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Case No: A3/2013/1211
A3/2013/1208

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Warren and Upper Tribunal Judge Timothy Herrington
[2013] UKUT 0105 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2015

Before :

LORD JUSTICE PATTEN
LORD JUSTICE BRIGGS
and
SIR COLIN RIMER

- -

Between :

THE TRUSTEES OF THE BT PENSION SCHEME	**Appellants/ Respondents**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents/ Appellants**

- -
- -

Mr Malcolm Gammie QC and **Mr Conrad McDonnell** (instructed by **Pinsent Masons LLP**) for the **Trustees**
Mr Rupert Baldry QC and **Mr James Rivett** (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Revenue**

Hearing dates : 10, 11, 12, 16 and 17 June 2015

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Approved Judgment

Lord Justice Patten :

Introduction

1. This is the judgment of the Court, to which all its members have contributed. It determines a series of related appeals and cross-appeals from the decision of the Upper Tribunal (Tax and Chancery Chamber) (Warren J and Judge Herrington) [2013] UKUT 0105 (TCC) which in turn dismissed appeals and cross-appeals from a decision of the Tax Chamber of the First-tier Tribunal (Sir Stephen Oliver QC and Julian Ghosh QC) [2011] UKFTT 392 (TC) which, with one exception, dismissed appeals by the Trustees of the BT Pension Scheme ("the Trustees") against decisions of HM Revenue & Customs ("HMRC") to disallow claims for payment of tax credits made by the Trustees in respect of tax years 1990/1991 through to 1997/1998 inclusive ("the relevant period").

2. The BT Pension Scheme ("the Scheme") is, and has at all material times been, an exempt approved scheme with UK resident trustees, with the consequence that it is exempt from tax on its investment income.

3. All the Trustees' claims for tax credits relate to dividend income received by the Scheme during the relevant period. Subject to one important exception, dividends received by UK taxpayers from UK resident companies gave rise to tax credits under a system of partial imputation designed to mitigate what would otherwise have been the double taxation of corporate profits, first by way of corporation tax in the hands of the company and secondly by way of income tax on the company's distribution of dividends to its shareholders. For the purposes of this introduction it is sufficient to summarise the essential features of this imputation scheme in the barest outline, by adopting the summary provided by Lewison LJ when determining a preliminary issue in these appeals in this Court (sitting with Longmore and Briggs LJJ) [2014] EWCA Civ 23, at paragraph 7:

> "When a UK-resident company paid a dividend to its shareholders it had to pay an amount of advance corporation tax ("ACT") to the Revenue. The rate of ACT was initially linked to the basic rate of income tax, and subsequently the lower rate. Thus, when the basic rate of income tax was 25%, the ACT rate was 25/75 (or 1/3) of the amount of the distribution. The company which paid the ACT was in due course entitled to set that ACT against its corporation tax liability for its annual accounting period. Individual shareholders were liable to income tax on dividends received. Their liability arose under Schedule F (that is, section 20 of ICTA). The ACT paid by the company was "imputed" to the shareholders. What this meant was that the measure of the shareholder's income for tax purposes was the aggregate of the dividend plus the ACT which the company had paid to the Revenue. However, the shareholder was entitled to a tax credit for the amount of the ACT that had been imputed to him in this way; and that tax credit went to reduce his own liability to tax. In some cases the procedure might result in the Revenue making a payment to the claimant. The overall objective was to

> prevent double taxation: once in the hands of the company and once again in the hands of the shareholder."

4. The most important aspect of these arrangements from the perspective of exempt pension schemes was that, to the extent that such tax credits exceeded their own income tax liability (which it usually did because such pension schemes had minimal, if any, taxable income) they were entitled to payments of the tax credits by HMRC or its predecessor the Commissioners of Inland Revenue (collectively "the Revenue"), so that the credits formed an important part of the income of such schemes. The credits were, in the jargon used by counsel on this appeal, "payable tax credits". The right to payment of the excess of such tax credits over the Trustees' income tax liability was conferred by s. 231 of the Income and Corporation Tax Act 1988 ("ICTA"), in the following terms:

> "(1) Subject to sections 247 and 441A, where a company resident in the United Kingdom makes a qualifying distribution and the person receiving the distribution is another such company or a person resident in the United Kingdom, not being a company, the recipient of the distribution shall be entitled to a tax credit equal to such proportion of the amount or value of the distribution as corresponds to the rate of advance corporation tax in force for the financial year in which the distribution is made.
>
> …..
>
> (3) A person not being a company resident in the United Kingdom, who is entitled to a tax credit in respect of a distribution may claim to have the credit set against the income tax chargeable to his income under section 3 or on his total income for the year of assessment in which the distribution is made and, subject to subsections (3A) to (3D) below, where the credit exceeds that income tax, to have the excess paid to him."

5. During the relevant period, the Trustees regularly claimed and received payable tax credits in respect of the dividend income of the Scheme, subject to two important exceptions. The first is implicit in the requirement in s. 231(1) that the company paying the dividend be resident in the United Kingdom. No such tax credits were payable in relation to the dividend income received from foreign companies. Nonetheless, since such income was investment income of the Trustees, they incurred no income tax liability in relation to it.

6. The second important exception related to what are called "foreign income dividends" ("FIDs"), namely dividends paid by an English resident company which it elected to attribute to income received by it from foreign subsidiaries. The FIDs regime was introduced by amendment to ICTA with effect from July 1994. We will have to explain its purpose and effect in a little more detail in due course but, for the purposes of this introduction, it is sufficient to say only that the receipt of a FID by a shareholder in a UK resident parent company did not entitle the shareholder to a tax

credit to which s. 231(1) and (3) applied. Rather, the shareholder was merely entitled to treat that income as already having borne tax at the lower rate. The practical result was that shareholders with sufficient income tax liability to absorb that credit by way of set-off were no worse off in relation to FIDs than in relation to other dividend income from UK resident companies, but exempt shareholders such as the Trustees were worse off because they were not entitled to receive payable tax credits.

7. Both the ACT imputation regime and the FIDs regime were abolished in relation to distributions made on or after 6th April 1999. At no time prior to their abolition was it perceived that the exceptions for foreign dividends and FIDs might offend against any principles, rights or freedoms conferred by what we will loosely refer to as EU law. But since the end of the relevant period, developments in the jurisprudence of the Court of Justice of the European Union ("the ECJ") have given rise to claims that those exceptions offend against two fundamental freedoms established by the EC Treaty ("the Treaty") and in force during the relevant period, namely the freedom of establishment (conferred by Article 43) and the right to free movement of capital, originally conferred by the Directive (88/361/EEC) and re-conferred by Article 56. Taking the two exceptions in the order in which the jurisprudence of the ECJ first focussed upon them, the denial of tax credits in relation to foreign dividend income was identified as potentially incompatible with the free movement of capital in *Proceedings brought by Manninen* (Case C-319/02) [2005] Ch 236 ("*Manninen*"), in September 2004. The potential incompatibility with free movement of capital constituted by the FIDs regime was first identified by the ECJ in December 2006 in *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* (Case C-446/04) [2007] STC 326 ("*FII (GLO) ECJ*").

8. The *Manninen* case was brought by a fully taxable (i.e. not exempt) Finnish taxpayer, and related to the difference in his tax treatment in Finland upon dividends paid to him by companies respectively in Finland and Sweden. The *FII* case was brought by UK resident parent companies making FIDs elections in respect of dividends attributable to income from foreign subsidiaries, of which the test claimant was British American Tobacco ("BAT"). The *FII* case was, therefore, unlike the *Manninen* case, specifically about the UK tax legislation in issue on these appeals.

9. By the time when these decisions became public knowledge, the period during which the UK's tax treatment of dividend income had been actually or potentially in conflict with EU rights and freedoms had long since ended. Furthermore the six-year limitation period for bringing claims for relief from tax (running, subject to irrelevant exceptions, from the end of the tax year in respect of which the claim is made) had also largely expired before the Trustees made any claim that their EU rights and freedoms had been infringed, either in relation to foreign dividend income or FIDs.

10. The Trustees were, and have remained, understandably uncertain about the nature of their potential remedies, if indeed their EU rights have been infringed. Their primary case has been that they were simply entitled to payable tax credits in respect of foreign dividends and FIDs during the whole of the relevant period (although in relation to FIDs only from the introduction of that regime in 1994). Alternatively, they claim to be entitled to restitution and/or damages for having been deprived of payable tax credits during the relevant period. They therefore instituted both High Court proceedings for restitution and/or damages, and made statutory claims for the tax credits which, on being rejected by HMRC, led to these appeals, initially to the

First-tier Tribunal ("the FtT"). For convenience, and again adopting the jargon of counsel, we will refer to these two types of statutory claim as the "*Manninen* claims" and the "FIDs claims".

11. It will be necessary to describe the chronology of the Trustees' claims in due course but, for the purposes of this introduction, it is sufficient to say that, partly because of resolution by this Court of the preliminary issue to which we have referred, it is now common ground subject to any appeal to the Supreme Court that, viewed from the perspective of UK domestic law but without regard to EU implications, the Trustees are now time-barred in respect of all their *Manninen* claims, and all their FIDs claims, save only for their FIDs claim in relation to the final tax year 1997/1998. The Trustees' claims for restitution and/or claims for damages in the High Court have been stayed pending the determination of their statutory claims for payable tax credits.

12. In those statutory proceedings of which this appeal is part, there have been three main issues, namely:

    i) Whether the non-availability of payable tax credits in relation to FIDs infringed the Trustees' EU right to free movement of capital.

    ii) Whether the non-availability of payable tax credits in relation to foreign dividends did so, and

    iii) Whether if the Trustees were therefore *prima facie* entitled to payment of such tax credits by way of remedy for the infringement of their EU rights, the pursuit of that entitlement is time-barred.

13. Both the FtT and (in dismissing the parties' appeals and cross-appeals) the Upper Tribunal resolved issues (1) and (2) in the affirmative but held that, save only in relation to FIDs distributed in the 1997/1998 tax year, all the Trustees' claims were time-barred and that the domestic time-bar in question did not itself offend any relevant EU rights or freedoms.

14. All the issues turned, with one exception, upon questions of EU law. In all those respects both Tribunals regarded their conclusions as *acte clair*, so that no reference to the ECJ was considered necessary or appropriate.

15. The only non-EU law issue raised in these statutory proceedings was whether the tax credit claims were subject to a domestic limitation period at all. This was a question of construction of the domestic tax legislation, and this Court determined, on a preliminary issue in the appeals, that those claims were subject to the six-year period prescribed by s. 43 of the Taxes Management Act 1970 ("TMA"), essentially because the claims for payable tax credits were claims for relief within the meaning of s. 43(1). The question whether that determination will become the subject of an appeal to the Supreme Court is in abeyance pending the determination of the remaining issues in these appeals, which therefore raise issues solely of EU law.

Determination

16. It is convenient at this stage to set out our decisions on the issues raised. They are as follows:

i) There is in our view a question of EU law raised by the FIDs claims which, in relation to the claim arising from FIDs received in the tax year 1997/1998, needs to be decided in order to resolve that appeal, and which we consider ought now to be referred to the ECJ. This is because that claim is not time-barred.

ii) Because we have concluded (see below) that all the *Manninen* claims are time-barred, there is no basis for a reference to the ECJ of the question whether the non-availability of tax credits in relation to foreign dividends infringes the Trustees' EU rights. Nonetheless, but for that outcome in relation to limitation, we would have considered, in respectful disagreement with both Tribunals, that the question was not *acte clair*, and would otherwise therefore have been appropriate for a reference.

iii) We dismiss the Trustees' appeal in relation to all questions of limitation. The result is that all the *Manninen* appeals, and all the FIDs appeals save only that for the tax year 1997/1998, remain dismissed. We consider that the questions of EU law raised by the time-bar issue are *acte clair*, so that no reference of them to the ECJ is necessary.

The FIDs claims

17. Our conclusion that the Trustees' FIDs claims (where they are not time-barred) raise a question of EU law which needs to be referred to the ECJ enables us to give our reasons in a more abbreviated form than would have been appropriate if we were determining that question. Nonetheless, we recognise that neither the FtT nor the Upper Tribunal considered it necessary to seek further guidance from the ECJ, taking the view in relation to both the FIDs and the *Manninen* claims that their conclusions "follow inevitably from the existing jurisprudence of the ECJ…": see paragraph 421 of the decision of the Upper Tribunal. The unanimous conclusion of two specialist tax tribunals about these matters means that our contrary view, namely that the questions of EU law are not *acte clair* and that a reference in relation to the surviving FIDs claim is necessary, calls for considerably more than our mere assertion to that effect.

18. The central thrust of the Trustees' case that the FIDs regime constituted unlawful interference during the relevant period with their Article 56 right to the free movement of capital is that, by denying them, as tax-exempt shareholders, a payable tax credit when receiving dividends by way of FIDs, they were thereby deterred from investing in UK-resident parent companies which themselves invested in foreign subsidiaries, by comparison with investing in UK-resident companies which invested only in UK-resident subsidiaries, and which would not therefore make distributions to shareholders by way of FIDs. Such a case has to surmount the obvious initial difficulty that the relevant difference in tax treatment arises not (as in the *Manninen* claims) between investment in UK-resident and foreign-resident companies, but between investment in two different kinds of UK-resident companies. The question

therefore is whether the difference in treatment between FIDs dividends and other dividends of UK-resident companies has any cross-border consequence in terms of free movement of capital of which they are entitled to complain.

19. The Trustees have, thus far successfully, met this initial objection by two arguments, which may be summarised as follows:

i) Investment in shares in a UK-resident parent company which itself invests in foreign subsidiaries is a cross-border movement of capital by the shareholder, and not merely by the parent company, if the requisite direct economic link can be demonstrated between the shareholder's investment and the parent company's investment in the foreign subsidiary.

ii) In any event, since the ECJ has already held that the denial of a payable tax credit in relation to FIDs contravenes the parent company's Article 56 right to the free movement of capital, the parent's shareholders may themselves pursue Article 56 claims, if adversely affected by that denial of a payable tax credit as tax-exempt shareholders, such as the Trustees plainly are. This second argument was described, perhaps pejoratively, by Mr. Rupert Baldry QC for HMRC, as the "piggyback" argument, a label which we will use for convenience, but without any pejorative intent.

20. The question which we have been unable to resolve without seeking the existence of the ECJ is whether either of those arguments convincingly meet the initial difficulty which we have described, to the extent that the outcome can properly be regarded as *acte clair*. In order to explain our conclusion that they cannot, it is necessary first to describe the FIDs regime in its context within the UK's tax treatment of corporate dividends at the material time and then to review, albeit in outline rather than in depth, the relevant jurisprudence of the ECJ, both about Article 56 generally and about its decision that the FIDs regime does indeed breach the Article 56 rights of the relevant parent companies.

