Neutral Citation Number: [2015] EWHC 2883 (Ch)

Case No: HC03C02223 & Others

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 14/10/2015

Before:

MR JUSTICE HENDERSON

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Between :

THE TEST CLAIMANTS IN THE FII GROUP LITIGATION	**Claimants**
- and -	
(1) THE COMMISSIONERS OF INLAND REVENUE **(2) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS**	**Defendants**

Mr Graham Aaronson QC and Mr Jonathan Bremner (instructed by **Joseph Hage Aaronson LLP**) for the **Claimants**
Mr Oliver Conolly (instructed by **the General Counsel and Solicitor for HMRC**) for the **Defendants**

Hearing date: 3 July 2015

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Approved Judgment on Costs in the Liability Proceedings

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HENDERSON

Mr Justice Henderson:

Introduction

1. As I shall explain, the Supreme Court by its order dated 14 January 2015 in the FII group litigation ordered the respondents, ("HMRC"), to pay 75% of the costs of the appellant test claimants in the Supreme Court and the Court of Justice of the European Union ("the ECJ") in respect of the third reference, but remitted the question of costs of the liability proceedings in the High Court and the Court of Appeal to myself. This is my judgment on the question remitted to me by the Supreme Court, on which I have had the benefit of written submissions from both sides, and oral submissions at a hearing convened at my request on 3 July 2015.

2. The background to, and history of, the FII group litigation are of quite exceptional complexity. A short introduction may be found in the judgment on quantification issues (together with some remaining issues of liability) which I handed down on 18 December 2014, following a lengthy trial between 6 May and 12 June 2014: see Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2014] EWHC 4302 (Ch), [2015] STC 1471 ("FII (High Court) II") at [1] to [10]. I will normally, and without further explanation, use the same definitions and abbreviations in this judgment as I did in FII (High Court) II.

3. In order to place in context the questions of costs which I now have to determine, only a brief summary of the history is needed. The account which follows draws substantially on the helpful introductory section of the claimants' written submissions on costs dated 13 February 2015.

4. The trial of the test cases began in June 2004, but was immediately adjourned while a reference was made to the ECJ on certain key issues of EU law. Following the delivery of that first ruling on 12 December 2006 (in FII (ECJ) I), an order was made for the split trial of the test cases, with issues relating to liability (but not causation or quantification) taken first. I heard the liability stage of the trial in July 2008, and delivered judgment on 27 November 2008: see FII (High Court) I. I subsequently gave both parties permission to appeal on all issues, and by my order of 23 March 2009 ordered HMRC to pay 20% of the test claimants' costs. Although I directed that several issues be referred to the ECJ, I gave permission to appeal those directions.

5. The Court of Appeal heard the appeals in October 2009, and gave judgment on 23 February 2010 by reference to 23 issues of law listed in the appendix to its order (as amended) dated 19 March 2010. The Court of Appeal confirmed the reference to the ECJ of the issues which I had directed, and added a further issue (concerning the lawfulness of the Schedule D Case V charge) to the reference. The Court of Appeal reversed my order, however, in relation to a number of important limitation and jurisdiction issues which I had decided in favour of the claimants. The Court of Appeal therefore set aside my costs order and ordered the test claimants to pay 65% of HMRC's costs of the appeal, with the costs in the High Court being remitted to myself to be determined in the light of the Court of Appeal's order. That remitted costs issue was subsequently stayed by an order of the High Court dated 14 July 2010 to await further developments.

6. The Court of Appeal refused both parties permission to appeal, and remitted to me the making of the second reference to the ECJ. Both sides then renewed their permission applications to the Supreme Court, which ruled on them by order of 8 November 2010. Where the parties sought to appeal against the reference of issues to the ECJ, those applications were refused by the Supreme Court, which added a further issue (on the question whether Article 63 TFEU applied where dividends were received from subsidiaries) which was also remitted to the High Court. In relation to various other issues, time for permission to appeal was extended until the outcome of the second reference to the ECJ. Permission to appeal was, however, granted to the test claimants on three issues relating to limitation and jurisdiction, to which a fourth limitation issue was added shortly before the appeal hearing.

