA or in third countries). Even if Henderson J had fully accepted the argument that PHL's corporation tax claim could be related back to PAC's original claim that would not on its own have supported the order that he made.

68. Therefore, the statement that PAC's and PHL's claims were "in time" was not a determination based on a fact-specific analysis of arguments based on "relating back". There was some "GLO dimension" to Henderson J's judgment and order on limitation issues. Yet if his judgment and order include a determination of earliest dates of constructive discovery binding on other GLO members there is no unequivocal statement of what those dates are. The statement that Henderson J "did not understand the Revenue to argue that" constructive discovery of a corporation tax claim took place before 14 July 1998 or that it was "unlikely" that constructive discovery of ACT claims took place before December 2006 are not the language of firm judicial conclusions intended to be binding on a large number of GLO members. That is particularly the case when no express concession had been made as regards either date.

69. In my judgment, the answer to the conundrum is that both HMRC and the Claimants are partially correct in their analyses of Henderson J's judgment and order. As HMRC argue, Henderson J did not determine any earliest date of constructive discovery, for the simple reason that he was not asked to do so. However, the Claimants are correct to assert that Henderson J was determining some questions of limitation as GLO issues. I have concluded, in short, that Henderson J did as requested in the parties' formulation of issues VIII.1 and VIII.2 (set out in paragraph 34 above) and determined, <u>as a GLO issue</u>, the extent to which <u>PAC's and PHL's</u> claims fell foul of a 6-year limitation period, concluding that their claims were in-time in their entirety.

70. The Claimants support their argument that the 2014 Order must have decided that their own claims were in time by observing that simply determining (even as a GLO issue) that PAC's and PHL's <u>particular</u> claims were in time could not have much to say about the claims of other litigants in the GLO, possibly with very different facts. Yet, on the analysis set out in paragraph 69, those other litigants are ostensibly bound by Henderson J's determination of GLO issues VIII.1 and VIII.2.

71. However, that observation relies unduly on hindsight. Only following *FII SC2* did it become clear that the date of constructive discovery had the potential to be fact-specific and require an analysis of when taxpayers discovered, or could with

reasonable diligence have discovered, that they had a "worthwhile claim" (to paraphrase *FII SC2*). Henderson J made his judgment and order at a time when *DMG* was the controlling authority. *DMG* did not set out a test that was particularly fact sensitive: it suggested that the sole relevant question was whether the CJEU had released a judgment determinative of a claim more than 6 years before that claim was made.

72. In the run-up to the trial before Henderson J, the validity of s320 was the most difficult limitation issue and that is why it was specifically included as issue VIII.2. However, after the trial concluded, *FII CJEU3* determined that s320 was invalid. In those circumstances, it is not surprising that Henderson J concluded that resolution of issue VIII.1 was adequately dealt with in the 2014 Order by a confirmation that the claims of PAC and PHL were in time in their entirety. It is only with hindsight based on the change of law in *FII SC2* that difficulties have arisen with the formulation of the GLO issue on limitation and the answer Henderson J gave to it.

73. Because the date of constructive discovery was thought to be governed by *DMG*, there was a benefit in a determination of the kind I have set out in paragraph 69 above. By determining, as a GLO issue, that PAC's and PHL's claims were in time, Henderson J was precluding any member of the GLO or HMRC (absent an "otherwise" order under CPR 19.12(1)(a)) from taking a position in the other claims that was inconsistent with that determination. *DMG* prevented HMRC from running any argument that the date of a claimant's constructive discovery was on anything other than the date of a final CJEU decision and there was just a handful of CJEU decisions that could realistically be argued to start the limitation clock. Henderson J's judgment and order prevented HMRC from asserting optimistically that an early CJEU decision started the clock if that would be inconsistent with PAC's and PHL's claims being in time. I consider that was the outcome that the parties were expecting in 2014 when they formulated their agreed List of GLO Issues. It is consistent with the limited nature of the argument before Henderson J.

74. Therefore, the central question raised by the Limitation Issue is whether it would be inconsistent with Henderson J's judgment in *Prudential HC*, or with the 2014 Order, for HMRC to assert that the <u>Claimants'</u> date of constructive discovery was earlier than 14 July 1998 (for corporation tax claims) or 12 December 2006 (for ACT claims).

75. Henderson J had ordered that PHL, who brought its claim for the first time on 14 July 2004 and who could not "relate back" that claim to any earlier claim, was in time to make corporation tax claims going back to 1994. There is force in the Claimants' point that he could not have made that order unless he had found that PHL's constructive discovery took place on or after 14 July 1998 (6 years before PHL made its corporation tax claims). There is, however, less force in the point in relation to the ACT claims. Henderson J accepted that PAC's ACT claim (made in 2009) could be "related back" to PAC's original corporation tax claim (issued on 8 April 2003). He also accepted that PHL's ACT claims (also made in 2009) could be related back to PHL's earlier corporation tax claims (made on 14 July 2004). Since all PHL's ACT claims were treated as made on 14 July 2004 for limitation purposes, Henderson J's conclusion that the entirety of PHL's ACT

claims were in time is not inconsistent with the proposition that PHL's date of constructive discovery for its ACT claims was 14 July 1998 at the earliest (rather than December 2006 as the Claimants argue).

76. In any event, even if the Claimants are correct and Henderson J's order is inconsistent with PAC's and PHL's date of constructive discovery being later than 14 July 1998 for corporation tax claims, or December 2006, for ACT claims, it does not follow that Henderson J determined those as dates of earliest constructive discovery for all claimants in the GLO. Issues VIII.1 and VIII.2 did not require Henderson J to determine a date of constructive discovery for PAC and PHL, still less for all claimants in the GLO.