<u>The FIDs regime</u>

21. Like the Upper Tribunal, we have found no better general description of the UK tax regime during the relevant period than that provided by Henderson J at an early stage in the *FII* litigation, in *Test claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch) ("*FII (GLO) Ch*"), at paragraphs 14-28:

> "14. Where a UK-resident company made a qualifying distribution it was liable to pay ACT on the distribution: section 14(1). The sum of the amount of the distribution and the ACT was called a franked payment: section 238(1). Before 6 April 1993, the rate of ACT was linked to the basic rate of income tax. For example, from 1988 to 5 April 1993, when the basic rate of income tax was 25%, the ACT rate was 25/75 (or 1/3) of the amount of the distribution. Between 6 April 1993 and 5 April 1994 the ACT rate was set at 22.5/77.5 (or 9/31). From 6 April 1994 until 5 April 1999 the ACT rate was linked to the

lower rate of income tax: section 14(3). At that time the lower rate of income tax was 20%. The ACT rate was therefore 20/80 (or 1/4).

Tax treatment of dividends received by individuals and exempt entities

15. Income tax was charged under various "Schedules" for different types of income. This is a peculiar feature of the UK tax system. Under Schedule F (section 20) individual shareholders were liable to income tax on dividends and other distributions received. A UK-resident individual in receipt of a qualifying distribution from a UK-resident company was entitled to a tax credit equal to such proportion of the amount or value of the distribution as corresponded to the rate of ACT: section 231(1). Income tax was chargeable on the total of the distribution and the tax credit: section 20(1). The tax credit extinguished all or part of the taxpayer's liability. Lower-rate taxpayers and non-taxpayers (e.g. taxpayers whose income did not exceed the personal allowances) could recover some or all of the tax credit in cash. Entities not subject to UK tax on investment income, e.g. pension funds, could before 2 July 1997 claim payment in full of the tax credit on dividends received.

Tax treatment of dividends received by companies

16. A UK-resident company was subject not to income tax but to corporation tax: section 6(2). However, corporation tax was not chargeable on dividends and other distributions received from another UK-resident company, nor were such payments taken into account in computing the corporation tax liability of the company making the distributions. This follows from section 208, which provides as follows:

> "Except as otherwise provided by the Corporation Tax Acts, corporation tax shall not be chargeable on dividends and other distributions of a company resident in the United Kingdom, nor shall any such dividends or distributions be taken into account in computing income for corporation tax."

17. A UK-resident company was, by contrast, subject to corporation tax on dividends received from non-resident companies. Such tax was charged under Case V of Schedule D, set out in section 18, being

> "Tax in respect of income arising from possessions out of the United Kingdom not being income consisting of emoluments of any office or employment."

The company was, however, granted relief for foreign taxes paid. Such relief was given either unilaterally under domestic rules (section 790) or under double taxation conventions entered into with other countries (section 788). The unilateral arrangements provided for the crediting against a company's UK corporation tax liability of withholding taxes paid on foreign dividends. Where the UK-resident company either directly or indirectly controlled, or was a subsidiary of a company which directly or indirectly controlled, not less than 10% of the voting power of the company paying the dividend, the relief extended to the underlying foreign corporation tax on the profits out of which the dividends were paid, including underlying tax incurred by lower-tier companies (section 801). The foreign tax was creditable only up to the amount of the UK corporation tax liability on the particular income. Similar arrangements generally applied under the UK's double taxation treaties with other countries: see, for example, the treaties with France, Spain and the Netherlands.

18. The standard clause in such treaties, reflecting section 790(4), is usually to be found in the "Elimination of Double Taxation" article. So, for example, Article 22(b) of the UK/Netherlands Double Taxation Treaty reads:

> "Where such income is a dividend paid by a company which is a resident of the Netherlands to a company which is a resident of the United Kingdom and which controls directly or indirectly not less than one-tenth of the voting power in the former company, the credit shall take into account (in addition to any Netherlands tax payable in respect of the dividend) the Netherlands tax payable by that former company in respect of its profits."

<u>Franked investment income</u>

19. A UK-resident company receiving a qualifying distribution from another UK-resident company was entitled to a tax credit: section 231(1). The total of the distribution and the tax credit was called franked investment income ("FII"): section 238(1). A UK-resident company receiving a distribution from a non-resident

company was not entitled to a tax credit, and the income did not qualify as FII. Where a UK-resident company received FII, it was liable to pay ACT in relation to its own dividends only to the extent that those dividends and the ACT referable to them (i.e. its franked payments) exceeded the FII: section 241. Special arrangements applied under section 247 to dividends paid between UK-resident members of groups of companies. Provided that they satisfied certain minimum holding requirements – broadly speaking, the requirement was that more than 50% of the shares of the company paying the dividend had to be held by the parent – the UK-resident subsidiary and its UK-resident parent could make an election (called a group income election) under which dividends could be paid to the parent by the subsidiary without its having to account for ACT. Where a group income election was in force, the payment of dividends under it did not entitle the parent company to a tax credit, and the dividends were not included within its FII. The effect of a group income election was to postpone the payment of ACT until a distribution was made by the parent company.

Set-off and surrender of ACT

20. A company was entitled to set ACT paid in respect of a qualifying distribution during an accounting period against its mainstream corporation tax ("MCT") liability for that and future periods. There was, however, a limit on the amount which could be set off based on the income tax rate (see paragraph 14 above). Since the UK operated a partial imputation system, so that the UK corporation tax rate exceeded the ACT set-off rate, the company always faced a marginal corporation tax liability on its profits. Moreover, where a company received credit for foreign tax, this reduced the amount of the corporation tax liability available for set-off of ACT: section 797(4). Unrelieved ACT, known as "surplus ACT", could be carried back or forward for set-off against MCT of other periods: section 239.

21. A company was also permitted to surrender to its subsidiaries the benefit of ACT payments it had made: section 240. The subsidiaries to whom the surplus ACT could be surrendered were restricted to subsidiaries resident in the UK: section 240(10). The subsidiaries were then able to set the surrendered ACT against their own UK MCT liability.

22. A company with surplus FII (that is, FII which exceeded franked payments) could, if it had losses, set the amount of those losses against the surplus FII under section 242

and obtain a payment in cash of the tax credit comprised in that amount of surplus FII. This provision was abolished with effect from 2 July 1997.

The FID regime

23. Experience with the arrangements described above showed that companies receiving significant foreign dividend income generated surplus ACT. This was because:

(i) foreign dividends did not attract a tax credit and therefore did not create FII which could be used to reduce the companies' ACT liability on distributions made by them; and

(ii) any credit given for foreign tax reduced the MCT liability against which the ACT could be set off.

Arrangements were introduced with effect from 1 July 1994 under which a UK-resident company could elect that a cash dividend which it paid to its shareholders was a FID: sections 246A to 246Y. The election had to be made by the date the dividend was paid and could not be revoked after that date. ACT was payable on the FID but, if the company could match the FID with foreign profits, a claim for repayment could be made for ACT arising in respect of the FID.

24. The reclaimed ACT became repayable at the same time as the MCT became payable, i.e. nine months after the end of the accounting period, and was set first against any MCT liability for the period and any excess was then repaid. As ACT was paid 14 days after the end of the quarter in which the dividend was paid, and MCT was payable nine months after the end of the accounting period, this meant that ACT would remain outstanding under the FID system for between 8½ and 17½ months depending when the dividend was paid in that accounting period.

25. A FID did not constitute FII, although a corporate shareholder could use a FID received by it to frank a FID paid, so that ACT was payable only on the excess of FIDs paid over FIDs received. Because a FID did not constitute FII the shareholder receiving the FID was not entitled to a tax credit under section 231(1); but an individual receiving a FID was nevertheless treated as receiving income which had borne tax at the lower rate for the year of assessment. However, no repayment was made to individual shareholders of income tax treated as having

> been paid, nor could a tax exempt shareholder such as a UK pension fund reclaim a tax credit similar to that which would have been payable on a non-FID qualifying distribution.
>
> Abolition of the ACT regime
>
> 26. For distributions made on or after 6 April 1999, the ACT system was abolished. Companies no longer had to pay or account for ACT on shareholder dividends and other qualifying distributions. The FID rules were also abolished.
>
> 27. For companies with brought-forward surplus ACT, a "shadow ACT" system was introduced. The shadow ACT regulations allowed companies access to their surplus ACT in an amount broadly similar to the relief allowable under the old rules. This meant that surplus ACT could only be utilised after the shadow ACT was notionally used and exhausted.
>
> 28. UK-resident individuals now receive dividends with a tax credit equal to one ninth of the dividend. The tax credit extinguishes lower and basic rate income tax liability on the dividend."

22. Tax-exempt investors such as pension funds of which the Scheme is a prime example form a substantial and important part of the shareholders of many large UK-resident companies. It is beyond question that the tax disincentive facing such pension funds when deciding whether to invest in parent companies which might distribute profits by way of FIDs, constituted by the denial of a payable tax credit, was a matter of concern not merely to the potential tax-exempt investors, but also to the parent companies themselves. Accordingly, many of them chose to enhance dividends which they might otherwise have paid, by increased amounts designed to offset that disincentive to their tax-exempt shareholders.

23. There have been no findings of fact in the present litigation sufficient to enable it to be known whether, during the relevant period, the FIDs which parent companies paid to the Trustees were enhanced, let alone sufficiently enhanced so as wholly to offset the disadvantage to the Trustees attendant upon the denial of a payable tax credit in relation to such dividends. We have therefore to proceed on the basis that (if relevant to the quantum of any claim which the Trustees might be able to pursue by reason of infringement of their EU rights) such enhancements of dividends as they did receive did not fully offset that disadvantage.

24. Nonetheless we mention dividend enhancement at this stage because it formed the bedrock of the parent companies' claims in the *FII* litigation that the denial of tax credits to their shareholders in relation to FIDs constituted a breach of their own freedom of establishment and free movement of capital, conferred respectively by Articles 43 and 56 of the Treaty, to which we now turn.

Freedom of Establishment and Free Movement of Capital

25. This case is entirely about an alleged infringement of the right to free movement of capital. Nonetheless, since part of the jurisprudence of the ECJ prayed in aid by the parties relates to freedom of establishment, we briefly describe that EU law right as well.

26. For the whole of the period during which the FIDs regime applied, the right to free movement of capital was conferred by Article 56 of the Treaty, (so far as relevant) in the following terms:

> "Chapter 4
>
> Capital and payments
>
> Article 56 (ex Article 73(b))
>
> 1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
>
> 2. …
>
> Article 58 (ex Article 73(d))
>
> 1. The provisions of Article 56 shall be without prejudice to the right of Member States:
>
>   (a) To apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
>
>   (b) …
>
> 2. …
>
> 3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56."

27. The right to freedom of establishment was conferred by Article 43 of the Treaty in the following terms:

> "Chapter 2
>
> Right of establishment
>
> Article 43 (ex Article 52)

> Within the framework of the provision set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

28. Article 56 replaced, with effect from January 1994, the slightly narrower right to the free movement of capital conferred by the Capital Directive (Directive 88/361/EEC), which provided directly effective rights for the period from July 1990 to December 1993. It was slightly narrower because it did not confer any freedom of movement of capital between a Member State and what Article 56 refers to as "third countries" (i.e. non-Member States). For present purposes, the text by which that right was conferred in the Capital Directive does not matter, but the Directive included at Annex 1 a non-exclusive list of relevant capital movements, called a Nomenclature which, in part III, headed "Operations in securities normally dealt with on the capital market" included:

> "A. Transactions in securities on the capital market
>
> 1. Acquisition by non-residents of domestic securities dealt in on a stock exchange.
>
> 2. Acquisition by residents of foreign securities dealt in on a stock exchange.
>
> 3. Acquisition by non-residents of domestic securities not dealt in on a stock exchange.
>
> 4. Acquisition by residents of foreign securities not dealt in on a stock exchange."

Although Annex 1 was not transposed into the Treaty when Article 56 replaced the Capital Directive, Mr Baldry submitted, without contradiction from Mr Gammie, that the Nomenclature has continued to be regarded as a non-exclusive indicator to the interpretation of Article 56, in the jurisprudence of ECJ: see *Schroder v Finanzamt Hameln* (Case C-450/09) [2011] STC 1248, at paragraph 25 of the Judgment.

29. More generally, the ECJ has treated Article 56 as deserving of a liberal rather than restrictive interpretation: see for example *Staatssecretaris van Financien v Verkooijen* (Case C-35/98) [2002] STC 654: at paragraph 13 of the Opinion of Advocate General La Pergola.

Condemnation of the FIDs regime by the ECJ

30. The UK regime for corporate and dividend taxation has been subjected to the intense scrutiny of the ECJ on several occasions. For present purposes reference need be made only to its scrutiny of the FIDs regime in *FII (GLO) ECJ*. This very long and complex judgment was concerned only in part with the FIDs regime, and only with a claim that the parent company, rather than its shareholders, had suffered an infringement of its EU rights. Furthermore the case was primarily about an infringement of the parent's freedom of establishment, although substantially the same reasoning was applied to the claim based upon restriction upon its free movement of capital. The question whether any infringement of its shareholders' EU rights had occurred was not addressed at all.

31. The ECJ identified two respects in which the FIDs regime infringed the parent company's rights under Articles 43 and 56. The first was a timing disadvantage in the way in which the FIDs regime relieved ACT incurred by the parent company on payment of dividends, by comparison with the way in which ACT was relieved by reference to dividend income paid to the parent company from UK resident subsidiaries. As explained by Henderson J in paragraph 19 of the part of his judgment quoted above, a UK-resident parent was liable to pay ACT on dividends to its shareholders only to the extent that those dividends and the ACT referable to them exceeded its own franked investment income from UK-resident subsidiaries. By contrast, (see again Henderson J at paragraphs 23 and 24) relief from ACT on FIDs paid by the parent became available only when its mainstream corporation tax (MCT) became payable, which might be between 8.5 and 17.5 months later. We need not say anything more about that timing disadvantage, for which, eventually, the parent companies received full compensation when issues as to quantum were later determined by the English courts, because it plays no part at all in the analysis of the Trustees' claim.

32. The second respect in which the FIDs regime infringed the parent companies' Article 43 and 56 freedoms was precisely because of the disentitlement of their tax-exempt shareholders to a payable tax credit upon receipt of FIDs. Although not, *prima facie*, a disadvantage suffered by the parent, the ECJ concluded that the absence of a payable tax credit operated as a sufficient disincentive to the parent to establish or invest in foreign subsidiaries (as opposed to English resident subsidiaries) because:

> " a company which has elected to taxed under the FIDs regime must increase the amount of its distributions if it wishes to guarantee its shareholders a return equivalent to that which would be achieved from a payment of nationally-sourced dividends" (see paragraph 149 of the Judgment).