7. The High Court referred the questions remitted by the Court of Appeal and the Supreme Court to the ECJ by order of 15 December 2010. The ECJ delivered its second ruling, in FII (ECJ) II, on 13 November 2012. The ruling substantially favoured the claimants, who were awarded 72.5% of their costs of the second reference by order of the High Court dated 14 May 2013. This order for costs was agreed between the parties, and was therefore not the subject of a reasoned decision.

8. Meanwhile, in February 2012 the Supreme Court heard argument on the four issues on which it had granted immediate permission to appeal, and it delivered its judgment on 23 May 2012 ("FII (SC)"). Determination of one of the issues, namely the lawfulness of section 320 of the Finance Act 2004, involved the making of a third reference to the ECJ, which gave its third ruling on 12 December 2013. The claimants were the substantially successful party, both on the issues determined by the Supreme Court and on the third reference to the ECJ. This success was reflected in the Supreme Court's order for costs dated 14 January 2015: see [1] above.

9. By the time when the Supreme Court made its costs order, the quantification stage of the High Court trial had already taken place and judgment had been handed down in FII (High Court) II on 18 December 2014. The claimants were again the substantially successful party, and by my order of 30 January 2015 I awarded them 85% of their costs of the trial.

10. In the fairly brief reasons which it gave for its costs order of 14 January 2015, the Supreme Court said that there were three options in relation to costs in the courts below. The first option was to "start from scratch" in assessing the significance of the points decided by the Supreme Court in the overall context of the case, but in circumstances where the Supreme Court did "not have a clear understanding of the relative importance of the many other issues litigated in the courts below". The second option was to use my 20% costs ruling in FII (High Court) I as a starting-point to decide on an appropriate figure in each court. The third option was to remit the question of costs in the courts below to myself, with directions that I was to decide on costs before both the Court of Appeal and myself. Alternatively, the costs before myself and the Court of Appeal could also be remitted separately to those respective courts.

11. The Supreme Court decided in favour of the third option, saying this:

> "On balance, the Supreme Court concludes that the most sensible (and just) course is to choose option (c). While this

> Court could no doubt assess the significance of the issues decided before it, there are too many unknowns about issues addressed by the courts below to enable it to make a just order with regard to the costs in the courts below. Thus, option (c) seems all things considered the most principled and appropriate approach. Remission of the issues in both the Court of Appeal and at first instance should be referred to Henderson J who would be appropriate as he is the judge best acquainted with the case. It seems to the Court that there is no reason why he should not determine the costs in the Court of Appeal as well as at first instance. Indeed the Court hopes that he will be able to do so at the same time. Perhaps it is not too much to hope that those issues can now be settled."

12. The Supreme Court's costs order was made by four of the seven justices who heard the appeal (Lord Clarke, Lord Dyson, Lord Sumption and Lord Reed), the other three members of the court having since retired.

Two preliminary questions of principle

13. With this introduction, I can now turn to two preliminary questions of principle which seem to me to arise. The first question is how far (if at all) I should have regard to the reasoning which led the High Court and the Court of Appeal to make their now superseded costs orders in FII (High Court) I and FII (CA). The second question is whether it is permissible for me to take into account the substantial success of the test claimants in the quantification trial, FII (High Court) II, including in particular the relative significance of the issues in that trial and the quantum of recovery which they have yielded to the test claimants.

(1) The superseded costs orders

14. The short answer to this question is not, I think, in doubt. The relevant costs orders have each been set aside, by order of a superior court. The task which I have been given by the Supreme Court, as I understand it, is to exercise my discretion afresh, in the light of the whole history of (at least) the liability proceedings down to the present day. My task is not merely to review the previous costs orders in the light of subsequent developments, or even to take them as my starting point. That would be, in effect, to adopt the second option which the Supreme Court expressly rejected.