77. The Claimants counter that PAC and PHL's claims were test claims for, among other GLO Issues, the question of limitation. That is true, but it does not mean that issues VIII.1 and VIII.2, should be construed as meaning that the outcome of those issues in PAC's and PHL's claims is binding in all other claims in the GLO. Issues VIII.1 and VIII.2 were not expressed in that way. They could not be intended to have that effect. PAC's and PHL's claims were made in 2003 and 2004 (later ACT claims having been "related back" to earlier corporation tax claims). Many claims on the CFC/Dividend GLO register were made much later. Neither the parties nor Henderson J can have intended issues VIII.1 and VIII.2 to be interpreted as meaning that if PAC's claim made in 2003, for example, was in-time so would a claim made, and entered on the GLO register, on 23 October 2013 (the day before judgment in *Prudential HC*).

78. As I have noted in paragraph 73, in 2014 the parties would have regarded a determination that PAC's and PHL's claims were in time, read together with the judgment in *DMG*, as providing a framework for determining whether other claims in the GLO were in time. However, it does not follow from this that Henderson J's judgment and order have binding effect under CPR 19.12 now that the law has changed following *FII SC2*. The only way to determine the extent to which Henderson J's judgment or order was binding is by ascertaining the extent to which they were judgments or orders "in relation to a GLO issue". Limitation was, as I have found, a GLO issue. However, the judgment or order that Henderson made was simply that PAC's and PHL's claims were in time. He made no determination as to a date, or earliest date, of constructive discovery for all claimants in the GLO for the simple reason that he was not asked to do so.

79. I acknowledge that there was a common understanding between HMRC, PAC and PHL at the hearing before Henderson J of the kind I have summarised in paragraph 38. It might well be inconsistent with that common understanding for HMRC to argue that the date of constructive discovery of a worthwhile ACT claim for a claimant other than PAC or PHL was before 12 December 2006. However, that would not be inconsistent with Henderson J's judgment or order relating to PAC and PHL. It was simply not canvassed in the proceedings before Henderson J, that the date of constructive discovery might vary from one taxpayer to another. All parties proceeded on the basis that constructive discovery could be fixed entirely by reference to the state of CJEU authorities in the six years before a claimant made a claim rather than by reference to matters particular to each claimant. The fact that the parties proceeded on that basis does not elevate

their approach (now shown to be incorrect in law) into the determination of a GLO issue, binding in other claims in the GLO.

80. The Claimants argue that, at [156] to [159], in a decision refusing permission to appeal on aspects of *Prudential HC*, reported at [2016] EWCA Civ 376 ("Prudential CA") the Court of Appeal reached a conclusion contrary to that set out in paragraph 79.

81. HMRC had sought permission to appeal against Henderson J's conclusion that ACT claims could be "related back" to earlier corporation tax claims. HMRC also sought permission to argue, on appeal, that the date of constructive discovery was 8 March 2001 (the date on which the CJEU gave judgment in Joined Cases C-397 and 410/98 – *Metallgesellschaft* and *Hoescht*). The Court of Appeal refused HMRC permission to appeal saying, at [158]:

> *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.*

82. I do not consider that passage to be inconsistent with my analysis in paragraph 79 above. In their application for permission to appeal, HMRC were seeking to establish that Henderson J's conclusion on the "relating back" of ACT claims was wrong. However, that could alter the outcome only if HMRC were permitted to resile from what the Court of Appeal considered to be their acquiescence in a common understanding before Henderson J that the date of constructive discovery was December 2006 at the earliest. The Court of Appeal refused permission to appeal because it was unwilling to permit HMRC to resile from that common understanding. That process of reasoning sheds relatively little light on the extent to which Henderson J conclusions set out in his judgment and order were binding in other claims in the GLO.

83. My conclusion on the limitation issue is that the Claimants' claims have not been conclusively established to have been issued within the limitation period by

reason of the orders and judgments in *Prudential HC*. It follows that the question whether the claims are in time needs to be determined in accordance with the law as determined in *FII SC2*.

Ordering "otherwise" under CPR 19.12(1)(a)

84. My conclusion set out in paragraph 83 means that the question of ordering "otherwise" does not arise. In their submissions on this issue, the parties explained that they have not been able to find much authority as to the principles that govern the exercise of a discretion under CPR 19.12(1)(a) to order "otherwise". The Claimants also do not accept that I have the power to order "otherwise" arguing that such an order could only have been made by Henderson J in 2014. I consider that resolution of this debate should be left to a case in which the issue matters. Accordingly I will not address the question of whether I can, or should, order "otherwise".

PART C – DETERMINATION OF THE SET-OFF ISSUE

The GLO Issue relating to unlawful ACT and Henderson J's determination of it

85. I will explain some terms that I will use in this section:

    i) I will refer to "unlawful ACT" as ACT levied in excess of the amount that should have been levied had UK tax law provided a proper credit when a Claimant received a dividend from a non-UK company.

    ii) I will adopt the phrasing that Mr Bremner used in his oral submissions of describing a claim for "utilised ACT" as embracing a restitutionary claim made when unlawful ACT is set off against lawful MCT. In such a case, the Claimants are seeking restitution for the inability to use the sums represented by the unlawful ACT over the period until they effectively obtained reimbursement of that unlawful ACT by having their liability to lawful MCT reduced.

86. As I have noted in paragraph 23 above, paragraph 11 of the CFC/Dividend GLO, designated, as a GLO Issue, the question "how should compensation or relief be assessed?". The parties are agreed that this raises, as a GLO issue, the availability or otherwise of a restitutionary claim for utilised ACT.

87. In the List of GLO Issues described in paragraph 23 above, the point was formulated slightly differently 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?*

88. It is common ground that slightly different formulation in the List of GLO Issues did not affect the designation as a GLO issue or the interpretation of the issue to be determined.

89. At [242] of *Prudential HC*, Henderson J held:

> *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.*

90. The common ground that Henderson J was referring to was set out at [195] of *Prudential HC* in the following terms:

> *[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.