33. This is why, as earlier explained, dividend enhancements lay at the heart of the parent companies' challenge to the legitimacy of the FIDs regime.

34. The ECJ left it to the UK courts to determine what if any remedy should be afforded to the parent companies in this respect, but with this guidance, at paragraphs 207 to 208 of the judgment:

> "207. However, contrary to what the claimants in the main proceedings contend, neither the reliefs waived by a taxpayer in order to offset in full a tax levied unlawfully, such as ACT, against an amount due in respect of an another tax, nor the loss and damage suffered by resident companies which elected to be taxed under the FID regime because they saw themselves as having to increase of their amount of their dividend so as to compensate for the lack of a tax credit in the hands of their shareholders, can form the basis of an action under Community law for the reimbursement of the tax unlawfully levied or of sums paid to the Member State concerned or withheld by it directly against that tax. Such waivers of relief or increases in the amount of dividends are the results of decisions taken by those companies and do not constitute, on their part, an inevitable consequence of the refusal by the United Kingdom to grant those shareholders the same treatment as that afforded to shareholders receiving a distribution which has its origin in nationally-sourced dividend.
>
> 208. That being the case, it is for the national court to determine whether the waivers of relief or the increases in the amount of dividends constitute, on the part of the companies concerned, financial losses suffered by reason of a breach of Community law for which the Member State in question is responsible."

35. In the event, when the matter returned to the UK courts, Henderson J accepted that there was a sufficient causative link between the denial of the payable tax credit and the parent companies' dividend enhancements, but refused any remedy in damages on the grounds that there was not a sufficiently serious or deliberate breach by the United Kingdom: see the *FII (GLO) Ch* case, at paragraphs 277, 288-302 and 404. His judgment was in those respects upheld by the Court of Appeal, and the outcome of an application by the parent companies for permission to appeal to the Supreme Court is pending.

36. Thus the background to the Trustees' present FIDs claims, from the perspective of the ECJ's jurisprudence, is that the parent companies which distributed by way of FIDs during the relevant period suffered an infringement in their freedoms of establishment and movement of capital by virtue of the non-availability of payable tax credits to their tax-exempt shareholders, and suffered a detriment in the form of dividend enhancement attributable to that infringement, but recovered no compensation or other valuable relief in respect of it. As we have said, we are not able to conclude from the facts determined in the present litigation that the parent companies in which the Trustees invested during the relevant period did enhance dividends, either at all, or to an extent sufficient wholly to alleviate the disadvantage suffered by the Trustees as tax-exempt shareholders in being denied payable tax credits in relation to FIDs declared by those companies. It is therefore open to the Trustees to contend that they

incurred a disadvantage by reference to the non-availability of that payable tax credit for which the companies in which they invested did not all provide full, or indeed any, compensation. For completeness, we note that there are further issues between the parties which we have not been invited to resolve, as to whether the payment of an enhanced dividend really does compensate shareholders for the absence of a payable tax credit, the Trustees' case being that, since they are in any case paid out of profits available for distribution, the enhancements reduce what would otherwise have been shareholders' funds in any event.

37. The ECJ's conclusion that the non-availability of a payable tax credit in relation to FIDs infringed the parent companies' relevant EU rights and freedoms does not, of course, mean that the statutory provision which did so (s. 246C, read subject to 246D of ICTA, which disapplied s. 231(1) ICTA and therefore also 231(3)) was or is to be treated as void or of no effect. It is simply to be construed (if possible), or applied in such a way as, not to infringe the EU rights of a person affected by it: see for example *Fleming v Revenue and Customs Commissioners* [2008] 1 WLR 195 ("*Fleming*"), per Lord Walker at paragraphs 24-25. Thus it does not follow (and Mr Gammie did not suggest otherwise) from the fact that a piece of domestic legislation infringes the EU rights and freedoms of one person or class of persons who are nationals of a Member State, that some other person or class of persons may automatically claim relief, merely because he or they have been adversely affected by the same provision. Rather, claimants must show either that their own EU rights have been infringed by that provision or, if not, that for some other reason the instrument conferring those EU rights (here the Treaty) is to be interpreted as conferring upon them a right to claim in respect of provisions which infringe the EU rights of others. The Trustees have, by the alternative arguments to which we have referred, succeeded thus far in pursuing both of those alternatives.

<u>Infringement of the Trustees' own EU rights</u>

38. Under this heading, the Trustees' argument is that their investment in the subscription for, or acquisition of, shares in a UK-resident company with foreign subsidiaries is to be treated for the purposes of the analysis of their EU rights and freedoms as a movement of their own capital to the Member States or third countries (collectively foreign states) in which those subsidiaries are resident. Thus, the tax disincentive in investment by the acquisition of shares in companies paying dividends by way of FIDs is said to be a disincentive to them in making cross-border investment of their capital.

39. This claim does not depend in any way upon the Trustees demonstrating that their money has been used by the parent company in the acquisition of shares, or other investment in, foreign subsidiaries. In practice, this would in almost all cases be impossible, either because the shares were acquired from an earlier shareholder rather than by way of subscription, or because no traceable money from their subscription to a cross-border investment of it by the parent company could ever be demonstrated. Nor does the claim depend upon demonstration that the parent's investment in its foreign subsidiaries followed, rather than preceded, the Trustees' investment in the parent's shares.

40. All that the Trustees were required to show, according to the Upper Tribunal, was that there existed a sufficient direct economic link between the denial of the tax benefit

arising out of the purely domestic transaction (investment in shares of the UK-resident parent) and a prior movement of capital between two Member States (investment by the parent in a foreign subsidiary): see paragraph 102 of the Upper Tribunal's Decision (where the Trustees' submission is set out) and paragraph 116 (where it is accepted and applied). The relevant direct economic link was found to exist by reason of the specific (and, for tax purposes, necessary) attribution of FID dividends by the parent to its receipt of dividend income from its foreign subsidiaries. As the Upper Tribunal put it at paragraph 115 of the Decision:

> "This analysis is fortified by the nature of the FIDs regime itself. The effect of the regime is to provide a quite separate tax treatment for UK-sourced dividends as opposed to dividends which are wholly derived from non-UK sourced dividends. A FID only carries the ACT benefit for the FID-paying company to the extent that it can be funded out of non-UK sourced profits and gives the UK shareholder a direct economic link to the underlying dividends received by the UK company making the distribution."

41. The Trustees submitted to the Upper Tribunal (and repeated in this court) that the "direct economic link" basis for treating their own Article 56 rights as infringed by the FIDs regime was established by the jurisprudence emerging from a trilogy of decisions from the ECJ, namely *Halliburton Services v Staatssecretaris van Financien* (Case C-1/93) [1994] ECR 1-1137, *Finanzamt Offenbach & Main-Land v Keller Holding GmbH* (Case C-471/04) [2007] STC 962 and *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor* (Case C-310/09) [2012] STC 438 (respectively *Halliburton*, *Keller* and *Accor*). The Upper Tribunal did not consider that the *Halliburton* case assisted the Trustees (see paragraph 97) and we need say no more about it, save that it was about freedom of establishment rather than free movement of capital, and had nothing to do with the use of a "direct economic link" test. But the Upper Tribunal appears to have found the submission based upon *Keller* and *Accor* compelling, and we therefore need to review those two cases in a little detail.

42. The *Keller* case was about freedom of establishment, although there is some indication in paragraphs 20 and 22 of the Judgment that the ECJ regarded its analysis as equally applicable to free movement of capital. The facts were that, during the relevant period, a German parent company, KH, wholly owned another German company, KG, which in turn wholly owned an Austrian subsidiary, KW. During the relevant period, domestic German tax law disallowed deduction of expenditure by KH to the extent that there was a direct economic link between that expenditure and its receipt of profits from its Austrian subsidiary (which were tax exempt in Germany), but permitted it where there was the same link between its expenditure and taxable profits from a German subsidiary. In fact the expenditure consisted of interest payable on capital borrowed to acquire its shareholding in KG, but there was found to have been a sufficient direct economic link between that expenditure and profits derived from KW. The ECJ held that the difference in deductibility under the German tax code, as between an indirect foreign subsidiary and an indirect German subsidiary, offended against KH's freedom of establishment.

43. It is true that, at paragraph 11 and following in the Judgment, reference is made to a "direct economic link" test but that reference is to a test applied by German domestic tax law in order to ascertain whether otherwise deductible expenditure is disallowed because of a direct economic link to tax-free profits: see paragraph 11 of the Judgment. Mr. Baldry submitted that the *Keller* case thereby gives no support to the identification of any "direct economic link" test as part of the jurisprudence of the ECJ for the purposes of deciding whether an investment by a UK person in a UK-resident parent company should be regarded as a cross-border movement of capital by the UK investor, merely because the parent company has foreign subsidiaries. We regard that submission as having considerable force.

44. The *Accor* case was about both freedom of establishment and free movement of capital. Although it concerned French domestic tax legislation, there are powerful similarities between it and *FII (GLO) ECJ* case to which we have already referred, not least because there was a denial of a tax credit for shareholders of the claimant parent company when redistributing dividends received from foreign subsidiaries, but the allowance of such a tax credit on the redistribution of dividends from French subsidiaries: see paragraphs 56-62 of the Judgment. Nonetheless, as in the *FII (GLO) ECJ* case, the claimant alleging breach of its EU rights was the parent company itself rather than its shareholders and the breaches alleged related to the parent company's freedom of establishment, and the parent company's free movement of its capital, since the relevant French tax treatment operated as a disincentive to investment in foreign subsidiaries. True it is that part of that disincentive consisted of the adverse tax consequences for the parent company's shareholders (see paragraphs 56 and 60) but there is no consideration at all in the ECJ's analysis of the question of whether the shareholders' EU rights were affected in any way. The relevance of the adverse tax consequences for the parent's shareholders was simply that it would operate as a disincentive to the parent company itself in making cross-border movements of its capital, when investing in foreign subsidiaries.

45. Again, Mr. Baldry submitted that the *Accor* case really provided no support for the "direct economic link" submission accepted by the Upper Tribunal, as a part of the jurisprudence of the ECJ and again, we see considerable force in that submission.

46. We do not thereby mean to suggest that we regard the "direct economic link" submission as necessarily wrong, still less as unarguable. For example, the Upper Tribunal was powerfully impressed by the example of a UK-resident investment company, established purely for the purpose of making investments in foreign companies, and treated the notion that investment by UK shareholders in such a company involved no cross-border movement of their capital as formalistic and verging on the absurd: see paragraph 114 of the Decision. That may or may not be so, but the difficulty in treating as *acte clair* a conclusion that the existence of a direct economic link of the type constituted by the FIDs election is decisive is that this question has yet to be addressed by the ECJ, and no answer to it appears to us to emerge from its current jurisprudence.

47. This is, we think, the first case in which shareholders of a company which is itself discouraged from investing in foreign, rather than domestic, subsidiaries, have asserted that their rights of free movement of capital are adversely affected, either by the FIDs regime or any other comparable domestic corporate tax regime. It is not surprising therefore that the question whether the shareholders' EU rights are

infringed, or whether their investment in a parent company which shares their Member State of residence is a cross-border movement of their capital has yet to be considered by the ECJ at all.

48. It is, at least in theory, possible that this Court could treat the outcome of such a question as *acte clair*, even in the absence of relevant ECJ jurisprudence, if for example we were persuaded that the outcome of a reference was a foregone conclusion. For reasons which we explain later, we are not so persuaded.

The Piggyback Argument – can the Trustees as shareholders rely upon an infringement of the parent company's EU rights, because they are adversely affected by the infringing provision of domestic tax law?

49. This piggyback argument, which again persuaded both Tribunals, is also put forward as based upon ECJ jurisprudence, by reference to another trilogy of cases, namely *Clean Car Autoservice v Landeshauptmann von Wein* (Case C-350/96) [1998] 2 CMLR 637, *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna* (Case C-294/97) [1997] ECR I-7447 and *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* (Case C-208/05) [2007] ECR I-181: (respectively *Clean Car*, *Eurowings* and *ITC*). To those three cases Mr. Gammie added in his submissions to us *HMRC v Phillips Electronics UK Limited* (Case C-18/11) [2013] 1 CMLR 6 (*Phillips*).

50. The submission based on these cases, which we have labelled the piggyback argument, is that wherever a domestic statutory provision infringes the EU rights of one person, then anyone else who is a national of a Member State may claim relief for the adverse consequence for him of the existence or enforcement of that provision, even if no specific EU rights or freedoms of his are thereby infringed.

51. None of the (now) four ECJ decisions relied upon was about free movement of capital, although the *Phillips* case was about freedom of establishment. In our view, taken together, they do disclose a well-known principle of EU law by reference to which the question whether someone may piggyback on an infringement of another's EU rights is likely to be answered by the ECJ. That is the principle of effectiveness. In short, if the protection intended to be conferred by a particular EU right or freedom upon nationals of EU Member States will not be effective if only those whose rights are thereby infringed can take proceedings in relation to that infringement, then the ECJ may extend a right of action to a wider class of persons adversely affected by the infringement. That this is the relevant underlying principle is, we think, illustrated by a brief review of those four cases.

52. The *Clean Car* case was about the freedom of movement of workers conferred by Article 48. Although plainly designed for the protection and benefit of workers the ECJ decided that the principle of effectiveness required that employers upon whom discriminatory conditions were imposed relating to the employment of workers from different Member States could themselves take proceedings for the adverse effect upon them of those provisions. At paragraphs 20-21 of its Judgment, the Court said:

> "20. It must further be noted that, in order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as

> a corollary the employment's entitlement to engage them in accordance with the rules governing freedom of movement of workers.
>
> 21. Those rules could easily be rendered nugatory if Member States could circumvent the prohibitions which they contain merely by imposing upon employers requirements to be met by any worker whom they wish to employ which, if imposed directly on the worker, would constitute restrictions on the exercise of the right to freedom of movement to which that worker is entitled under Article 48 of the Treaty."

53. The *Eurowings* case was about the right to free movement of services conferred by Article 59. For present purposes, the relevant question was whether that freedom conferred rights only on the provider of services, or also on the recipient of services. The ECJ held, consistently with earlier jurisprudence, that Article 59 did confer rights on the recipient of services: see paragraph 34. The case had nothing to do with free movement of capital. While it shows that particular rights or freedoms may be conferred simultaneously on different classes of EU nationals, it affords no assistance to the Trustees in the submission which they advance in the present case.

54. The *ITC* case was, like the *Clean Car* case, about free movement of workers under Article 48. There the ECJ held that Article 48 could be prayed in aid by an employment agency, upon the basis that this was necessary, on the facts of that case, to enable the protection of workers conferred by Article 39 to be fully effective: see paragraphs 25-27 of the Judgment. Again, it illustrates the careful fact-based analysis conducted by the ECJ of the question whether, in relation to a particular right or freedom, such an extension of the ambit of those entitled to complain of an infringement was necessary.