15. It does not follow from this, however, that the reasoning which led me in March 2009 to award the test claimants 20% of their costs of the High Court liability trial is now completely irrelevant. On the contrary, I think it still forms part of the overall picture which I now have to consider, and may be of some assistance as a record of how I then weighed up the relative success of the parties in the light of all the uncertainties which at that stage still beset the case.

16. At the beginning of my costs ruling of 23 March 2009, I identified three factors which meant that whatever order I made was to a large extent likely to be academic, except in relation to the question of a payment on account of costs at that stage. The first factor was that nearly all of the substantive issues were under appeal by the losing party. The second factor was that the hearing had been the first part of a split trial,

dealing only with issues of liability and, to a small extent, some minor aspects of causation. The third factor was that in relation to some very important parts of the claim, including the corporate tree questions, I had expressed the view that a further reference to the ECJ was necessary. I then said (page 2 of the approved transcript):

> "So for all those reasons, any assessment of costs at this stage is to a large degree an academic exercise which may bear little relation to the ultimate success or failure of the parties at the end of the day in what may be more than a few years hence."

17. I then set out what I described as "a rough balance sheet of success and failure" on the points which I had decided, while recognising "the need to bear in mind the importance of the individual issues as well as their mere enumeration". My overall assessment (page 6 of the transcript) was as follows:

> "Standing back and looking at the picture in the round, it seems to me, in a very general way, that the claimants have done significantly better than the Revenue on liability issues, while the Revenue have done significantly better than the claimants on remedies questions, although both of those generalisations need a great many qualifications and they are only meant to be just that: very broad generalisations."

18. I then recorded that the claimants were asking for 60% of their costs in relation to the BAT test claim, and 100% of their costs in relation to the Aegis test claim (which had been added to deal with the limitation issue arising from section 320 of the Finance Act 2004). For their part, HMRC were asking for 50% of their costs on the basis that they were substantially the successful party. The claimants supported their position by arguing that the proceedings had had to be brought in order to establish the right to recover anything, and even on the basis of my judgment as it stood, leaving out of account the corporate tree points, there were at least three heads of recovery which the test claimants had established, provisionally quantified (on the footing that compound interest would be payable) in a sum of at least £90 million. On the other hand, HMRC submitted that recovery of this order of magnitude was only a tiny fraction of a total claim which in argument had been said to amount to well over £5 billion, quite apart from the claim to damages which I had comprehensively rejected.

19. I then stated my conclusions, from which I quote the following extracts (pages 12 to 16 of the transcript:

> "In the first place, I reject the submission that the Revenue are to be treated at this point as the successful party. It seems to me that, even on the basis of a balance sheet of issues, the highest the case can be put in their favour is to say that the hearing was in effect a draw, with a number of goals scored on each side. As I have already indicated, however, that can be no more than a starting point, particularly where both sides are appealing, where there is a split trial, and where there is the possibility, if not the probability, of further references to the ECJ to come.
>
> …