91. That conclusion was reflected in Declaration 8A of the Order which stated as follows:

> *8. Issues VII.1(i)-(ii) are answered as follows;*
>
> *A. in relation to those claims which are upheld these issues do not arise for decision as it is common ground that:*
>
> ...
>
> *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;*
>
> ...
>
> *iv) unlawful ACT which was utilised against lawful MCT is recoverable, on the same basis as in* Hoechst*...*

92. HMRC deny that Henderson J has made a conclusive determination of a GLO issue in relation to utilised ACT for the following reasons:

    i) Henderson J was simply recording, in Declaration 8A, a position that was "common ground". A recording of a common position such as this is not capable of being appealed (see, for example, [71] of the judgments of Lord Reed and Lord Hodge in *FII SC2*). Therefore, it is not capable of being a determination of a GLO issue because CPR 19.12(2) expressly envisages that a determination can be of a GLO issue only if it can be appealed.

ii) In Declaration 8A, Henderson J said only that a claim for restitution of unlawful ACT utilised against lawful MCT was available "on the same basis as in *Hoescht*". Yet the CJEU's judgment in *Hoescht* did not specify any particular remedy but said only that domestic UK law had to provide some remedy.

iii) Henderson J's judgment was superseded by the judgment of the Supreme Court in *Prudential SC* which determined that there is no common law restitutionary remedy as regards utilised ACT.

93. I do not accept the premise of the argument in paragraph 92.i) above. Henderson J did not just make a declaration on an issue that was common ground. The 2014 Order went further. In paragraphs 3(d)(i) and 4 of the "Orders" section, there was a determination of a GLO issue, namely that (i) there was a restitutionary claim in respect of utilised ACT and (ii) the claim was to be satisfied by an award of compound interest. It was clearly material to Henderson J's determination that HMRC did not dispute the existence of a restitutionary claim. However, that does not alter the conclusion that he made a judgment or order "in relation to" a GLO issue.

94. Even if I had accepted the premise of HMRC's argument set out in paragraph 92.i), I would not have accepted the conclusion that HMRC seek to draw from it. CPR 19.12(2) expands the group of people who are entitled to seek permission to appeal by providing that persons other than the immediate parties to a judgment or order are entitled to seek that permission. It does not say, and does not need to say, that a judgment or order ceases to have binding effect on other GLO members simply because that permission is unlikely to be granted (whether because a party conceded a point or for any other reason).

95. I reject the argument in paragraph 92.ii) for reasons similar to those set out in paragraph 93. Henderson J did not make a declaration that was devoid of any effect because it referenced only the inconclusive determination of the CJEU in *Hoescht*. He made a specific order that compound interest was payable by way of restitutionary remedy in utilised ACT situations.

96. HMRC's argument in paragraph 92.iii) needs to be addressed in the light of the judgment of the Supreme Court in *Prudential SC*. Paragraph [34] of the Supreme Court's judgment sets out three categories of situation in which the taxpayer asserted an entitlement to compound interest as a restitutionary remedy in respect of the unlawful levying of ACT. Category (a) involved utilised ACT. As I have noted, HMRC accepted before Henderson J in *Prudential HC* that compound interest was due in that situation. They stood by that concession in *Prudential SC* on the basis that it was what the House of Lords had decided in *Sempra Metals* (see paragraph [35] of *Prudential SC*).

97. HMRC, however wanted to argue as regards categories (b) and (c) that the opportunity to use money mistakenly paid is not a benefit obtained at the expense of the person who made the mistaken payment (see [39] of *Prudential SC*). By making that argument, they wished to establish that there was no restitutionary remedy in categories (b) and (c) and that, instead, the remedy in those situations

should consist of simple interest only under s35A of the Senior Courts Act 1981 (the "1981 Act")

98. PAC's position was that the approach in *Sempra Metals,* that determined the availability of compound interest as a restitutionary remedy in a category (a) situation (i.e. utilised ACT) should apply also to categories (b) and (c). PAC further argued that HMRC should not even be permitted to advance the arguments set out in paragraph 97 above, having conceded the position as regards category (a), because those arguments challenged the reasoning in the *Sempra Metals* case and therefore the basis on which the concession was made (see [39] of *Prudential SC*).

99. At [40] of *Prudential SC*, the Supreme Court permitted HMRC to advance submissions questioning the soundness of the reasoning in *Sempra Metals*. Their Lordships noted that the law on the concept of a benefit being obtained at the expense of a claimant, and the related concept of a transfer of value, was evolving and had recently been considered at the level of the Supreme Court. They observed:

> *As we explain later, there is indeed a difficulty involved in reconciling the Sempra Metals case with this court's more recent case law. Accordingly, even if the revenue had not wished to subject the decision in the Sempra Metals case to critical analysis, that is an exercise which this court could not have avoided. In addition, it is important to bear in mind that this appeal has to be decided in the context of a GLO, and also that the point of law which the revenue wish to argue is undoubtedly one of general public importance.*

100. At [68] to [79] of their judgment in *Prudential SC*, the Supreme Court explained that, when money is paid by mistake, a claimant provides a single benefit to the defendant "at his own expense": namely the amount of the payment itself. The Supreme Court concluded, contrary to the judgment of the majority in *Sempra Metals*, that there was no additional and simultaneous transfer of value comprising the opportunity to use the money which could also give rise to a cause of action based on unjust enrichment. Those conclusions underpinned the Supreme Court's overall conclusion on categories (b) and (c) set out at [79] of *Prudential SC* as follows:

> *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 the revenue 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 the revenue.*

101. The Claimants submit that the Supreme Court "held HMRC to their concession" and therefore did not disturb Henderson J's conclusion that PAC was entitled to compound interest in a category (a) situation. That is true so far as it goes, but does not answer HMRC's argument summarised in paragraph 92.iii). Henderson J had not just decided that PAC was entitled to compound interest by way of restitutionary remedy in a category (a) situation. He had decided, as a GLO issue, that all claimants on the register with category (a) facts were entitled to that remedy. The relevant question for the purposes of HMRC's argument is posed by the opening words of CPR 19.12(1), namely whether the Supreme Court was giving or making a judgment or order "in relation to one or more GLO issues". If it was, then the Supreme Court's judgment or order is binding on other claims that were on the register at the relevant time (including those of the Claimants). The question whether the Supreme Court's judgment and order was binding in other claims in the GLO is not determined conclusively by whether PAC retained the compound interest that Henderson J had ordered.