55. Finally, the *Phillips* case was about the much more closely analogous freedom of establishment. The English resident claimant company was a business partner of a Dutch company which suffered an infringement of its freedom of establishment by UK tax provisions relating to its UK branch, which adversely affected the claimant because it was denied loss relief, which it sought to obtain by setting the losses of the Dutch company's UK branch against its own profits. It is evident from the opinion of Advocate General Kokott, at paragraphs 83-89, that it was the Dutch company rather than the claimant which suffered an infringement of its freedom of establishment but that the effectiveness of that freedom would be impaired unless a right of action was afforded to the English resident claimant. At paragraph 39 of its Judgment, the Court said:

> "It is, in the present case, of no relevance in that regard that it is not the taxpayer, a company established in the United Kingdom, whose freedom of establishment has been unjustifiably restricted, but rather the non-resident company with a permanent establishment in the United Kingdom. In order to be effective, freedom of establishment must also entail, in a situation such as that in the main proceedings, the

> possibility that the taxpayer may have the benefit of group relief set against its profit."

56. Again, that case illustrates a careful, heavily fact-dependent assessment by the ECJ of the question whether the principle of effectiveness necessitated a broadening of the right to seek relief beyond the class immediately protected by the relevant Treaty freedom. It was not a case, like *FII*, where an argument could have been based upon the right to free movement of capital. While it is perhaps the closest illustration of the way in which the jurisprudence of the ECJ applies the principle of effectiveness to the question whether to broaden the class of those entitled to seek relief beyond those immediately effected by the relevant infringement of an EU right, we do not consider that it offers any compelling or inevitable answer to that question as posed by the piggyback argument in the present proceedings.

57. If the principle of effectiveness were to be applied to the present case, the question would be whether the effectiveness of the right to free movement of capital conferred upon UK resident companies investing in foreign subsidiaries requires a right to seek relief for an infringement constituted by the FIDs regime to be conferred upon every one of its UK shareholders, in addition to the parent company itself. In sharp contrast with the employment cases, where a right conferred on one person (namely the employer or the employment agency) provided effective protection for a multitude of employees who might be thought, individually, to be ill-placed to advance claims for infringement of their EU rights, the present case appears, at least at first blush, to be the opposite end of the spectrum. Parent companies with foreign subsidiaries would appear, at least at first sight, to be well able to seek redress for the infringement of their relevant freedoms, whether of establishment or free movement of capital, without having to depend upon proceedings brought by one or more of their potentially large number of shareholders.

58. Furthermore, the conferring of such a right on the shareholders, in particular if the remedy would simply be a right to seek the payable tax credit in full on the basis of a simple disapplication of s. 246C (as the Upper Tribunal held) would appear to give at least a prospect not merely of full effectiveness of the protection of the parent company, but of double recovery, in any case in which the parent company had enhanced its dividends for the purpose of relieving its tax-exempt shareholders from the relevant disadvantage.

59. Nonetheless, the merits of the question whether the principle of effectiveness requires a right to seek redress for adverse consequences to be conferred upon the parent company's shareholders are by no means entirely one-sided. In relation to the infringement constituted by the denial of the payable tax credit, it is the tax-exempt shareholder rather than the parent company which suffers the immediate adverse consequence. Furthermore, the outcome of the lengthy and expensive litigation of the *FII* claims has been (subject to any appeal to the Supreme Court) that the parent companies obtained no effective redress, even on an assumption that they enhanced their dividends to protect their tax-exempt shareholders from the loss of the payable tax credit. They failed to do so because their remedy lay only in damages, and because they did not demonstrate a sufficiently serious (or rather deliberate) breach of the relevant EU rights by the UK's FIDs regime.

60. We regard it as a matter of very substantial uncertainty whether the ECJ would apply the principle of effectiveness, in the manner illustrated by the cases just reviewed, to the present circumstances so as to give effect to the Trustees' piggyback argument. The difficulty is not that there is no relevant European jurisprudence, but that its application for the first time to a different freedom, and to a wholly new and different fact situation, is a matter which has yet to be undertaken.

61. It is for those reasons that we consider it necessary to refer to the ECJ the question whether the Trustees, as shareholders of companies distributing profits by way of FIDs during the relevant period, have their own right to seek relief for the infringement of Article 56, the matter being, plainly in our view, far from *acte clair*.

62. We would add that, in the event that the ECJ were to confirm the view of both Tribunals that such a right exists, referable questions might then well arise in relation to the nature of any consequential remedy. The Tribunals concluded that the remedy lay simply in disapplying s. 246C, so that the Trustees could claim payable tax credits under s. 231(3) in the usual way. On the face of it, nothing in the Tribunal's analysis suggested that the Trustees would be obliged to bring into account any benefits received during the relevant period by the enhancement of dividends by the parent company paying FIDs to the Trustees. We have already referred to what appears to us to be a real risk of double recovery.

63. For present purposes, we do no more than point out that there may be consequential issues worthy of a reference, which could (so as to avoid further delay and expense in these already protracted proceedings) conveniently be included along with the reference of the main question whether the Trustees have any right of their own to seek relief at all. We are mindful that, having regard to our dismissal, without a reference, of the appeals in relation to limitation, the Trustees are on the face of it left only with a single FIDs claim, for one tax year, and that to take the slightest risk of a double reference, once in relation to entitlement, and later in relation to relief, would be a serious example of case mis-management. Accordingly, we invite the parties to consider both the form of the question to be put to the ECJ arising from the issue as to entitlement to seek relief, and also both the substance and the form of any additional questions as to the nature of that relief, if the main question was to be answered by the ECJ in the affirmative.

<u>The "*Manninen*" claims</u>

64. On 17 October 2005, the Trustees made eight so-called "*Manninen*" claims to the Revenue under s. 231(3) of ICTA for payable tax credits in sums totalling just under £124m in respect of the tax years 1990/1991 to 1997/1998. The Revenue refused the claims as unfounded in principle and as anyway time-barred by the six-year limit imposed by s. 43 of the TMA. The Trustees made in time appeals to the FtT against such refusals. The FtT held all the claims to be well-founded in principle but dismissed the appeals on the ground that all the claims had been made out of time. The Trustees appealed to the Upper Tribunal, which agreed with the FtT on both issues and dismissed the appeals. As we later explain, we consider both tribunals were correct to hold that all the claims were time-barred and we shall therefore dismiss the Trustees' appeals to this court.

65. It follows that it is not necessary for this court to consider, let alone decide, the substantive merits of the Trustees' *Manninen* claims; and we were told by Mr Baldry that, so far as the Revenue are aware, there are no other exempt taxpayers with pending like claims whose disposition might be assisted by such consideration. On 1 April 2005, the Trustees did, however, also issue High Court claims for restitutionary and/or compensatory relief in relation to their claimed right to payable tax credits for the same eight tax years. The claims are currently stayed by a consent order of 3 September 2007 but, if and when the stay is lifted and the claims are permitted to proceed despite the limitation problems to which they are *prima facie* subject, questions as to their merits will arise. In that event, this court's views on the merits might potentially be of assistance.

66. We have respectful doubts as to the correctness of the views of the Upper Tribunal (see paragraph 421) that the Trustees' entitlement to the claimed payable credits follows inevitably from the existing jurisprudence of the Court of Justice. Had a decision on the merits of the claims been necessary for a disposition of the appeals, we would have concluded that the question was not *acte clair* and would have made a reference under Article 267. In the circumstances we have set out, all we shall do by way of further discussion of the claims is to identify the essence of the issue as to the Trustees' entitlement or otherwise to the claimed payable credits and say why we consider it raises a referable question.

67. The background is straightforward. The Trustees have invested a significant part of their equities portfolio in quoted companies resident in other Member States and third countries. There is no dispute that in doing so they were exercising their Article 56 EC freedom (now Article 63 of the TFEU) to move capital between Member States and between Member States and third countries. There is also no dispute that the tax treatment to which, as exempt persons, the Trustees were subject as regards the dividends they received from UK resident companies differed for the relevant years from that to which they were subject as regards the foreign dividends they received from non-UK resident companies.

68. By way of illustration, during the relevant tax years an individual, taxable shareholder receiving a dividend from a UK resident company was chargeable to Schedule F income tax on a sum equal to the aggregate of the distribution and the tax credit he was given for the ACT paid by the company on the distribution, but he could set the credit off against his income tax liability. The position of an exempt shareholder, such as the Trustees, receiving a like distribution and tax credit from a UK-resident company was different. They were not only exempt from UK income tax on the aggregate of the distribution and the credit, they were also entitled to be paid the amount of the credit for the ACT paid by the company. Thus, assuming an ACT rate of 25%, a UK resident company might pay 75 to its shareholders and 25 of ACT to the Revenue, but an exempt shareholder would be entitled to recover the 25 and so obtain a tax-exempt distribution of 100.

69. By contrast, whilst an exempt shareholder receiving a foreign dividend from a non-UK resident company would be exempt from UK tax on the distribution, he would receive no tax credit for ACT paid (none being payable by the foreign company); and, in a case in which the company had paid foreign corporation tax on the distribution, nor was he entitled to a payable credit in respect of the tax paid. He was not, therefore, entitled to a payment comparable to the payable credit for the ACT to

which the exempt shareholder in a UK resident company would be entitled. Thus, by way of a like example, and assuming a foreign corporation tax rate of 25%, he would be unable to increase his distribution from 75 to 100 by recovering from the Revenue the 25 of foreign tax paid.

70. The Trustees say it follows that there was an obvious difference in the Revenue's treatment of the exempt shareholder according to whether the distribution paid to him derived from a UK resident company or a non-UK resident company. The difference disadvantaged an exempt shareholder of a non-UK resident company; and is thus said to have operated as a deterrent to his investment of his capital overseas and so to constitute an unlawful restriction on the movement of his capital contrary to the former Article 56 EC freedom, which prohibits restrictions on the movement of capital between Member States and between Member States and third countries.

71. The Trustees' *Manninen* claims relate, therefore, to distributions of foreign dividends to the Trustees by non-UK resident companies in which no payable credit was available under UK law in respect of foreign tax paid by the companies on the distributions. They say that, to the extent that s. 231 of ICTA denied them such payable credits, it must be disapplied so as to be conformable with the Article 56 freedom. What it comes down to is that they claim that the UK Treasury was obliged to make a cash payment to them equal to the foreign tax paid in respect of each foreign dividend they received so as to achieve the result that not only was the dividend exempt from UK tax, it was in their hands also exempt from foreign tax. The tribunals below agreed with the correctness of that assertion.

72. The inspiration for the Trustees' case is the decision of the Court of Justice in *Manninen*, which was decided just over seven months before the Trustees made their claims. It concerned the Finnish regime for taxing dividends in the hands of a person 'fully taxable' in Finland. Mr Manninen, a Finnish resident, received dividends from both a Finnish company and a Swedish company. Whereas Finnish national law granted him a credit in respect of the Finnish corporation tax paid by the Finnish company on the payment of the Finnish dividend, it did not grant him a corresponding credit in respect of the payment of the Swedish corporation tax paid by the Swedish company on the payment of the Swedish dividend. The result was that whereas the Finnish dividend was subject to tax merely once (by the payment of the Finnish corporation tax), the Swedish dividend was taxed twice (by the payment of Swedish corporation tax and of income tax in the hands of Mr Manninen). Whilst the double tax convention in place between Member States of the Nordic Council attenuated that effect, it did not, unlike the Finnish law in relation to Finnish dividends, provide for a system of setting off corporation tax against income tax due on revenue from capital.

73. The Court of Justice explained, at paragraph 8, that the purpose of the Finnish tax credit was to avoid double taxation on Finnish dividends. Likewise, it said at paragraph 20 that the tax credit under Finnish legislation was designed to prevent the double taxation of company profits distributed to shareholders by setting off the corporation tax due from the company against the tax due from the shareholder by way of income tax on revenue from capital, with the end result that dividends were no longer taxed in the hands of the shareholder. It explained that as the tax credit applied solely in favour of dividends paid by Finnish companies, the legislation disadvantaged "fully taxable persons in Finland" who received dividends from companies established in other Member States and were subject to income tax at a rate of 29% on

such dividends. The court held it followed that the Finnish legislation constituted a restriction on the free movement of capital, which was prohibited by Article 56. It held further that:

> "36. Where a person fully taxable in Finland invests capital in a company established in Sweden, there is thus no way of escaping double taxation of the profits distributed by the company in which the investment is made. In the face of a tax rule which takes account of the corporation tax owed by a company in order to prevent double taxation of the profits distributed, shareholders who are fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from a company established in that member state or from a company established in Sweden."

74. The outcome, as the court summarised at paragraphs 54 and 55, was as follows:

> "54. In those circumstances, the calculation of a tax credit granted to a shareholder fully taxable in Finland, who has received dividends from a company established in Sweden, must take account of the tax actually paid by the company in established in that other member state, as such tax arises from the general rules on calculating the basis of assessment and from the rate of corporation tax in that latter member state ….
>
> 55… the answer to the questions referred must be that articles 56 and 58 EC preclude legislation whereby the entitlement of a person fully taxable in one member state to a tax credit in relation to dividends paid to him by limited companies is excluded where those companies are not established in that state."

75. The Upper Tribunal, at paragraph 213, described the basis of the court's judgment in *Manninen* as being that "where a Member State imputes all or part of the corporation tax which a company resident in that state pays to the shareholder in the form of a tax credit when that company pays a dividend, it must equally do so where a shareholder in a company resident in another Member State receives a dividend from that company".

76. Mr Baldry submitted to us, as he did to the Upper Tribunal, that *Manninen* does not establish any such general principle. *Manninen* was about, and only about, the taxation treatment of a person 'fully taxable' in a Member State. The vice of the Finnish legislation was that whereas it prevented double taxation for domestic dividends, it created double taxation for foreign dividends and so disadvantaged taxpayers who, as regards the receipt of both types of dividend, were in a comparable situation: the key to the case lay in the second sentence of paragraph 36 of the court's judgment. It was a case in which a Member State had exercised its competence to charge both domestic and foreign dividends to tax but taxed the foreign dividend less favourably than it taxed the domestic dividend: because whilst it gave a credit for corporation tax paid in respect of the domestic dividend, it gave no credit for that paid in respect of the foreign dividend.