> Secondly, it seems to me that the test claimants must be, to a significant extent, treated as successful in the sense that, on the basis of my judgment as it stands, they have established what will almost certainly be a right to some substantial recovery … The quantum recoverable at this point is obviously highly uncertain, not least because I only have calculations for the BAT group and two other groups in any detail, and because of the uncertainty as to whether compound interest will be recoverable. However, I think I may legitimately take the provisional view that compound interest is, I would say, more likely to be recoverable at the end of the day than merely simple interest, given the approach of the ECJ in Hoechst itself to time value claims for the loss of the money, the decision of the House of Lords in Sempra Metals, and the views expressed in the present case by both the Advocate General and the ECJ about the underlying purpose of the restitution which has to be made when tax has been unlawfully levied.
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> …
>
> I think, on any view of the matter, if I ask myself who has to put his hand into his pocket, the answer is the Revenue will have to, and I cannot regard the sums involved as de minimis, or as equivalent to a merely nominal recovery … One needs to remember that even at the present time £100 million is still, by any standards, a very substantial amount of money …
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> The third conclusion I would state is that I can see no basis for treating Aegis separately from the other test claimants. As I have indicated, it is a pure accident that Aegis was joined to deal with only one issue, and I think it would be contrary to the whole rationale of the GLO procedure for me to distinguish in any way between Aegis and the other test claimants.
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> At the end of the day I have a wide discretion in the matter, and there is a limit to how far one can try to articulate the reasons for coming to a particular conclusion. I have done my best to take into account both the balance sheet of success and failure on individual issues which I have been through and the substantial success which at least some of the claimants, it seems to me, can point to at this stage in terms of a likely award in their favour at the end of the case. But equally I do bear in mind that, for example, the whole damages claim has been ruled out by my findings on sufficiently serious breach, and that even £100 million is only a small amount in comparison with £5 or £6 billion.
>
> Doing the best I can, and fully recognising that this, in a sense, is only an interim staging post on a journey which still has a long way to go, my conclusion is that the Revenue should pay 20% of the claimants' costs of the proceedings."

20. One negative point which is worthy of emphasis is that the costs which I was asked to deal with in January 2009 were the costs of the action. They did not include the costs of the first reference to the ECJ, upon which I heard no submissions and gave no ruling. This may have been an oversight by all concerned, since the ECJ had ruled in the usual way that the costs of the reference were to be decided by the national court, on the footing that the reference was a step in the action pending before the national court. The fact remains, however, that those costs, unlike the costs of the second and third references, have never been the subject of a ruling by the High Court. Those costs are therefore included in the questions which I now have to determine.

21. I can deal much more briefly with the costs order made by the Court of Appeal following its judgment in FII (CA), because the Court provided no detailed ruling. The relevant part of the ruling of the Court given by Arden LJ on 19 March 2010 is as follows:

> "4. As to the costs of the appeals, the Court directs the Claimants to pay the Revenue 65% of its costs and makes no further order for the costs in the Court of Appeal.
>
> 5. As to the costs below, this Court sets aside the orders of the Judge. This follows from its judgment. However, this Court does not have all the information necessary to enable it to make an appropriate order for the costs below and accordingly it remits to the Judge the question of what new orders for costs should be made, and when."

22. The Court of Appeal's order giving HMRC 65% of their costs of the appeal reflected their success on the crucial issues of limitation and jurisdiction which had the effect of confining the test claimants to Woolwich-based claims with a six year limitation period, most of which had to be pursued through the machinery of section 33 of the Taxes Management Act 1970 (or, more accurately, its corporate equivalent). The decision of the Court of Appeal on those issues has subsequently been reversed by the Supreme Court, and by the ECJ on the third reference, thereby substantially restoring the conclusions which I had reached at first instance. It follows that I can derive little assistance from the Court of Appeal's costs ruling.

(2) The quantification trial

23. HMRC submit that it would be wrong in principle for the court to take any account of the outcome of the quantification trial in FII (High Court) II when dealing with the costs of the liability proceedings. Three main arguments are advanced in support of this submission. The first argument is that the hearings in FII (High Court) I and FII (CA) were concerned with issues of principle which were common to the claimants in the FII Group Litigation. They were in the nature of preliminary issues, and the costs of determining those issues should be allocated on the basis of success and failure on those issues, including of course the ultimate success or failure on particular issues on appeal. The outcome of the later quantification trial has been reflected in the costs order made in those proceedings, and for present purposes is irrelevant.

24. The second argument is of a more practical nature. The quantification trial was confined to those claims which the relevant test claimants were entitled to pursue, in

the light of the outcome of the liability proceedings. This means that it is impossible to compare the quantum of the test claimants' success with the quantum of their failure on the issues which they were not entitled to pursue. So, for example, no claims for damages have been pursued, nor have any restitutionary claims for reliefs utilised against corporation tax. Such claims would have been substantial, but they have never been quantified and so no comparison is possible with the outcome of the quantification trial in which the amount recovered by the test claimants has been computed, following the trial, as approximately £1.2 billion.