102. In my judgment, the Supreme Court did make a judgment or order "in relation to" the question whether members of the GLO were entitled to a restitutionary remedy in respect of utilised ACT. That was a GLO issue that Henderson J had decided so as to be binding on all members of the GLO at the relevant time. At paragraph [79] of their judgment, the Supreme Court stated expressly that there was no restitutionary claim for compound interest in category (a) for precisely the same reasons that there was no such claim in categories (b) and (c).

103. The Claimants place emphasis on paragraph [78] of *Prudential SC*. In that paragraph, their Lordships noted a distinction between category (a) on the one hand and categories (b) and (c) on the other. Whereas simple interest under s35A of the 1981 Act could be payable in situations falling within categories (b) and (c), there could be no such simple interest payable, at least on a literal reading of s35A, in a category (a) situation. That gave rise to a potential problem because EU law required an effective remedy in a category (a) situation. The Claimants are correct to note that in paragraph [78] of *Prudential SC* their Lordships left open the possibility that domestic law might permit some interest to be payable in a category (a) situation remarking that "… there are a number of potential solutions" to the apparent difficulty under s35A. However, whatever those solutions might consist of, they could not include the availability of a restitutionary remedy of the kind raised by the Set-Off Issue. Paragraph [79] of *Prudential SC* ruled out the availability of a restitutionary remedy for utilised ACT for precisely the reasons that it ruled out that remedy in situations falling within categories (b) and (c).

104. Moreover, one of the reasons that the Supreme Court gave, at [40] of their judgment, for considering submissions that questioned the soundness of the reasoning in *Sempra Metals*, was that the appeal had to be decided in the context of a GLO and that the points of law which HMRC were raising were of general public importance. I do not agree with the Claimants that in this paragraph the Supreme Court was indicating only that the debate on the categories (b) and (c) was of general public importance (category (a) not being contentious because HMRC were being held to their concession). Paragraph [40] set out the Supreme Court's explanation as to why it was prepared to hear any argument that called

into question the correctness of the decision in *Sempra Metals*. Moreover, having heard that argument and having decided to overrule *Sempra Metals*, the Supreme Court expressly extended their conclusion beyond categories (b) and (c) by including claims relating to utilised ACT. Against that background, the Supreme Court's judgment as regards utilised ACT must have been intended to be, and was, a determination "in relation to" the GLO issue that Henderson J had decided.

105. My conclusion on the Set-off Issue is that the Claimants are not entitled to a claim in restitution for unlawful ACT utilised against lawful tax or repaid before the issue of their claim. That is because the judgment of the Supreme Court in *Prudential SC* was given "in relation to" that very issue and determines that no such restitutionary remedy is available. Accordingly, by CPR 19.12, that judgment is binding in those claims that were on the GLO register at the time of the Supreme Court's judgment.

Ordering "otherwise"

106. In those circumstances, no question of ordering "otherwise" arises under CPR 19.12(1)(a). For reasons that I have already given, I will not express any view on how I would have exercised the discretion under CPR 19.12(1)(a) had the question arisen.

PART D - DETERMINATION OF THE PLEADING ISSUE

Background to the issue

107. This issue arises in relation to AXAIUK's corporation tax claims. In a simple case, the insufficiency of DTR that AXAIUK relies upon would just result in it having an excessive corporation tax liability on receipt of those dividends. However, the impact of the insufficient tax credit was also felt elsewhere in AXAIUK's corporation tax computation and not just in accounting periods in which it received the dividends in question. That is because under the UK corporation tax regime, some of the excessive corporation tax charged on dividends was satisfied by the use of other deductions or credits. Setting off those deductions and credits against excessive corporation tax due on overseas dividends necessarily meant that AXAIUK could not use them elsewhere.

108. In his skeleton argument, Mr Bremner provided a helpful example to illustrate the point. I will take the liberty of simplifying that example somewhat so that it can readily be considered in the context of the judgments of the CJEU and the Supreme Court which I deal with below:

    i) Consider a UK resident company ("A") which has a loss of 500 that is freely available to be set off against profits of any description in accounting period 1.

    ii) In accounting period 1, A receives a cash dividend of 70 from a non-UK company ("B"). That dividend carries with it an underlying tax credit of 30. Assuming a UK corporation tax rate of 30%, if the dividend from B was A's only income in accounting period 1 then A would be subject to tax on

100 (the cash dividend of 70 "grossed up" by the tax credit of 30). That would result in a prima facie UK corporation tax liability of 30. However, A would be able to set off its tax credit of 30 against that corporation tax liability leaving it with no corporation tax to pay.

iii) Now suppose that 100 of A's loss is required by applicable corporation tax rules to be set off against the taxable income generated by the receipt of the dividend from B (100). That would mean that A still has no corporation tax liability in accounting period 1, but A's loss available for carry forward is reduced to 400.

iv) Next, consider the position in accounting period 2 in which A has taxable profits of 500. Its loss of 400 is carried forward and set off against that profit, leaving a profit subject to tax of 100 and a corporation tax liability of 30.

v) Therefore, across accounting periods 1 and 2, A has a total corporation tax liability of 30. However, had B been a UK resident company, the dividend that A received in accounting period 1 would have been entirely exempt from corporation tax and no losses would have been set off against it. From that it would follow that A was entitled to carry forward a loss of 500 (and not just 400) into accounting period 2 and so would have no corporation tax liability in accounting period 2.

vi) Therefore, in this situation, looking at the position across accounting periods 1 and 2, A pays 30 more tax as a consequence of receiving a dividend from a non-UK resident company than it would have paid if it had received a dividend from a UK resident company. That result can be understood as attributable to A's tax credit on the dividend from B (worth 30) being "lost" when a part of the loss was set off against that dividend.