77. The position of the Trustees, who are exempt from UK taxation, is, said Mr Baldry, materially different. Under the UK's imputation system, the grant of a tax credit to an exempt shareholder is not directed at serving the purpose of preventing double taxation: it is directed at the different purpose of enabling the shareholder to enjoy exemption from UK tax on distributed profits. The exempt shareholder will also enjoy exemption from UK tax on foreign dividends, albeit that those dividends may be charged to foreign tax in the hands of the non-resident company. The distinction from *Manninen* is, however, that the present is not a case in which the UK has charged any tax on the foreign dividends. It is simply one in which the UK has exercised the competence open to it to exempt pension funds from UK tax on distributed profits, and in which the foreign state has exercised the competence equally open to it to charge those profits to tax in the hands of the foreign company. Mr Baldry submitted that those situations are not comparable and that the Court of Justice has consistently recognised that disadvantages which arise from the parallel exercise of tax competences by different Member States do not constitute restrictions prohibited by the Treaty provided only that they are not discriminatory.

78. In developing his submission Mr Baldry referred us to various decisions of the Court of Justice. *Meilicke and others v. Finanzamt Bonn-Innenstadt* (Case C-262/09) [2013] STC 1494, which raised questions similar to those in *Manninen*, clarified what the Court had said in paragraph 54 of *Manninen* and explained that it was not necessary for the national court to give the taxpayer a full tax credit for the corporation tax paid in the other Member State. All that must be done is to give the taxpayer a credit to cancel out the double tax charge imposed by the domestic law: see the judgment at paragraphs 33 and 34. Mr Baldry said it followed that if the national court did not charge the taxpayer to *any* domestic tax on the foreign dividend, it need not do anything towards relieving him from any foreign tax paid in respect of the dividend.

79. We were also referred to *Staatssecretaris van Financien v. Orange European Smallcap Fund NV* (Case C-194/06) [2008] ECR I-3747 (*Orange Smallcap*) which can be said to be closer to the present case. It concerned a Netherlands 'fiscal investment enterprise' ("FIE"), which was liable to corporation tax but at a rate of 0%. Its shareholders were, however, taxed on the entirety of the profits distributed to them, that is both on dividends from Netherlands companies and on foreign dividends.

80. The FIE's dividends from companies established in Netherlands suffered the deduction of tax at source but it was entitled to obtain a refund of the tax so deducted. Dividends received by the FIE from companies resident in Germany and Portugal also suffered the deduction of tax at source; and, when distributed by FIE to its shareholders, were taxed in the hands of the shareholders and so suffered double taxation. At the level of the FIE, however, all dividends – whether received from companies resident in the Netherlands or from companies resident in Germany and/or Portugal – were not taxed under Netherlands law. The effect of giving the FIE a refund in respect of tax deducted by Netherlands companies was to exempt the FIE from that tax: as Advocate General Bot said (see paragraph 86), deduction of tax at source was no more than a means of recovering the tax on dividends owed by the person receiving them. Under Netherlands law, the FIE could not, however, claim back the tax deducted from dividends from German or Portuguese companies, but in neither case was it subject to domestic tax on those dividends. The question for the

court was whether the FIE ought to be entitled to such refunds on the basis that the disparity of treatment amounted to a disincentive to exercise the Article 56 freedom to move capital between Member States.

81. The Court of Justice noted, at paragraph 30, the preliminary point, upon which Mr Baldry laid emphasis, that it is for each Member State to organise, in compliance with Community law, its system for taxing distributed profits and to define, in that context, the tax base and tax rate which apply to the shareholder receiving them: the court referred to *Test Claimants in Class IV of the ACT Group Litigation* (Case C-374/04) [2006] ECR I-11673 ("*Class IV ACT (ECJ)*"), paragraph 50; and *FII (GLO) ECJ*, paragraph 47.

82. The court then explained, at paragraph 31, that the dividends of a company established in one Member State paid to a company established in another may be subject to taxation at several levels: for example, initially to corporation tax owed by the paying company and then to a deduction of tax when the dividends are paid to the recipient company. The dividends may then be subject to "juridical double taxation" when they are taxed again in the Member State of the recipient, and the taxation of dividends in that Member State may also give rise to a series of charges to tax. Paragraph 32 explained that it is up to the Member State to decide how to deal with such questions, particularly with a view to eliminating double taxation. Paragraph 33 explained that the Netherlands had decided to make FIEs liable to corporation tax on all dividends, but at a rate of 0%, provided that all profits were distributed to shareholders. Paragraph 34 explained that, whatever the geographical origin of the dividends, an FIE is not subject to tax on them in the Netherlands. The court continued by providing the following important explanation:

> "35. Consequently, by not charging [FIEs] tax on dividends from Germany or Portugal, the Kingdom of the Netherlands treats those dividends in the same way as dividends from Netherlands companies, in respect of which those enterprises are not taxed either. In addition, by refraining from taxing dividends from other Member States, the Kingdom of the Netherlands avoids the imposition of a series of charges to tax arising from the exercise of its own fiscal power, just as it does in respect of dividends paid by Netherlands companies.
>
> 36. Therefore, contrary to the assertions of [the FIE] and the Commission, Netherlands legislation, such as that at issue in the main proceedings, does not treat dividends from Germany or Portugal differently from dividends distributed by Netherlands companies.
>
> 37. While, in those circumstances, dividends from Germany or Portugal are subject to a greater tax burden than are dividends distributed by Netherlands companies, that disadvantage is not attributable to the Netherlands legislation at issue in the main proceedings, but is the product of the parallel exercise of fiscal sovereignty by the Member States in which the distributing companies are established and the Member State in which the recipient company is established, whereby the former chose to

impose a series of charges to tax on distributed dividends and the latter opted to refrain from any taxation of dividends with respect to [FIEs] (see, to that effect, Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraph 20).

38. The Commission contends, however, that in its capacity as the Member State of residence of the company in respect of dividends, it is for the Kingdom of the Netherlands to offset the foreign tax burden on those dividends in the same way as it offsets the domestic tax burden to which those dividends are subject.

39. That argument cannot be accepted. Admittedly, it follows from the case-law that, where a Member State has a system for preventing or mitigating a series of charges to tax or economic double taxation for dividends paid to residents by resident companies, it must treat dividends paid to residents by non-resident companies in the same way (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 55 and the case-law cited).

40. Under such systems, the situation of shareholders resident in a Member State and receiving dividends from a company established in that State is comparable to that of shareholders who are resident in that State and receive dividends from a company established in another Member State, inasmuch as both the dividends deriving from a national source and those deriving from a foreign source may be subject to a series of charges to tax (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 56).

41. However, the status of the Member State of residence of the company in receipt of dividends cannot include the obligation for that Member State to offset a fiscal disadvantage arising where a series of charges to tax is imposed entirely by the Member State in which the company distributing those dividends is established, since the dividends received are neither taxed nor treated differently by the first Member State as regards investment enterprises established in that State.

42. It follows that, in a situation where the greater tax burden imposed on dividends distributed by companies established in Germany or Portugal to a [FIE] established in the Netherlands than that which is imposed on dividends distributed to that same enterprise by companies also established in the Netherlands does not arise as a result of a difference in treatment attributable to the tax regime in the Netherlands, but stems from the decision of the Federal Republic of Germany and the Portuguese Republic to make a deduction at source from those dividends, and from the decision of the Kingdom of Netherlands not to tax those dividends, the fact that the latter

> Member State has not granted a concession in respect of the deduction at source for which the first two States have opted does not constitute a restriction on the movement of capital."

83. That is said by Mr Baldry to provide the answer to the Trustees' claims. *Manninen* is materially distinguishable. The FIE in *Orange Smallcap* provides the relevant comparator for the purposes of this case and the decision shows where the Member State in which the foreign dividend is received imposes no domestic tax on the dividend, it does not need to give any credit for foreign tax imposed on the dividend. Mr Baldry also referred us to *Class IV ACT (ECJ)* (to which the Court of Justice also referred in *Orange Smallcap*); and to *Kronos International Inc v. Finanzamt Leverkusen* (Case C-47/12) [2015] STC 351, a decision of the Court of Justice that post-dated the decision of the Upper Tribunal. We will not refer to *Kronos* in detail, but note that the Court's reasoning and explanations in paragraphs 81 to 86 in relation to the tax treatment of foreign dividends are, as might be expected, in line with what it had earlier said in *Orange Smallcap.*

84. *Orange Smallcap* was considered by the Upper Tribunal, at paragraphs 222 and following, which distinguished it essentially on the grounds that the withholding tax levied by the Netherlands on domestic dividends was not comparable to the ACT levied by the UK on domestic dividends. Mr Baldry submitted that that was an irrelevant distinction, both ACT and withholding taxes being in substance taxes on distributed profits. Moreover, he said that the distinction could not stand with the Court of Justice's subsequent decision in *Kronos,* in which it appeared that the subsidiaries were paying corporation tax on the distributions and it was that tax that was being refunded to those parent companies which had received domestic dividends.

85. Mr Gammie (who did not appear before either tribunal below) submitted in support of the decision of the Upper Tribunal that it was self-evident that a dividend derived from a UK resident company in respect of which the tax credit was paid was receiving more favourable treatment than a dividend derived from a foreign investment, where no tax credit is given (let alone paid), and that such difference was in itself a breach of the freedom of the movement of capital since it represented a disincentive to invest in foreign shares. He did not, however, go so far as to say that this court should finally decide that issue in the Trustees' favour. Like Mr Baldry, he recognised that the European jurisprudence has not dealt with the situation in which there were payable tax credits in circumstances involving an exempt taxpayer like the Trustees. In his view, were it necessary for this court to rule on the merits of the *Manninen* claims, it would have to refer the question to the Court of Justice.

86. As already indicated, we do not propose to decide the merits of the Trustees' *Manninen* claims, although we shall at least say that we regarded the arguments advanced by Mr Baldry in criticism of the reasoning of the Upper Tribunal as cogent and we consider that there is a real question as to the correctness of that reasoning. Given, however, that both tribunals below came to the confident views that they did, and also that counsel are agreed that there is no decisive Court of Justice jurisprudence on the particular question raised by these claims, we would, had it been necessary for our disposition of the appeals, have referred an appropriate question to the Court of Justice.

87. We add that, as regards dividends received by the Trustees from third countries (that is, countries other than EU Member States), the Upper Tribunal held that the breach of Article 56 they found established was justified on the grounds of 'effective fiscal supervision', for reasons set out in paragraphs 233 to 253. The Trustees challenged that conclusion in their appeal to this court, just as the Revenue sought to uphold it, as well as to contend that any restriction of the Article 56 freedom was justified, both for Member State dividends and for third country dividends, by the need to preserve the cohesion of the tax system. The parties' respective arguments with regard to this aspect of the appeals were not developed in argument before us and so we shall say nothing more about it.

Limitation

88. It is common ground that the prescribed method for claiming a tax credit under s. 231(3) of ICTA is contained in s.42 TMA. So far as material to the time of these claims, s.42 provided:

> "(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.
>
> (2) Subject to any provision in the Taxes Acts for a claim to be made to the Board, every claim shall be made to an inspector.
>
> …
>
> (5) A claim shall be in such form as the Board may determine and the form of claim—
>
> (a) shall provide for a declaration to the effect that all the particulars given in the form are correctly stated to the best of the knowledge and belief of the person making the claim, and
>
> (b) may require—
>
> (i) a return of profits to be made in support of the claim, and
>
> (ii) any such particulars of assets acquired as may be required in a return by virtue of subsections (2) and (3) of section 12 of this Act,
>
> and, in the case of a claim made by or on behalf of a person who is not resident, or who claims to be not resident or not ordinarily resident or not domiciled, in the United Kingdom, the inspector or the Board may require a statement or declaration in support of the claim to be made by affidavit."

89. Section 42(3) gave the taxpayer a right of appeal against a decision of HMRC on the claim which was exercisable by written notice given within thirty days of the written notification of the decision under appeal.

90. The making of a claim for relief under s.42 is also subject to the time limit imposed by s.43(1). This provides:

> "Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief under the Taxes Acts shall be allowed unless it is made within six years from the end of the chargeable period to which it relates."

91. The Trustees notified the Revenue of its claims for tax credits in respect of FIDs by letters of claim sent on 28 October 2003 (for the year 1996/97); on 23 January 2004 (for the year 1997/98) and on 28 January 2005 (for the years 1994/95 and 1995/96). The *Manninen* letters of claim for each of the years from 1990/91 to 1997/98 were all sent on 17 October 2005. On the basis that the six-year limitation period under s.43(1) began to run from the end of each relevant chargeable period then only the FIDs claim for the year 1997/98 was made in time.

92. Before any of the letters of claim for the tax credits had been written, the Trustees issued (on 31 January 2003) their High Court claim in respect of the FIDs tax credits. This seeks a declaration that the ACT and the FID regime was invalid under EU law and compensation (whether as damages or restitution) for not having received the tax credits to which the Trustees allege they were entitled. The claim form was served on 29 May 2003. The High Court claim seeking similar relief in respect of the *Manninen* tax credits was issued on 1 April 2005.

93. As part of their defence to the FIDs High Court claim, the Revenue challenged the jurisdiction of the High Court to hear the claim for damages or restitution given what they alleged was the co-extensive jurisdiction of the Special Commissioners (as they then were) to determine the challenge to the FID system by way of statutory appeal. Although on one view the s.42 claims made for the tax credits were (with the one exception we have identified) all out of time, the Trustees had appealed the Revenue's refusal of the claims within the s.42(3) time limit. On 21 July 2004 Chief Master Winegarten made a group limitation order (GLO) in the light of other similar claims by exempt pension funds challenging the non-payment of tax credits under the FID regime. The Trustees were nominated as the lead claimants and their claim was directed to proceed as the test claim.

94. At a case management conference in October 2005 (by which time the Trustees had also issued their *Manninen* claims in the High Court and had sent most of the s.42 letters of claim), Park J was asked to decide whether to refer certain questions of EU law to the ECJ. These included the central questions of whether the Trustees and other exempt pension funds were entitled to a tax credit either in respect of FIDs or in respect of dividends received from direct holdings in foreign companies (*Manninen*). It was agreed that the *Manninen* issue which had arisen later in time and after the making of the GLO should be added to the list of issues by amendment. But the Revenue took the point that it would be premature to make the reference at that stage in part because the Trustees should have raised their objections to the legislation

disentitling them to tax credits in respect of the FIDs and directly paid foreign dividends by way of statutory appeals under s.42(3).