25. The third argument is related to the second. The only claims which have so far been quantified are those of the BAT test claimants, together with those of the Ford group which was added to the quantification trial because they raised certain factual situations which did not arise in the claims of the BAT group. The intention in the quantification trial was to cover all issues of principle relating to quantum which were thought to arise across the FII GLO, but those issues will affect the different corporate groups enrolled in the GLO in different ways, nor are all of the issues common to all of the members. It cannot therefore be assumed that the recovery made by the BAT test claimants will necessarily be replicated across the GLO.

26. A further point, upon which Mr Conolly placed particular emphasis in his oral submissions for HMRC, is that the quantification trial involved many difficult and important issues of law, on nearly all of which permission to appeal has been granted. It would therefore be unrealistic to suppose that my judgment will remain the last word on those issues, and if the experience of the liability proceedings is anything to go by, it may be several years before all of the issues have been finally resolved. The changing fortunes of the parties on appeal can be reflected in costs orders made by the higher courts in the quantification proceedings, but, by contrast, those courts would not have jurisdiction to revisit the costs orders made in the liability proceedings. Thus there is a real danger, submits Mr Conolly, that if I were to allow the outcome of the quantification trial at first instance to influence my determination of the costs of the liability proceedings, that influence might later be shown to be mistaken in the light of future appellate rulings in the quantification proceedings, by when it would be too late for my determinations to be revisited. The only fair way to deal with a risk of this nature, says Mr Conolly, would be to postpone determination of the liability costs until after the final outcome of the quantification proceedings; but nobody has ever suggested this, and it would run counter to the hope expressed by the Supreme Court in its ruling of 14 January 2015 that the costs issues remitted to me "can now be settled".

27. The cumulative force of these arguments is powerful, and persuades me that I would need to be very cautious before taking any account of the outcome of the quantification trial in the determinations which I now have to make. I do not, however, accept the submission in its extreme form, which is that it would be wrong in principle for me to have any regard at all to the quantification trial. It seems to me that it necessarily forms part of the legal and factual background against which the costs of the liability stage of the proceedings now have to be determined, and the right way for me to take account of the points made by HMRC is not to disregard the quantification trial altogether, or pretend that it never took place, but rather to give due weight to all the uncertainties surrounding quantification which still exist, and to be correspondingly cautious in taking such considerations into account.

Classification and relative importance of the issues

28. Both sides are agreed that, in a case as complex as this, the appropriate basis for the costs orders is a percentage rather than an issue-based approach. Such an approach accords with the guidance in CPR 44.2(7), which says that before the court considers making an (issue-based) order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) (i.e. an order that a party must pay a proportion of another party's costs, or costs from or until a certain date only) instead. Furthermore, I seriously doubt whether, in a case with so many and frequently interlocking issues, it would even be possible to adopt an issue-based approach, at any rate without making a large number of arbitrary assumptions about the allocation of costs to particular issues. What is needed, therefore, is an appropriate methodology to classify and assess the relative importance of the issues, so as to provide a proper foundation for a percentage-based order.

29. For this purpose, the claimants submit (and I agree) that a simple tally approach, recording which party was ultimately successful in relation to each issue, would be inappropriate. It would fail to distinguish between issues of fundamental importance to the whole claim, or issues which open the door to whole new areas or periods of recovery, on the one hand, and isolated issues of purely local significance on the other hand. In addition, a tally approach would not make due allowance for the fact that success on some issues has been made irrelevant by failure on others. So, for example, the claimants won on the issue whether Article 63 TFEU was engaged when dividends were received from third country subsidiaries, but their claims to recover Case V tax in those circumstances nevertheless failed in their entirety because they were excluded by the standstill provision in Article 64(1) TFEU.