109. A modification of the UK rules was introduced in respect of dividends arising after 30 March 2001 through the introduction of legislation on "eligible unrelieved foreign tax" ("EUFT"). That permitted unused foreign tax credits effectively to be carried forward within a company or surrendered to another group company. That reduced the impact of the problem set out in paragraph 108 above but it did not fully eliminate it. First, UK tax law continued to calculate foreign tax credits (and so EUFT) by reference to the amount of overseas tax actually paid. It is now clear, however, that EU law requires that tax credit to be calculated at the "foreign nominal rate" or "FNR" being the headline rate of corporation tax applicable in the overseas jurisdiction concerned. Second, EUFT could not be set off against all categories of income. Therefore, taxpayers such as AXAIUK did not consider that the EUFT regime fully addressed the problem and continued to make claims for restitution as regards corporation tax overpaid in the situations I have set out.

110. Claims such as these gave rise to some conceptual difficulties that took a while to resolve. For example, there was a live issue as to whether they should be characterised as *San Giorgio* claims in restitution, or as *Francovich* claims for damages. Since the test cases in the Prudential litigation did not involve any such claim, the debate on these issues was not resolved within the context of the

CFC/Dividend GLO and instead took place within the FII GLO. Following *FII CA1*, it was thought that there was no claim at all in this situation for reasons that I do not need to set out. However, following this judgment there were developments in EU law that shifted the focus of the debate.

111. In joined cases C-436/08 and C-437/08 [2011] STC 917 ("*Salinen*"), the CJEU considered the example set out in paragraph 108 above. The question arose because the Austrian tax system taxed certain non-Austrian dividends in much the same way as the UK corporation tax system taxed non-UK dividends. Whereas "Austria to Austria" dividends were tax exempt, an Austrian company receiving dividends from a company resident outside Austria would in certain circumstances be subject to tax on that dividend with a credit for non-Austrian tax paid.

112. The Austrian courts notified the question to the CJEU. They asked, effectively, whether in the circumstances of the example in paragraph 108 it would be a breach of Article 63 of the TFEU for Austrian legislation to deny the ability to carry forward the credit of 30 (using the figures in that example) that would otherwise be lost. The CJEU concluded that the provisions of Article 63 of the TFEU would indeed be breached if the tax credit of 30 could not be carried forward. The CJEU characterised the inability to carry forward the tax credit as being, in effect, the application of higher taxation on the non-Austrian dividends than was applied to Austrian dividends in the following extract from its judgment:

> *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… 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.*

113. The issue came before the Supreme Court in *FII SC3*. I accept the Claimants' analysis of the Supreme Court's judgment which can be summarised as follows:

    i) UK domestic legislation which prevents the carrying forward of unused DTR is precluded by EU law since it results in an unjustified difference in

treatment between domestic-sourced dividends and foreign-sourced dividends with one manifestation of that difference being the example set out in paragraph 108 above (*FII SC3* at [142]). The additional UK corporation tax charge arising in the context of that example was "unlawful economic double taxation, equivalent in effect to the postponement of an unlawful tax charge on the dividend income until a later tax year" (*FII SC3* at [139]).

ii) The way to address that incompatibility was to "read down" domestic UK legislation so as to interpret it in a way that is compatible with EU law. The focus of that process of "reading down" should be on the provisions dealing with the carry forward of unused DTR credits.

iii) The appropriate way to "read down" domestic legislation is as follows ([145] of *FII SC3*):

> *…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.*

iv) The process of "reading down" the domestic legislation deals with the issue going forward. However there remains a question about what should be done in the situation where tax has already been paid as a result of the inability under domestic law to carry forward unused DTR. In that case, there is a *San Giorgio* claim (which is a claim in restitution under domestic law) which can be described as follows ([155] and [158] of *FII SC3*):

> *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. Since the claim for repayment proceeds on the basis that the DTR credits would (but for the claimants' mistake) have been carried forward and used, those credits cannot be regarded as remaining available in addition to the restitution of the tax: otherwise, there would be double recovery. To the extent, however, that the inability to carry forward unused DTR credits did not result in the payment of tax, the unused credits must be regarded as remaining available.*

v) Their Lordships noted expressly the conclusion in *Salinen* that the inability under UK domestic law to carry forward unused DTR "amounted to indirect taxation of the earlier dividend income" ([138] of *FII SC3*).

The Claimants' pleadings in this case

114. The Claimants' position on the pleadings issue is that they have pleaded a claim in restitution for the recovery of unlawful tax which was paid as a result of their inability to offset unused DTR credits.

115. Paragraph 2 of the claim form to which the claimants were party, originally issued on 8 April 2003, included the following paragraph in the section giving brief details of the claim:

> *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.*

116. Paragraph 40(b) of the Claimants' current Particulars of Claim served on 27 March 2019 contains the following claim for relief. That claim has been a feature of the Claimants' pleadings throughout and was included in paragraph 7(b) of the particulars of claim endorsed on the original claim form in 2003:

> *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.*

117. The "circumstances referred to in paragraph 3 above" (which were also set out in paragraph 3 of the particulars of claim endorsed on the original claim form in 2003) were 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 s18 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.*

118. Paragraph 32 of the current particulars of claim served on 27 March 2019 reads as follows:

> *In calculating their liability to corporation tax on the shareholders' share of the Dividend Income, the Claimants took into account such reliefs which would have otherwise been available for alternative use by the Claimants had the corporation tax liability on the Dividend Income not arisen in particular but without limitation in deducting expenses of management as set out in paragraph 18 above which otherwise would have been available to be carried forward.*

119. HMRC submit that the Claimants' pleadings are inadequate for the following reasons:

    i) The "short description of the claim" summarised in paragraph 115 above does not advance the debate greatly since the question is how the claim is set out in the pleadings themselves.

    ii) The pleading set out in paragraph 116 above is not adequate. It simply sets out a claim for restitution of corporation tax paid on the dividends themselves. It does not extend to a claim for restitution of tax paid in respect of completely different income (for example trading income or interest income) paid in accounting periods after those in which overseas dividends were received. The position is not cured by the fact that the Claimants seek restitution of "monies paid or liable to be paid... in the circumstances referred to in paragraph 3 above". There is no such thing as a claim in restitution for monies "liable to be paid".