95. The Revenue's challenge to the High Court's jurisdiction was based on the then recent decision of the House of Lords in *Autologic Holdings plc v IRC* [2006] 1 AC 118, a test case under a GLO concerning the availability of group loss relief under the ACT regime. The claimants in that case (as here) had commenced High Court proceedings for restitution and damages in respect of the Revenue's refusal to grant them the benefit of group relief. Some of the claimants were still in time to obtain the relief if they were entitled to it. But others faced the additional difficulty that their claims for relief or any appeals against its refusal were out of time. The House of Lords (by a majority) held that where the claims for relief and any statutory appeals were still in time the correct course was for the taxpayers to appeal against the disputed assessment rather than to apply to the High Court for declaratory and other relief. Lord Nicholls of Birkenhead said:

> "19. As I see it, these claimants fall into two broad classes. One class comprises cases where, if the claimant company's contentions on Community law are well-founded, it is still open to the company to obtain in full the group relief to which, on that footing, the company is entitled. The other class comprises cases where this course is not open to the claimant company. The difference between these two classes corresponds to the distinction between (a) giving effect to the group relief provisions as read and applied in accordance with Community law and (b) awarding damages for breach of a Community law right.
>
> 20. In my view in the former of these two classes the category (1) claims in the High Court are misconceived. Where a claimant company can obtain through the statutory procedures the very tax relief of whose non-availability it is complaining, I see no justification for the company by-passing the statutory route and, instead, going to the High Court and claiming damages or a restitutionary remedy based on the proposition that the company has been wrongly refused the tax relief to which it is entitled under Community law.
>
> …..
>
> 30. Of course, to be compliant with Community law the remedial route prescribed by the legal system of a member state must be such that the rules "are not less favourable than those governing similar domestic actions (principle of equivalence)" and, additionally, the rules must not render "practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)": see the *Hoechst* case, para 85. The statutory route prescribed for group relief claims was not designed for claims in respect of non-resident companies. So, as United Kingdom law presently stands, at the initial step a taxpayers' group relief claim will

> inevitably be refused by the revenue. Further, as already noted, some statutory requirements will need adaptation to accommodate claims in respect of non-resident companies. But neither of these features should present any major problem. Neither of them renders the statutory route "practically impossible or excessively difficult". Adaptation of the formal requirements will be needed whichever route is followed, and the appropriate adaptation is a matter on which the special commissioners' practical expertise will be invaluable."

96. Lord Nicholls, however, accepted that in a case where the claim for group relief or an appeal against the assessment were now out of time the only remedy for the taxpayer was to pursue a High Court claim for compensation for the breach of its EU law rights:

> "[40] Time bars of this character are commonplace. I see no reason to suppose the statutory time bars applicable to group relief claims are in themselves inconsistent with Community law: cf *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* (Case C-338/91) [1993] ECR I-5475 and *Johnson v Chief Adjudication Officer* (*No 2*) (Case C-410/92) [1995] ICR 375, [1994] ECR I-5483. This means that, in respect of this class of cases, it is now too late for the taxpayers to obtain group relief by following the statutory route. A similar view has, rightly, been expressed by the Court of Appeal in respect of an employment tribunal's jurisdiction to entertain claims for unfair dismissal involving directly applicable Community rights outside the statutory time limits: see *Biggs v Somerset County Council* [1996] ICR 364.
>
> [41] In such cases the taxpayers' remedy necessarily lies elsewhere. In such cases the taxpayer's remedy is of a different character. The taxpayer's remedy lies in pursuing proceedings claiming restitutionary and other relief in respect of the United Kingdom's failure to give proper effect to Community law. The appeal commissioners have no jurisdiction to hear such claims. Such claims are outside the commissioners' statutory jurisdiction, and the commissioners have no inherent jurisdiction. Claims in this class should therefore proceed in the High Court. Difficult questions, both of domestic law and Community law, may arise about the time limits applicable to High Court claims of this character. Some of these questions were explored recently by the Court of Appeal in *Deutsche Morgan Grenfell Group plc v IRC* [2005] EWCA Civ 78, [2005] STC 329. Those are not matters arising on these appeals.
>
> [42] I add one caveat. The Revenue and the appeal commissioners have power to extend time limits for late amendments and late appeals. Before proceeding with their

> High Court claims claimant companies in this class of cases should therefore take the simple step of inviting the Revenue or the appeal commissioners to extend the time limits appropriately. If this invitation is accepted, the claimants should proceed along the statutory route. If the invitation is declined, or if the Revenue and the appeal commissioners have no power to grant the necessary extensions, the way will be clear for the High Court proceedings to continue."

97. In the light of this decision, Park J considered that there was a prior issue between the parties about jurisdiction which made it inappropriate for a reference to be made in the High Court proceedings at that stage. It is worth noting that the Revenue's argument was that the stay of the High Court proceedings should also extend to the tax years in respect of which the Trustees could have but did not make claims for the relevant tax credits. But the judge was only concerned with an application for an immediate reference and did not decide how far any stay on jurisdictional grounds would extend. Ultimately the parties were able to agree, without prejudice to their substantive arguments about procedure or jurisdiction, that their statutory appeals against the rejection of their s.42 claims for the tax credits should proceed before the hearing of their High Court claims and Rimer J made an order by consent on 3 September 2007 staying the test claims under the GLO pending the determination of the Trustees' statutory appeals.

98. In these circumstances, the only issue on limitation is whether the Trustees were out of time in making the s.42 claims for tax credits. In the High Court proceedings, which include common law restitutionary claims, there are likely to be issues as to whether (if otherwise well founded) the claims enjoy the benefit of the extended limitation period under s.32(1)(c) of the Limitation Act 1980. But, subject to one point which we shall come to, the Trustees do not contend that the effect of EU law is to modify s.43(1) so as to replicate the provisions of s.32(1)(c). Their principal submission, embodied in grounds 2 and 3 of their notice of appeal, is that the EU principles of effectiveness and equivalence require the s.43(1) time limit to be disapplied either completely or at least for the tax years in respect of which they issued a High Court claim within that six-year time limit. This latter argument would (if successful) allow the FIDs claim for the year 1996/97 to proceed. In the alternative (as ground 5), the Trustees contend that the FIDs claim for the tax credit for 1996/97 should be treated as made for the purposes of s.42 by the issue of the FIDs High Court claim on 31 January 2003.

99. The other ground of appeal relating to limitation concerns the Revenue's extra-statutory concession about the waiver of time limits (ESC B41) published on 10 February 1992. The Trustees submit that the Revenue (whether as a matter of national law or on the application of the EU principles of equivalence, effectiveness and legal certainty) acted unlawfully in refusing to give them a waiver of the s.43 time limits in respect of their s.42 claims. This part of the argument was rejected by the Upper Tribunal on jurisdictional grounds and requires us to consider the limits of the decision of Sales J (as he then was) in *Oxfam v. HMRC* [2009] EWHC 3078 (Ch), [2010] STC 686 and whether it was correct.

100. In order to set the principal issue about the disapplication of the s.43 time limit in its proper statutory context we need also to mention the earlier appeal to this Court on

what is ground 1 in the notice of appeal. This was the Trustees' argument that, as a matter of statutory construction, the claims for the tax credits were not claims "for relief" within the meaning of s.43(1) and were not therefore subject to the six-year time limit. The Trustees' contention was that their entitlement to a tax credit arose automatically under s.231(1) which provided that "the recipient of the distribution shall be entitled to a tax credit". No claim under s.42 was therefore necessary. Alternatively, they said that the claim for a credit was a claim for "any other thing to be done" rather than for "relief" under s.42 and that s.43 only applied to claims for the latter. The other issue raised on the appeal was whether a claim for the credits had been made either by the Trustees' original claim for exemption from income tax under s.592 ICTA or by the annual returns which it had filed.

101. This court dismissed the appeal and affirmed the decision of the Upper Tribunal that the tax credit was a "relief" within the meaning of s.42(1) and had to be the subject of a claim. The Upper Tribunal (whose reasoning on this point was expressly affirmed by Lewison LJ in his judgment) had said (at [294]):

> "In the first place, we consider that the claim made by BTPS for the tax credits to which we have held . . . it is entitled, are 'claims' within s 43. We accept Mr Baldry's submissions concerning the structure of s 231 and consider that a taxpayer is entitled to the set-off or payment referred to s 231(3) if, but only if, he makes a claim. The formal claim will, ordinarily, be made in a tax return. But even if Mr McDonnell is right in saying that set-off is automatic and does not need to be claimed, he cannot, we think, be right in saying that a request or demand by a taxpayer for payment under s 231(3) is not a claim. That of itself lends strong support to the view that even a set-off has to be claimed, otherwise a distinction – unwarranted, it seems to us – would have to be drawn between set-off and payment in terms of time limits."

102. The Court also rejected the Trustees' alternative argument that the claim had been made in their tax returns or by the s.592 claim for exemption. As Lewison LJ put it at [30]:

> "So far as the second argument is concerned, the problem here, as I see it, is that the annual returns did not in fact claim tax credits in respect of foreign dividends. That is not surprising, because until the CJEU's ruling, no one thought that they could be claimed. But I do not see how a failure (or omission) to claim something can amount to a claim to the very thing that has been omitted."

103. One therefore starts the consideration of grounds 2 and 3 from the premise that the Trustees have not made an in-time claim for any of the tax credits except in respect of the FIDs credit for the year 1997/98. But they could (had they realised much earlier that they had grounds under EU law for challenging the bar on the payment of tax credits in respect of foreign dividends) have written and sent the letters of claim within the six-year time limit under s.43. Their argument for the disapplication of that time limit therefore depends upon an objective evaluation and comparison between

the s.42 procedure as it applies to claimants seeking to obtain the tax credits in reliance on their rights under EU law and a UK taxpayer making a s.42 claim for a tax credit provided for under the UK tax regime. Mr Gammie did not accept that a UK taxpayer making a s.42 claim was the appropriate comparator. He contends, much as he did on the first appeal, that most UK taxpayers are not required to complete tax returns and receive any tax credits or reliefs to which they are due automatically as part of the assessment of their tax liability or under their PAYE coding. But, in our view, the appropriate comparator in the case of the Trustees is someone who, like them, is required to make a tax return and claims any credits or relief to which he is entitled either as part of that return or by way of separate claim. Since, as this Court has held, the Trustees are required under the prescribed domestic law procedure to claim any tax credit due to them under s.42, the question is whether that treatment breaches the principles of equivalence or effectiveness when looked at in comparison with the position of a UK taxpayer making a claim for the same type of relief; not with a taxpayer who is not making a claim for a credit under s.231.

104. The content of the principles of equivalence, effectiveness and legal certainty is not really in dispute. The imposition of limitation periods governing the bringing of a claim to enforce rights under EU law may, in the interests of legal certainty, be made subject to a reasonable time limit without thereby infringing the principle of effectiveness. In *Fantask A/S and Others v Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783 (*Fantask A/S*) the ECJ said at [48]:

> "The Court has thus acknowledged, in the interests of legal certainty which protects both the taxpayer and the authority concerned, that the setting of reasonable time limitation period for bring proceedings is compatible with Community law. Such periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought" reference being made to Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989 paragraph 5 and Case C-45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043, paragraphs 17 and 18."

105. It is well established that to have this effect the time limits must be fixed in advance and with sufficient certainty to enable the claimant to see from the legislation what limitation period will apply to his claim. For the same reason, the introduction of a limitation period which has retrospective effect will breach EU law unless it is accompanied by transitional provisions to deal with and preserve the existing (in time) rights of claimants which would otherwise be removed by the coming into force of the legislation: see *Marks and Spencer v Customs and Excise Commissioners* (Case C-62/100) [2002] ECR I-6325 [2003] QB 886 and *Fleming*.

106. In the present appeals we are not concerned with difficulties of this kind. The six-year time limit imposed by s.43(1) has co-existed with s.42 throughout the relevant period of the claims. The real gravamen of the Trustees' argument is that in a case such as this where the domestic tax system excludes the giving of a tax credit and the administrative arrangements it generates (such as the printed form of tax returns) accordingly make no allowance for such a claim, a claimant in the position of the

Trustees is disadvantaged by comparison with other taxpayers entitled to claim relief under s.42 both in terms of having to overcome the lack of provision for and even hostility towards such a claim contained in the relevant documentation and, more generally, by the delay in the recognition of the claim due to the pace of development of EU law in the ECJ and elsewhere.

107. It is convenient to start our analysis of these points by referring to the way in which the principles of equivalence and effectiveness have been routinely expressed in the ECJ. In *FII (GLO) ECJ* at [202]-[203] the Court said:

> "202. However, the fact remains that, according to established case law, the right to a refund of charges levied in a member state in breach of rules of Community law is the consequence and complement of the rights conferred on individuals by Community provisions as interpreted by the Court of Justice: see, inter alia, *Amministrazione delle Finanze dello Stato v SpA San Giorgio (Case 199/82) [1983] ECR 3595*, para 12 and *Metallgesellschaft [2001] Ch 620*, para 84. The member state is therefore required in principle to repay charges levied in breach of Community law: *Société Comateb v Directeur Général des Douanes et Droits Indirects (Joined Cases C-192 to C-218/95) [1997] STC 1006*, para 20 and the Metallgesellschaft case, para 84.
>
> 203. In the absence of Community rules on the refund of national charges levied though not due, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness): see, inter alia, *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland (Case 33/76) [1976] ECR 1989* , para 5 and *Comet BV v Produktschaap voor Siergewassen* (Case 45/76) [1976] ECR 2043 , paras 13 and 16; and, more recently, *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze (Case C-231/96) [1998] ECR I-4951* , paras 19 and 34; *Dilexport Srl v Amministrazione delle Finanze dello Stato (Case C-343/96) [2000] All ER (EC) 600*, para 25 and *Metallgesellschaft v Inland Revenue Commissioners [2001] Ch 620*, para 85."

108. In Case *Aprile v Amministrazione delle Finanze dello Stato* (C-228/96) [1998] ECR I-7141 the ECJ gave guidance in relation to the application of both principles to time limits similar to those contained in s.43:

> "19. As regards the latter principle, the court has held that it is compatible with Community law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the administration concerned: *Rewe-Zentralfinanz e.G. v. Landwirtschaftskammer für das Saarland (Case 33/76) [1976] E.C.R. 1989*, 1997–1998, para. 5; *Comet B.V. v. Produktschaap voor Siergewassen* (Case 45/76) [1976] E.C.R. 2043, 2053, paras. 17 and 18, and *Denkavit Italiana [1980] E.C.R. 1205*, 1225, para. 23; see also *Palmisani v. Istituto Nazionale della Previdenza Sociale (Case C-261/95) [1997] E.C.R. I-4025*, 4046, para. 28, and *Haahr Petroleum Ltd. v. Åbenrå Havn (Case C-90/94) [1997] E.C.R. I-4085*, 4158, para. 48. Such time limits are not liable to render virtually impossible or excessively difficult the exercise of rights conferred by Community law. In that regard, a time limit of three years under national law, reckoned from the date of the contested payment, appears reasonable: see *Edilizia [1998] E.C.R. I-4951*, 4990, para. 35 and *SPAC [1998] E.C.R. I-4997*, 5019, para. 19.
>
> 20. Observance of the principle of equivalence implies, for its part, that the procedural rule at issue applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues. That principle cannot, however, be interpreted as obliging a member state to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law: see *Edilizia*, p. 4991, para. 36 and *SPAC*, p. 5020, para. 20."