30. The claimants therefore submit that the most appropriate and manageable way to assess success is by acknowledging the differing importance of issues, and by focusing on the components of the claims which have been successful or not rather than on the multitude of issues and sub-issues comprised within those components. To that end, they propose a grouping of the issues by topic, with each topic representing a component of the claim or a discernible category of issues to which a value can be attributed. For example, the topic of "Case V tax on third country dividends" comprises both the question whether Article 63 TFEU was engaged, and whether the standstill provision applied; the topic of "Limitation" comprises the issue whether the Woolwich remedy was alone sufficient to satisfy the claimants' *San Giorgio* claims, as well as whether sections 320 of the Finance Act 2004 and 107 of the Finance Act 2007 were lawful; and the "Corporate tree" topic comprises the issues relating to the corporate roots, the corporate branches, and whether ACT paid in the branches can ground a claim in restitution as opposed to damages.

31. The next stage in the analysis, according to the claimants, is to assess the significance of each topic. For this purpose, a three tier approach is used. Issues which are fundamental to the outcome of the litigation and/or issues which would add hundreds of millions of pounds to the value of the claim are characterised as "most important"; issues which add (or subtract) more than £100 million to or from the value of the claim are classified as "important"; while issues which add or subtract less than £100 million are "less important". Finally, the claimants assess whether they have won or lost on each topic, depending upon whether the outcome added to the value of the

claim or not. Where the outcome was divided, involving both losses and added value, the topic is sub-divided accordingly.

32. Using this methodology, the claimants prepared a table grouping the issues under 17 topics, showing:

    (a) the court, or courts, in which the topic was at issue;

    (b) the importance of the topic; and

    (c) the outcome, with a few explanatory notes.

33. In their supplementary skeleton argument on costs dated 2 July 2015, HMRC accept that the exercise conducted by the claimants of grouping the issues, and according them varying degrees of importance, is a useful starting point. They submit, however, that it is inappropriate to measure the importance of the topics by reference to the sums which the BAT test claimants will recover as a result of them. They also dispute the claimants' analysis of whether certain issues were "wins" or "losses". In relation to the monetary value assigned by the claimants to the topics, HMRC rely on their arguments which I have already rehearsed in relation to the quantification trial. They accept, however, that a qualitative judgment necessarily has to be made in relation to each topic, although not by reference to the amounts recovered by the BAT test claimants. These criticisms apart, HMRC propound no rival methodology of their own.

34. I agree with HMRC that the assessment of the importance of each topic needs to be more broadly based than the predominantly financial approach advocated by the claimants, both as a matter of general principle and because the reliance which can be placed on the outcome of the quantification trial is, for the reasons which I have already given, in my opinion very limited. What I propose to do, therefore, is to examine the 17 topics in turn, recording any points of disagreement between the parties and doing my best to assess their general significance in the context of the group litigation as a whole.

The 17 topics

35. The first three topics identified by the claimants concern issues which arose in FII (ECJ) I only. Topic 1 is whether the incidence of ACT on EU dividend income is a breach of EU law in principle. This is classified by the claimants as a "most important" win for them, because without winning this issue no claim to recover ACT would have been possible. HMRC comment that the decision of the ECJ on this question was "of course a necessary gateway to the claim", but it was factored into the initial costs order in FII (High Court) I. Further, they say it leaves open the critical question of the quantum of recoverable loss flowing from the breach. I agree with the claimants' assessment of this as a most important win, which is a fundamental prerequisite to the successful claims for unlawfully levied ACT. On any reasonable view, the value of these claims across the FII GLO as a whole is likely to be enormous. Failure at this first hurdle would have eliminated the claims in their entirety. Moreover, it is not correct to say that the claimants' success on this topic was factored into the original costs order in FII (High Court) I. As I have explained, that order did not deal with the costs of the first reference to the ECJ.