    iii) More generally, the Claimants' pleading does not comply with CPR 16.4. Nor does it comply with the following guidance given by Lord Burrows at [18] of his judgment in *Samsoondar v Capital Insurance Co Ltd* [2020] UKPC 33 as to what needs to be done to plead a claim in restitution:

        It has now become conventional to recognise … that a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence. The ideal pleading of a statement of case by the claimant should indicate that the claim is for restitution of unjust enrichment and should identify facts that satisfy each of those three elements. While it may be desirable, it is not essential, that the words 'unjust enrichment' are used but the claimant must identify sufficient facts to show how those three elements are satisfied…

    iv) It is much more arguable that the pleading set out in paragraph 32 of the particulars of claim served in 2019 pleaded a proper restitutionary claim. However, as a result of paragraph 51(6) of Schedule 18 of the Finance Act 1998, that pleading can be disregarded since it was made after 1 April 2010 and therefore was made too late to set out a proper restitutionary claim if none had been made previously.

120. I do not accept HMRC's argument set out in paragraph 119.ii). The claim is not just for restitution of sums that can be understood as having been imposed directly on the dividends. The declaration sought is wider: namely that the claimants are not liable to tax "in respect of" the dividends. Moreover, the request is for restitution of "monies paid... in the circumstances referred to in paragraph 3... pursuant to a mistake of law". Both *Salinen* and *FII SC3* have established that this difference in treatment outlined in the example in paragraph 108 results, in

effect, in an unlawful tax charge on overseas dividends (see [138] of *FII SC3* and [158] and [159] of *Salinen*). In my judgment, a claim for restitution of tax paid by mistake in the light of the unjustified difference in treatment between the corporation tax treatment of UK dividends and of overseas dividends (the "circumstances set out in paragraph 3" of the Claimants' particulars of claim) is sufficient to articulate a claim for the restitution of tax overpaid in the example set out in paragraph 108.

121. I also consider that the pleadings summarised in paragraphs 116 and 117 above comply, albeit in a brief way, with Lord Burrows' guidance set out in paragraph 119.iii) above. 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.

124. I consider that the conclusion I have reached is consistent with the judgment of the majority of the Court of Appeal in *Deutsche Morgan Grenfell Group plc v IRC* [2005] EWCA Civ 78 on a pleading issue that was not subsequently reversed by the judgment of the House of Lords. In that case, the taxpayers made a claim for restitution in respect of ACT paid on dividends. The pleading of that claim was in reasonably general terms not dissimilar to the pleadings of AXAIUK (set out in paragraph [242] of the judgment of Jonathan Parker LJ). The amount of ACT that the taxpayers had paid was expressed to include, but not be limited to, amounts set out in a schedule. When the taxpayers sought to add additional amounts to the schedule, both Jonathan Parker LJ and Rix LJ concluded that they were giving further particulars of an existing claim, rather than making a new claim (see [238] to [249] of the judgment of Jonathan Parker LJ and [250] to [260] of the judgment of Rix LJ). In his oral submissions, Mr Ewart resisted the analogy arguing that, if HMRC had wanted to understand the Claimants' case in 2003 when the claim form was served, they would not have been asking for particulars of amounts, but would have been asking whether the Claimants had a claim at all. As Mr Ewart put it in his oral submissions:

> *Now, it's, of course, true that the Revenue could have asked for further particulars of the actual liability to corporation tax on the dividends. That's the point they made in DMG. But what we couldn't have asked and what wouldn't have made any sense is to ask them, well, do you have any claims? Are you claiming any other tax that you might have paid which you haven't referred to in paragraph 3?*

125. The flaw in that 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.

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 pleaded a claim based in unjust enrichment.

127. My conclusion on the pleading issue is that the Claimants have pleaded a claim in restitution for the recovery of unlawful tax which was paid as a result of their inability to offset unused DTR credits.

Issue C(i) - "How should the claim be assessed"?

128. This was the first sub-issue identified in paragraph 9.iv) above. However, no party advanced any submissions on quantification before me and, accordingly, I will not address this issue.

Issue C(ii) - Paragraph 51(6) of Schedule 18 of the Finance Act 1998

129. Paragraph 51 of Schedule 18 of the Finance Act 1998 ("Paragraph 51") permits a company to make a claim to HMRC for repayment of corporation tax that the company considers was either not due or has been overpaid. Paragraph 51(6) is a provision that ousts other methods of reclaiming corporation tax considered to be overpaid (for example common law restitution reclaims). However, paragraph 51 (6) has no application to claims made before 1 April 2010.

130. Some of the additional corporation tax that AXAIUK considers that it has overpaid as a consequence of the inability to carry forward unused DTR was paid in respect of profits of its 2017 and 2018 accounting periods. HMRC argue that AXAIUK could not have made a claim for repayment of this amount until 2017 and 2018 at the earliest (since it could not apply for repayment of tax until that tax fell due). Therefore, argue HMRC, paragraph 51(6) has the effect of ousting

a restitutionary claim in respect of tax paid in the 2017 and 2018 accounting periods.

131. In my judgment, this issue is dealt with in the same way as the pleading issue dealt with above. AXAIUK's claim was, following the reasoning of *Salinen*, a claim for restitution of tax overcharged on the dividends that it had received. AXAIUK made that claim in 2003. Accordingly, paragraph 51(6) does not apply.

Issue C(iii) – income tax set off against corporation tax in accounting periods ended 31 December 1995 and 31 December 1996

Introduction to the issue

132. Companies resident in the UK are liable to corporation tax, rather than income tax on their profits. However, despite not being liable to income tax, UK resident companies can receive payments from which income tax has been deducted. For example, payments of yearly interest were often required to be paid under deduction of income tax at the rate of 20%.