109. In much of the *FII GLO* litigation the principles of equivalence and effectiveness have been stated and applied in the context of *San Giorgio (Amministrazione delle Finanze dello Stato v San Giorgio SpA* (199/82)) claims for the repayment of tax that was unlawfully levied which include claims for the time value of the money paid. The extract from *FII (GLO) ECJ* above is framed in those terms. But there is no doubt that the same principles apply to any domestic statutory procedures for the making of a claim for relief as the House of Lords recognised in *Autologic* so that in the context of s.42 we have to consider whether the necessary adaptations (such as they were) of the claims procedure to accommodate EU law claims for the credits were sufficient to infringe either or both of the principles so as to require the disapplication of the s.43 time limit.

110. One principle which emerges very clearly from the decisions of the ECJ in cases involving non-compliant tax provisions is that it is for the national court, not the ECJ, to decide whether the domestic rules and procedures for claiming overpaid (or, in this case) unpaid tax comply with the principles of equivalence and effectiveness. A useful statement of the role of the national court is to be found in the judgment of the ECJ in *Littlewoods Retail Ltd and others v Revenue and Customs Commissioners*

(Case C-591/10) [2012] STC 1714 which concerned the recovery of compensation for overpaid VAT. The Court said:

> "31. As for verifying whether the principle of equivalence has been complied with in the case at issue in the main proceedings, it should be noted that compliance with that principle requires that the national rule in question apply without distinction to actions based on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action. However, the principle of equivalence cannot be interpreted as requiring a member state to extend its most favourable rules to all actions brought in a certain area of law. In order to ensure compliance with that principle, it is for the national court, which alone has direct knowledge of the procedural rules governing restitution actions against the state, to determine whether the procedural rules intended to ensure that the rights derived by individuals from EU law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions. For that purpose, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics (see, to that effect, *Pontin v T-Comalux SA* (Case C-63/08) [2009] ECR I-10467, para 45 and case law cited)."

111. A similar statement in relation to the principle of effectiveness is contained in [29]-[30] of the judgment.

112. This guidance reinforces our view that the appropriate comparator in the present case is a UK taxpayer making a s.42 claim to obtain a s.231 tax credit and not a taxpayer who is not required to make such a claim at all. But it also, we think, confirms that the question whether the domestic procedural rules for the enforcement of the claimant's EU law rights breach the principles of equivalence or effectiveness is essentially a factual one which, in the case of a statutory appeal, the specialist tax tribunal is particularly suited to determine and which this Court will not interfere with unless the Tribunal's decision discloses a clear error of law.

113. In relation to the principle of equivalence, Mr Gammie's principal argument is that in order to claim the tax credits in respect of foreign dividends it was necessary for the Trustees to make what amounted to a separate claim because, consistently with the UK tax legislation, neither the standard form tax returns nor any other documentation authorised by the Revenue provided for the making of such a claim. In fact the return form was even more discouraging than that because, in the rubric in part 2 of the form headed "Income from UK dividends with tax credits", the taxpayer is told to include "United Kingdom dividend or qualifying distribution income except for … dividends payable under the Foreign Income Dividend Scheme and distributions treated as foreign income dividends".

114. Ultimately, when the possibility of making a claim for tax credits under EU law was recognised by the Trustees, the s.42 claims were made by separate letters containing

details of the non-UK dividends received in the relevant period of assessment and a summary of the claim based on Article 56 of the EU Treaty.

115. Mr Gammie submits that the need to resort to this method of making the claim constitutes less favourable treatment by comparison with the position of a UK taxpayer making a s.42 claim for a tax credit permitted under s.231. We disagree. Section 42 requires in each case a claim to be made either in the taxpayer's return or in some other form which contains the necessary particulars. These provisions do not distinguish between the position of a taxpayer seeking to claim in respect of foreign dividends and any other taxpayer entitled to claim a credit. It is, of course, true that in every case where the claim for the credit or other relief depends upon a disapplication of the existing tax legislation in order to make the claim, the claimant is likely to be faced with standard forms which mirror the legislation in its current form and therefore make no provision for the inclusion of the credit. But the need for the claimant in these circumstances to modify his return by the addition of a letter of claim, as in the present case, does not take him outside the scope of s.42 or materially disadvantage him in relation to the making of the EU law based claim. If Mr Gammie is right, the relatively minor inconvenience of having to write a letter of claim as opposed to merely completing the standard form return would be enough to disapply the s.43 time limit in every case. As Lord Nicholls observed in *Autologic*, this can hardly be said to render the statutory route particularly impossible or excessively difficult nor, for the same reasons, did it disadvantage the Trustees.

116. Mr Gammie's challenge to the effectiveness of the s.42 procedure in relation to claims for tax credits on foreign dividends is based on more fundamental grounds. His argument is that this case provides an exception to the general rule that reasonable time limits do not infringe the principle of effectiveness even though they may operate to exclude a claim for the enforcement of the claimant's EU law rights as set out in the extract from *Fantask A/S* at [104] above. In terms of authority, he relies upon the decision in *Emmott v. Minister For Social Welfare* (Case C-208/90) [1991] 3 CMLR 658. This concerned a challenge to the refusal by the Irish Minister for Social Welfare to grant the claimant a non-discriminatory welfare benefit from 23 December 1984. Her entitlement was based upon Directive 79/7 which was not implemented in Ireland until legislation which took effect in 1986. The Directive required its implementation by Member States to take place before 23 December 1984. The Irish legislation was not made retrospective. In March 1987 the claimant entered into correspondence with the Minister seeking the benefit of the Directive. But she was told that judgment was still awaited on a pending reference to the ECJ which was designed to resolve the claimant's entitlement to retrospective payments of the benefit and that nothing would be decided until after then. When in 1988 the claimant did commence proceedings for judicial review, the Minister contended that the delay in commencing the proceedings constituted a bar to her claim. The ECJ held that the Minister was not entitled to rely on the claimant's delay in initiating proceedings until after Ireland had transposed the Directive into Irish domestic law:

> "20. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which are not in conformity with a directive, has the Court recognized the right of persons affected thereby to rely, in judicial proceedings, on a directive

> as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of directives, cannot justify a Member State absolving itself from taking in due time implementing measures appropriate to the purpose of each directive (see judgment in Case 102/79 *Commission v Belgium* [1980] ECR 1473).
>
> 21. So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgment finding that the Member State in question has not fulfilled its obligations under the directive and even if the Court has held that a particular provision or provisions of the directive are sufficiently precise and unconditional to be relied upon before a national court.
>
> 22. Only the proper transposition of the directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created.
>
> 23. It follows that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.
>
> 24. The answer to the question referred to the Court must therefore be that Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by Article 4(1) of Directive 79/7, on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system."

117. On any view the decision in *Emmott* was highly fact-specific and there is nothing in the judgment to suggest that the ECJ intended to lay down any kind of general principle that ignorance of or uncertainty about the state of the law is sufficient to prevent time running on grounds of effectiveness contrary to the established jurisprudence of the Court in the cases referred to in the extract from the judgment in *Fantask A/S.* Confirmation of this was provided by the judgment in *Haahr Petroleum Ltd v Abenra Havn* (Case C-90/94) [1997] ECR I-4085 at [48]-[52] and, more recently still, by the decisions in *Fantask A/S* itself and in *Iaia v Ministero dell' Istruzione and others* [2011] ECR 1-0000 which treat *Emmott* as a case in which the state was itself responsible for the claimant's delay in making its claim. In *Iaia* the Court said:

> "21. It follows that EU law does not preclude a national authority from relying on the expiry of a reasonable limitation period unless, by its conduct, it was responsible for the delay in the application, thereby depriving the applicant in the main proceedings of the opportunity to enforce his rights under an EU directive before the national courts.
>
> 22. It should also be made clear that, in accordance with settled case law, the fact that the court may have ruled that the breach of EU law has occurred generally does not affect the starting point of the limitation period.
>
> 23. This is a fortiori the case where, as in the main proceedings, the breach of EU law was not in doubt. In such a situation, a ruling by the Court that there has been such a breach is not necessary to enable the beneficiaries to ascertain the full extent of their rights. The fact that the period starts to run before the Court has given its ruling does not therefore render it virtually impossible or excessively difficult to safeguard the rights derived from EU law."

118. The other case which Mr Gammie relied on was *Banca Antoniana Popolare Veneta SpA v Ministero dell'Economia e delle Finanze, Agenzia delle Etrate* (Case C-427/10) [2012] STC 526 (*Banca Antoniana*) in which the claimant sought to recover overpaid VAT on supplies made between 1984 and 1999 which were eventually accepted to be exempt. The claim by the bank to recover the overpaid tax from the tax authority was subject to a two-year time limit commencing from the date when the VAT was paid. The difficulty faced by the bank was that the Italian tax authority announced in a circular in 1999 that it had re-considered and changed its view about the tax status of the relevant supplies but made no specific arrangements to enable the taxpayer to recover the VAT for the period back to 1984. Claims by the bank to recover the overpaid VAT were therefore largely out of time from the moment that the circular was published. But the bank's customers, who had paid the VAT as part of the charges for the exempt supply, still had civil claims against the bank to recover the amount of the VAT which were subject to more generous limitation periods and were largely in time. In these circumstances, the ECJ decided that there was a breach of the principle of effectiveness whereby the bank was liable to pay the tax to its customers but had no effective remedy against the tax authority for the same period:

> "32. In the case before the referring court, it should be noted, first of all, that - as the European Commission pointed out at the hearing - it would have been impossible or, at the very least, excessively difficult for BAPV to obtain, by means of an action brought within the two-year time-limit, a refund of the VAT paid in the years from 1984 to 1994, particularly in view of the position adopted by the tax authority - and confirmed, according to the information provided by the referring court, by the case-law of the national courts - which dismissed the possibility that the services supplied by BAPV fell within the exemption provided for under Article 10(5) of DPR No 633/72.

33. Also, by attributing retroactive effect to the Circular of 26 February 1999, the interpretation provided by the referring court and by the court decision referred to in paragraph 16 above has the result of moving the starting point of actions for recovery back to the date on which the VAT was paid, which - given that the service provider had no more than two years in which to bring an action against the tax authority for the recovery of sums paid but not due - totally deprived the provider of any possibility of recovering the tax paid but not due.

34. Lastly, it is common ground that the consortia brought an action for the recovery of sums paid but not due after the expiry of the two-year specific limitation period during which it was open to BAPV, with effect - according to the case-law interpretation mentioned above - from the date on which the VAT was paid, to claim a refund from the tax authority of the VAT paid but not due.

35. The consortia brought an action for recovery of sums paid but not due following publication of the Circular of 26 February 1999 by which the tax authority changed its interpretation of the nature of the transactions at issue in the main proceedings, thereafter regarding them as exempt from VAT.

36. Consequently, it should be noted that, in a situation such as that at issue before the referring court, it is BAPV itself which bears the cost of paying the VAT which was not due, without any possibility of effectively claiming a refund from the tax authority because the two-year time-limit has expired, even though such a situation is not its fault, but a result of the fact that, prompted by the Circular of 26 February 1999, the recipients of the services brought an action against BAPV, after the expiry of the above time-limit, for the recovery of sums paid but not due.

…..

42. It is apparent from the above considerations that the principle of effectiveness does not preclude national rules governing the recovery of sums paid but not due, under which the time-limits for a civil law action for recovery of sums paid but not due, brought by the recipient of services against the supplier, a taxable person for the purposes of VAT, are more generous than the specific time-limits for a fiscal law action for a tax refund, brought by the supplier against the tax authority, provided that it is possible for that taxable person effectively to claim reimbursement of the VAT from the tax authority. That condition is not satisfied where the application of such rules has the effect of totally depriving the taxable person of the right to

> obtain from the tax authority a refund of the VAT paid but not due, which the taxable person has himself had to pay back to the recipient of his services."

119. The Upper Tribunal treated this as another case which turned on its very specific facts rather than a re-formulation of general principle. It said:

> "354. Moreover, paragraphs 40 to 42 of the judgment indicate the factors which weighed heavily with the Court in reaching its decision. Thus (paragraph 40) the circular effectively reopened the question whether transactions consisting of the collection of those contributions were subject to VAT, (paragraph 41) the national authority must take account of the particular situations of economic operators and, where appropriate, provide for adjustments to the way in which this new legal assessments of those transactions are applied. This is just the sort of situation envisaged in paragraph 21 of *Iaia* (see paragraph 306 above) where the Member State is responsible for the delay in the taxpayer's application for a refund. We do not think that what the Court said in paragraphs 31 and 32 can be taken as lending support to the proposition that whenever a tax-collecting authority collects tax on the basis of its understanding of the law (including Community law) which is later shown to be wrong by a judicial assessment (and not by a change of view on the part of the authority) it necessarily follows that the principles of legal certainty or effectiveness are not met."

120. We agree with this analysis. In our view, there is nothing comparable to the situation in *Banca Antoniana* in the present case. The absence of a claim for the tax credits by the Trustees was not due to the conduct of the Revenue reproducing in the standard form tax returns or in their guidance notes the terms of the relevant legislation. It was simply a product of timing in relation to the decisions of the ECJ on the legality of the ACT regime. Had the current legal position been established earlier there would have been no further impediment by the Revenue or under the domestic rules of procedure to the making of a s.42 claim.

121. As a subsidiary point in relation to the principles of equivalence and effectiveness, the Trustees rely upon their position as Trustees as additional grounds for saying that national law has made it virtually impossible or excessively difficult for them to make s.42 claims in this case before the expiry of the six-year limitation period. They contend that it would not have been reasonable for Trustees to have made statutory claims (necessitating litigation before the Special Commissioners) prior to the judgment of the House of Lords in *Autologic*. Similarly, they could not reasonably have made the *Manninen* claims until after the judgment of the ECJ in *Manninen* which was given on 7 September 2004. Prior to that, community law was in an uncertain and developing state.

122. Much of this argument is based on the need for trustees to act reasonably and not to expend trust money on speculative or uncertain litigation at least without the protection of a *Re Beddoe* order, if at all. But, in our view, the special position of

trustees does not justify the grant of special treatment under EU law in relation to the application of domestic time limits for the making of claims. The principle of legal certainty which allows a claim under EU law to be excluded even though throughout the limitation period the claimant may have been unaware of its legal rights due to delays in the development of the law ought to apply equally to all classes of potential claimant. So far as the ECJ recognised that an exception needed to be made for the claimant in *Banca Antoniana*, it did so because that claimant had been specifically disadvantaged by the disparity in treatment under national law between the limitation period which applied to the bank's claim against the tax authority and that which governed its own liability to its customers.

123. The need for trustees to exercise caution does not create a difference of treatment of that kind. We agree with the submission of Mr Baldry that these difficulties, such as they are, are at most a complaint about the risk in terms of costs for trustees who embark on speculative or hazardous litigation. They do not constitute a form of discrimination for which s.43 TMA is in any way responsible.