133. Under the law as it stood in relation to AXAIUK's accounting periods ended 31 December 1995 and 31 December 1996, income tax that AXAIUK suffered when it received a payment made under deduction of income tax could be treated in the following ways:

    i) It was first to be set off against, and so operated to reduce, its corporation tax liability for the relevant accounting period (s7(2) of ICTA).

    ii) To the extent that its corporation tax liability was insufficient (for example if AXAIUK had suffered £500,000 of income tax, but only had a corporation tax liability of £200,000), AXAIUK could claim repayment of the excess income tax (£300,000 in the above example).

    iii) However, if AXAIUK sought repayment of income tax, it needed to make a claim in a corporation tax return for the relevant period or by way of an amendment to the return (s7(5) to s7(7) of ICTA).

134. Issue C(iii) raises a question of some detail as regards the quantification of AXAIUK's corporation tax claim in circumstances where some of the corporation tax that it paid for relevant accounting periods was satisfied by income tax pursuant to s7(2) of ICTA. The issue arises in the following circumstances (with the figures used being "round number" versions of the actual figures in the interests of simplicity):

    i) In its 1992 to 1994 accounting periods, AXAIUK had a DTR credit of £500,000 which, it is common ground, should be treated as being available for carry-forward by applying the judgment of the Supreme Court in *FII SC3* (see paragraph 113 above).

    ii) In its 1995 accounting period, AXAIUK was in the following position:

a) It received dividends from non-UK subsidiaries but received £200,000 less DTR on those dividends than it should have obtained under EU law principles.

b) At the time, AXAIUK prepared its returns on the basis of a corporation tax liability of £6.2m. That return did not take into account either (i) the fact that it was entitled to £200,000 additional DTR "in year" (see 134.ii)a) above) or (ii) any possibility of carrying forward £500,000 of underused DTR from earlier accounting periods (see 134.i) above).

c) AXAIUK calculated its corporation tax liability for the 1995 accounting period on this basis as being £6.2m. AXAIUK had received payments under deduction of £6m of income tax in the 1995 accounting period. It set that £6m off against the corporation tax liability of £6.2m shown as due in its return and made a cash payment of £200,000 to HMRC.

iii) In its 1996 accounting period, AXAIUK was in the following position:

a) It received dividends from non-UK subsidiaries but obtained £330,000 less DTR than it should have obtained under EU law principles.

b) Its return at the time did not take into account this insufficiency of DTR. Nor did the return make any claim for carry-forward of underused DTR from earlier accounting periods. On that basis, AXAIUK calculated its corporation tax liability as being £3m.

c) It had received payments under deduction of income tax of £4 million in its 1996 accounting period. It set £3m of that against the corporation tax liability shown in its return and obtained a refund of the remaining £1m.

iv) In its 1997 accounting period, AXAIUK was in the following position:

a) It received dividends from non-UK subsidiaries but obtained £300,000 less DTR than it should have obtained under EU law principles.

b) It computed its corporation tax liability as £10m without taking into account either the shortfall in DTR or any possibility of carrying forward unused DTR from earlier accounting periods. It paid £5m in cash and satisfied the remaining £5m with credits for income tax that had been withheld from payments that it had received in 1997.

135. The disagreement between the parties starts with the analysis of the position in the 1995 accounting period. HMRC contend:

i) With hindsight it can now be seen that £700,000 of the corporation tax returned as being payable in the 1995 accounting period was unlawful. That

was because the actual corporation tax liability calculated as due should have been reduced by both (i) £500,000 of DTR carried forward from previous accounting periods and (ii) additional "in-year" DTR of £200,000.

ii) HMRC are prepared to accept that £200,000 of the unlawful charge was satisfied by means of a cash payment of £200,000. (HMRC suggest that other methods of apportionment might have been possible, but are content to adopt this approach in the circumstances of this case). A restitutionary claim as regards this £200,000 is in principle available, provided that AXAIUK has made that claim within applicable time limits.

iii) It follows that the remaining £500,000 of the unlawful corporation tax charge was apparently "discharged" by AXAIUK's available income tax credits. However, since the £500,000 corporation tax charge was unlawful it was a nullity. By analogy with the reasoning in the paragraph [101] of *Prudential SC*, and noting that the provisions relating to the crediting of income tax against corporation tax are similar to those providing for the credit of ACT against corporation tax that were considered in *Prudential SC,* the correct analysis is that the £500,000 of income tax credit was not used in 1995 and remained available.

iv) In principle, therefore, AXAIUK could have sought to reclaim that £500,000 income tax in cash. However, the time for making such a claim has now expired.

v) It follows that all of the consequences of AXAIUK's inability to carry forward the £500,000 of surplus DTR from its 1992-1994 accounting periods were all addressed in its 1995 accounting period. No further carry-forward is possible beyond 1995.

136. AXAIUK does not accept the entirety of the analysis set out in paragraph 135 above. Its primary position is as follows:

i) It agrees with HMRC that the £200,000 shortfall in its "in year" DTR for 1995 can be the subject of a claim in restitution. Therefore, it accepts HMRC's analysis set out in paragraph 135.ii) although it does not agree that this involves any element of concession on HMRC's part as to the correct basis of apportionment.

ii) However, AXAIUK argues that the £500,000 of DTR credit available for carry-forward from the 1992-1994 accounting periods should be carried forward until it can be set off against corporation tax that was paid in cash. The first available cash payment of corporation tax took place in 1997. Its restitutionary remedy based on *FII SC3* and *Salinen* should therefore be calculated by reference to an assumed carry-forward against the profits of the 1997 accounting period.

<u>Analysis of Issue C(iii)</u>

137. The parties are agreed on the outcome so far as relating to the £200,000 "in year" insufficiency of DTR in 1995 if not on the reasoning that supports that outcome.

I do not, therefore, need to make any determination in relation to that issue. Accordingly, I focus on the £500,000 DTR that is, under the principles of *FII SC3* to be treated as available for carry-forward.

138. One point at least is clear. In 1995, it would not even have occurred to AXAIUK that any part of the corporation tax liability it had could be discharged by means of a notional carry-forward of under-used DTR. In saying this, I am not, of course, making any finding as to a date of constructive knowledge for the purposes of section 32(1)(c) of the Limitation Act. However, even if AXAIUK had known or suspected that it had been given £500,000 too little DTR between 1992 and 1994, it could scarcely have realised that any surplus DTR could be carried forward to 1995 since UK domestic law at the time set out no ability for unused DTR to be carried forward. I therefore agree with AXAIUK that HMRC's argument involves undertaking a "notional reconstruction" of AXAIUK's 1995 corporation tax computation under which carried forward DTR that AXAIUK could not have known was available is set off against a notional corporation tax liability that AXAIUK could not have considered due because of the availability of credit for income tax.

139. AXAIUK submits that HMRC unsuccessfully argued for a similar "notional reconstruction" at [141] of *FII SC3*. However, I agree with HMRC that their argument in *FII SC3* was different from that now made. In *FII SC3*, HMRC were arguing that domestic legislation on the set-off of management expenses against income could be construed in a way that would have prevented those management expenses from being set off against "Case V income" such as non-UK dividends. HMRC advanced that "conforming construction" with a view to persuading the Supreme Court that it would remove a central cause of the problem identified in paragraph 108, namely the set-off of reliefs against income that could otherwise be sheltered with DTR (see paragraph 108.iii)). If this feature of the tax landscape was removed by HMRC's suggested "conforming construction", it was argued that the problem identified in paragraph 108 would not arise. The taxpayer would have a notional corporation tax liability of 30 on a gross dividend of 100 that would be fully satisfied with DTR of 30 and would retain the ability to carry forward management expenses of 500.

140. HMRC's unsuccessful argument summarised at [141] of *FII SC3* was not, therefore, directed at the question of which corporation tax liabilities carried forward DTR should be set off against. Rather, it was an attempt to persuade the court that there was no need for taxpayers to have the ability to carry forward DTR in the first place. HMRC's argument failed because the court considered that the root cause of the problem identified in paragraph 108 was that the UK's DTR legislation was contrary to EU law. Therefore, the way to address that was by means of a conforming construction of DTR legislation rather than a conforming construction of provisions related to management expenses (see [143] of *FII SC3*).

141. However, AXAIUK is on much stronger ground when it submits that the notional reconstruction of its 1995 corporation tax computation that HMRC seek is inconsistent with all the Supreme Court's analysis at [154] to [158] of *FII SC3*. Those paragraphs must be read together with [146] of *FII SC3*. In my judgment, the following points emerge from that analysis:

i) It is necessary to identify the extent to which "tax was paid as a result of the inability to carry forward unused DTR credits".

ii) The requisite transfer of value necessary for a claim in restitution is present if a payment of corporation tax was made under the mistaken belief that underused DTR credits could not lawfully be carried forward and set against that corporation tax liability.

iii) A restitutionary claim is available because EU law does not permit the indirect double taxation of foreign-sourced dividends, when domestic-sourced dividends are exempt from tax.

142. HMRC's analysis is premised on the proposition that £500,000 of corporation tax in AXAIUK's 1995 accounting period became "unlawful" when it was not mitigated by a carry forward of surplus DTR. However, there is no basis for that proposition in *FII SC3*. On the contrary, the whole focus of [146] and [154] to [158] of *FII SC3* is on the need to identify tax paid as a consequence of a mistaken belief that underused DTR credits could not lawfully be carried forward. The Supreme Court said explicitly at [154] "We are concerned with the payment of tax, not with its non-payment." That actual tax paid will necessarily relate to amounts shown in actual tax computations.

143. The flaw in HMRC's analysis is that they focus, not on actual tax paid, but on tax that counterfactually, could not have been paid if AXAIUK had, with remarkable prescience, realised in 1995 that it could carry forward surplus DTR.

144. HMRC effectively argue that AXAIUK should have made a claim in 1995 for repayment of income tax and must, therefore, suffer the consequences if it is now too late for such a claim to be made. However, the only basis on which it is said that AXAIUK should have made this claim is the notional rewriting of its actual tax computation for 1995 which HMRC now advance some 28 years after the event. There was no realistic prospect of AXAIUK making the claim which HMRC say they should have made in 1995. Therefore, the effect of HMRC's analysis is to deny AXAIUK any restitution of indirect double taxation of foreign-sourced dividends arising as a consequence of a mistaken belief that surplus DTR could not be carried forward. I do not consider that to be consistent with either the outcome or the reasoning in *FII SC3*.

145. Therefore, the premise of HMRC's analysis fails. The only remaining task is to answer Issue C(iii) which was worded as follows:

> *iii. Are the Claimants entitled to a claim in restitution for accounting periods ending on 31 December 1995 and 1996 in respect of Income Tax purportedly set off against Corporation Tax?*

146. This is quite a compressed way of dealing with a question of some difficulty. Moreover, the formulation of the question suggests that it is income tax set off against corporation tax that is to be the subject of a claim for restitution. The true position is that the restitutionary claim is for the indirect double taxation on dividends that AXAIUK received between 1992 and 1994. I will therefore answer the question slightly differently from the way in which it was posed.

147. Subject to compliance with appropriate time limits, AXAIUK is entitled to make a claim for restitution of an economic double charge to corporation tax on dividends received between 1992 and 1995, together with interest, as follows:

i) £200,000 of corporation tax paid in its 1995 accounting period.

ii) £500,000 of corporation tax paid in its 1997 accounting period.

148. The reason for omitting the 1996 accounting period is simply that HMRC and AXAIUK have reached a settlement in relation to that accounting period which neither side invites me to disturb.

DISPOSITION

149. The Limitation Issue and the Set-Off Issue are determined in favour of HMRC (see paragraphs 83 and 105 above).

150. The Pleading Issue and sub-issues C(ii) and C(iii) are determined in favour of the Claimants (see paragraphs 127, 131 and 147 above).