124. This brings us to the two subsidiary issues of whether the Upper Tribunal was right to dismiss on jurisdictional grounds the claim that the Revenue acted unlawfully in refusing to grant a waiver of the s.43 time limit under the terms of the extra-statutory concession and whether the issue of the High Court claim form for the FIDs tax credit in respect of the year 1996/97 falls to be treated as a s.42 claim.

<u>ESC B41</u>

125. The extra-statutory concession ESC B41, published on 10 February 1992, states:

> "Claims to repayment of tax
>
> Under the Taxes Management Act [TMA 1970], unless a longer or shorter period is prescribed, no statutory claim for relief is allowed unless it is made within six years from the end of the tax year to which it relates.
>
> However, repayments of tax will be made in respect of claims made outside the statutory time limit where an overpayment of tax has arisen because of an error by the Revenue or another Government department, and where there is no dispute or doubt as to the facts."

126. The Trustees submit that, as a matter of language, "error" by the Revenue can include the overpayment of tax due to a mistake of law. Although, as held by this Court on the appeal in respect of ground 1, the Trustees did not make s.42 claims in the tax returns which they filed, Mr Gammie submits that there have been errors of law both in terms of the general failure by the Revenue to apply s.231 in accordance with EU law and in promulgating written directions in the self-assessment tax returns (quoted earlier) to the effect that the credits are not available in relation to FIDs and foreign dividends. He contends that, in the light of these errors, the Revenue should have applied the extra-statutory concession and disapplied the s.43 time limit so as to allow the present s.42 claims.

127. Mr Baldry disputes this construction of ESC B41. He submits that even if this had been a case (which it was not) which led to tax being overpaid that was not "because of an error by the Revenue" so as to create a lack of equivalence between the treatment of the Trustees and other taxpayers. ESC B41 is concerned, he says, with administrative errors made by the Revenue in its treatment of the taxpayer. The guidance note (SACM10040) gives an example of such a situation to which the ESC B41 would apply:

> "For example, you might accept a late claim under ESC B41 where, before the time limit for making the claim, an HMRC officer wrongly advised a person that a claim or election was not possible, where the officer ought to have known, from the information given to them, that this advice was incorrect".

128. What ESC B41 is not concerned to correct is the effect of errors which do not arise "*because* of an error by the Revenue" but rather because of the incompatibility of the particular provision of UK tax legislation with the relevant principle of EU law. If ESC B41 is to be construed as broadly as that, it would result, he submits, in the disapplication of the TMA time limits in every case in which domestic tax provisions have operated incompatibly with EU law.

129. Our own view is that HMRC's construction of ESC B41 is almost certainly correct and is conclusive of this issue. But the Upper Tribunal did not decide the point on this basis. It held that it had no jurisdiction to decide what amounted to a challenge to the lawfulness of the Revenue's refusal to extend to the Trustees the benefit of the extra-statutory concession because it amounted to a public law challenge which should be brought by way of an application for judicial review in the Administrative Court. In so doing, the Upper Tribunal refused to follow the decision of Sales J in *Oxfam v. HMRC*:

> "401. Our reasons for saying that the Tribunal has no jurisdiction to give effect to the Extra-Statutory Concessions stems from the recent decision of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UK Upper Tribunal 363 (TCC) ("*Hok*") a decision of Warren J and Judge Bishopp. Mr Vajda has relied on the decision of Sales J in *Oxfam v. HMRC* [2009] EWHC 3078 (Ch), [2010] STC 686 ("*Oxfam*"), paragraphs 61 to 79 to demonstrate that the Tribunal does have jurisdiction. However, that decision turned on a construction of 83(1)(c) of the Value Added Tax Act 1994 which Sales J held gave jurisdiction to the VAT Tribunal to deal with legitimate expectation in the context of an appeal as to the amount of input tax. It lends no support at all to the view that the Tribunal has a general jurisdiction to deal with public law matters, whether in the context of direct tax or indirect tax, in particular to require, in the exercise of some sort of supervisory jurisdiction, HMRC to give effect to a concession. The suggestion that there is a jurisdiction in the context of direct tax is refuted by the decision in *Hok*."

130. Mr Gammie disputed the premise on which this part of the Upper Tribunal's decision is based. His argument is that the Upper Tribunal was not concerned with a public

law issue whether in the form of a denial of a legitimate expectation or otherwise. It was asked to consider the legality of HMRC's refusal to accept s.42 claims outside the s. 43 time limits notwithstanding its practice under ESC B41 of waiving time limits for similar claims under domestic law. This engages, he says, the principle of equivalence and provides another reason why the time limits should be disapplied.

131. We are not persuaded by this argument. It seems to us that for the principle of equivalence to have any application to the use of ESC B41 the Trustees would have to show that it operated so as to distinguish between errors of law based on (e.g.) the misinterpretation of the domestic legislation and cases where the legislation has mistakenly been applied in breach of some relevant directive or principle of EU law. On the Trustees' construction of the concession, it would apply indiscriminately to both cases so that, looked at objectively, there is no breach of the principle of equivalence in its operation.

132. If, on the other hand, the complaint by the Trustees is that they have been unfairly denied the benefit of the concession in respect of HMRC's error of law about the correct operation of s.231 then this is a public law challenge to the application of ESC B41 which should have been brought by way of judicial review because the sole ground of complaint is that they have been denied the benefit of a concession to which, on its terms, they are entitled.

133. The jurisdiction of the FtT is statutory. Section 3(1) of the Tribunal, Courts and Enforcement Act 2007 ("TCEA 2007") provides:

> "There is to be a tribunal, known as the First-tier Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act."

134. In relation to income tax, its primary functions are to determine appeals notified to it: see TMA ss.49D(3) and 49G(4). An appeal means any appeal under the Taxes Act: see TMA s.48(1). The statutory appeals with which we are concerned were against closure notices disallowing the claims for tax credits. In respect of such an appeal, TMA Schedule 1A, para 9 provides:

> "(7) If on an appeal notified to the tribunal, the tribunal decides that a claim which was the subject of a decision contained in a closure notice under paragraph 7(3) above should have been allowed or disallowed to an extent different from that specified in the notice, the claim shall be allowed or disallowed accordingly to the extent that appears appropriate, but otherwise the decision in the notice shall stand good."

135. An appeal to the Upper Tribunal against the decision of the FtT lies on a point of law: see TCEA 2007 s.11. On such an appeal, the Upper Tribunal has the following powers under TCEA 2007 s.12:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal–

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either–

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

(3) In acting under subsection (2)(b)(i), the Upper Tribunal may also–

(a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;

(b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal–

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate."

136. The effect of s.12(4)(a) is that if the appeal is allowed and the decision re-made, the Upper Tribunal has the same powers as the FtT under TMA Schedule 1A.

137. In *Oxfam v. HMRC* the issue was whether, and if so in what proportion, Oxfam was entitled to deduct residual input tax incurred on its fundraising activities. In part, the question turned on the correct tax treatment of that expenditure but since 2000 the charity had apportioned its residual input tax on expenditure between business and non-business supplies in accordance with a method approved by the Commissioners. Following a High Court decision which cast doubt on the correctness of the assumptions underlying the approved method, the Commissioners revoked their agreement to it and refused retrospective claims for the repayment of VAT. Part of Oxfam's case was that the 2000 agreement was either binding on the Commissioners contractually or at least amounted to an assurance that the recoverable input tax would be calculated in accordance with the agreed formula which gave rise to a legitimate expectation enforceable in public law.

138. To guard against the FtT not having jurisdiction to decide its public law claim, Oxfam issued parallel judicial review proceedings along with its statutory appeal. The judicial review application was adjourned pending the appeal to the Value Added Tax and Duties Tribunal but was then heard by Sales J along with the appeal from the Tribunal. Although not necessary in the circumstances, Sales J decided that the point

about legitimate expectation could have been decided by the Tribunal as part of the statutory appeal and the judge proceeded to decide the point as an additional ground of the statutory appeal.

139. The jurisdiction of the VAT Tribunal depended on s.83 VATA which provided:

> "(1) … an appeal shall lie to the tribunal with respect to any of the following matters— …"
>
> (c) the amount of any input tax which may be credited to a person …"

140. The judge said:

> "[63] On the ordinary meaning of the language of that provision, it appears that it covers all the issues between Oxfam and HMRC regarding the question whether HMRC should have allowed Oxfam credit for a higher amount of input tax under the approved method formula, including both the contract issue and the legitimate expectation issue. The words, 'with respect to', in s 83(1) appear clearly to be wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be credited to a taxpayer. The tribunal's jurisdiction is defined by reference to the subject matter specified in the section, not by reference to the particular legal regime or type of law to be applied in resolving issues arising in respect of that subject matter.
>
> …..
>
> [67] Usually, of course, an appeal under one of the sub-paragraphs of s 83(1) will be on the merits of decision taken by HMRC, and questions of private law or public law (such as whether HMRC took into account irrelevant considerations or failed to take account of relevant considerations) will simply not be relevant to the tribunal's task on the appeal. But in my view it does not follow from this that the tribunal will never have jurisdiction to consider issues of general private law and general public law where that is necessary for it to determine the outcome of an appeal against a decision of HMRC whose subject matter falls within one of the sub-paragraphs of s 83(1).
>
> [68] I do not think that it is a valid objection to this straightforward interpretation of s 83(1)(c) according to its natural meaning that it has the effect that sometimes the tribunal will have to apply public law concepts in order to determine cases before it. It happens regularly elsewhere in the legal system that courts or tribunals with jurisdiction defined in statute by general words have jurisdiction to decide issues of public law which may be relevant to determination of questions falling within their statutorily defined jurisdiction. No special

language is required to achieve that effect. Where they are themselves independent and impartial courts or tribunals (as the tribunal is) there is no presumption that public law issues are reserved to the High Court in the exercise of its judicial review jurisdiction. So, for example, a county court may have to consider whether possession proceedings issued by a local authority have been issued in breach of its public law obligations (*Wandsworth London BC v Winder* [1994] 3 All ER 976, [1985] AC 461); magistrates' courts and the Crown Court may have to decide issues of public law in so far as they arise in relation to criminal proceedings (eg to determine if a byelaw is a valid and proper foundation for a criminal charge: *Boddington v British Transport Police* [1998] 2 All ER 203, [1999] 2 AC 143 or to determine the validity of a formal instrument which is in some way a necessary foundation for the criminal charge: *DPP v Head* [1958] 1 All ER 679, [1959] AC 83); and employment tribunals may have to decide issues of public law in employment proceedings (eg to determine whether a contract of employment with a public authority is vitiated as having been made ultra vires).

[69] I cannot see any good reason for adopting a different approach to the interpretation of the jurisdiction of the tribunal in s 83 of VATA. The tribunal is used to dealing with complex issues of tax law. There is no reason to think that it would not be competent to deal with issues of public law, in so far as they might be relevant to determine the outcome of any appeal. That view is reinforced by the fact that the tribunal may have to deal with complex public law arguments in relation to Convention rights when construing legislation under s 3 of the Human Rights Act 1998, and is recognised by Parliament as being competent to do so.

[70] Moreover, there is a clear public benefit in construing s 83 by reference to its ordinary and natural meaning which strongly supports that construction. It is desirable for the tribunal to hear all matters relevant to determination of a question under s 83 (here, the amount of input tax to be credited to a taxpayer) because (a) it is a specialist tribunal which is particularly well positioned to make judgments about the fair treatment of taxpayers by HMRC and (b) it avoids the cost, delay and potential injustice and confusion associated with proliferation of proceedings and ensures that all issues relevant to determine the one thing the HMRC and taxpayer are interested in (in this case, the amount of input tax to be recovered) are resolved on one occasion in one place. It seems plausible to suppose that Parliament would have had these public benefits in mind when legislating in the wide terms of s 83.

> [71] Therefore, apart from any authority on this question, I would hold that s 83(1)(c) bears its ordinary and natural meaning, so that resolution of the issue of legitimate expectation which arose between Oxfam and HMRC fell within the tribunal's jurisdiction."

141. We have heard no argument about s.83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section. But, in agreement with the Upper Tribunal, we do not consider that the decision in *Oxfam v HMRC* should be treated as authority for any wider proposition and we reject the suggestion that the reasoning of Sales J can or should be applied to the jurisdiction of the FtT and the Upper Tribunal to determine the appeals in this case.

142. The statutory jurisdiction conferred upon the FtT by s.3 TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Schedule 1A TMA do not extend to what are essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer. The extra-statutory concession is, by definition, a statement as to how HMRC will operate in the circumstances there specified and its failure to do so denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it. We are not concerned as in these statutory appeals with the direct application of the taxing instrument modified, or otherwise, by any relevant principles of EU law. The sole issue in relation to ESC B41 is whether it was fairly operated in accordance with its terms.

143. We therefore consider that the reasoning of Sales J in *Oxfam v HMRC* has no application to the statutory jurisdiction under s.3 TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession. The appeals are concerned with whether the Trustees are entitled under s.231 to claim the benefit of the credits on FIDs and foreign dividends. Not with what is their entitlement under ESC B41. This reading of TCEA 2007 is strengthened by s.15 TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT.

The High Court claim

144. The final question on limitation is whether the High Court claim in respect of the FIDs tax credit for 1996/97 should be treated as a s.42 claim. Mr Gammie says that the High Court claim seeks relief for the non-payment of the tax credits including the amount of the credits themselves and that in order to comply with the principles of effectiveness and equivalence it was and should be treated as a claim under s.42. Since there is no specified form for a claim under s.42, it can be made in any form: see *Gallic Leasing Ltd v Coburn* [1991] STC 699.

145. The difficulty about this argument is that neither the principle of effectiveness nor the principle of equivalence require domestic law to establish a uniform procedure for the making of claims based on EU law rights. Member States are left to provide remedies under domestic law which will be recognised as effective unless they make the enforcement of the claimant's EU law rights impossible in practice or excessively

difficult or disadvantage such claims over comparable domestic claims. In the present case, s.42 was capable of being operated by the Trustees without causing them any of those difficulties. Like the Upper Tribunal, we do not consider that the High Court claim can be treated as a s.42 claim because it was not a claim for a tax credit. It is in terms and substance a claim for compensation at common law for the Revenue's failure to grant the tax credits in the relevant years.

146. It also failed to comply with the statutory requirements for a s.42 claim because it was not made to an officer of the Board of the Inland Revenue (see paragraph 2(1) of Schedule 1A TMA) and was not served before 15 May 2003. The Upper Tribunal was therefore right to reject the issue of the High Court claim form as the making of a s.42 claim.

147. None of the grounds of appeal relating to time limits raise issues which we feel unable to decide without the benefit of a reference to the ECJ. We therefore dismiss the Trustees' appeals on these grounds.