36. Topic 2 is "Was the inability to utilise ACT arising from the distribution of EU income a breach?", and the claimants again characterise it as a most important win with the comment that it was necessary for the recovery of surplus ACT. The claimants' schedule cross-references this topic to question 3(b) in FII (ECJ) I, which was in fact a highly specific question relating to the reduction of corporation tax liabilities through double taxation agreements, and consequent limitations on the ability to set off ACT, on which the claimants' arguments were not accepted by the ECJ. Mr Conolly did not dispute, however, that the general formulation of the topic was fundamental to the success of the claims to recover surplus ACT, and that the claimants had succeeded on this general issue before the ECJ. I agree with the claimants that it should be classified as a most important win, and again it is not directly covered by the costs order in the High Court liability trial.

37. Topic 3 is whether ACT paid on FIDs was lawful. The claimants classify this as an important win, on the footing that it was worth £150 million to BAT. They comment that other claimants have either recovered interim payments or issued summary judgment application for ACT on FIDs exceeding £140 million, including both EU and non-EU FIDs. HMRC accept that this was an important win for the claimants, but again assert that it was factored into the original High Court costs order. That is only partially correct, because the unlawfulness of the FID regime in relation to both EU and third country FIDs had already been established in principle by the ECJ, and the live issues in the High Court liability trial related mainly to the standstill provision in what was then Article 57(1) EC: see FII (High Court) I at [180] to [191]. All in all, I see no reason to dissent from the claimants' assessment that the decision of the ECJ on this topic represented an important win for them.

38. The next two topics are ones which arose in FII (High Court) I only. The first of these, topic 4, is whether BAT did as a matter of fact enhance FIDs to compensate for the lack of a shareholder credit. I found that the primary reason why the FIDs were enhanced in the BAT group was indeed to compensate exempt shareholders for the absence of a tax credit for them under the FID regime: see FII (High Court) I at [277] to [302]. The claimants therefore classify this as a "less important" win, while acknowledging that it was of no value to them given my ultimate conclusion that the conditions for a damages claim were not met. This assessment is challenged by HMRC, who submit that this was one factual element in a claim for damages which failed. It took up considerable time in the High Court, and occupied 25 paragraphs of my judgment. I agree with HMRC on this point, although I think it makes little practical difference whether the outcome is characterised as a subsidiary win which was nullified by my conclusions on damages, or as a component of an unsuccessful claim for damages. Either way, the eventual outcome was the same. It is conceivable that the difference might become material at a future date, if the Supreme Court were to grant permission to appeal on the Factortame damages question and reverse my conclusion that the relevant conditions for such a claim were not satisfied. In that event, it would of course be open to the Supreme Court to revisit previous costs orders relating to that part of the case.

39. Topic 5 involves the factual issue whether the unlawfully levied Case V tax and ACT was paid under a mistake, and the legal issue whether a mistake-based restitution claim applied to recover such tax. The claimants classify this as a most important win, commenting that it is a high value issue. Without the findings of law and fact on

this topic, BAT's claims would have been confined to a six year limitation period extending back to dates in 1997 to 1999, rather than extending back to 1973. HMRC accept, rightly in my view, that the claimants' success on these issues must be regarded as most important.

40. The remaining topics all arose in multiple courts, i.e. in at least two of the ECJ, the High Court and the Court of Appeal.

41. Topic 6 is whether the Case V charge to corporation tax was unlawful under EU law. It arose in all three courts, and the claimants classify it as a most important win. They comment that although not much Case V tax was actually paid, ACT (both lawful and unlawful) utilised against such tax accounts for about £225 million of the BAT claim, and the interlinking of Case V tax and ACT also clearly makes this a most important issue. I agree with this assessment, which recognises the fundamental nature of this issue in the FII group litigation. Its importance is reflected in the fact that the issue has been refined and developed in the first and second references to the ECJ, and in the arguments addressed to me and the Court of Appeal. Indeed, this process continued even into the quantification proceedings, because the first issue which I had to consider in FII (High Court) II was in precisely what respects the Case V charge was unlawful under EU law: see my judgment in that case at [20] to [40]. HMRC seek to characterise the claimants' victory on this topic as a highly qualified one, because there are likely to be many cases where the "dual credit" for actual or nominal EU tax which I have held to be required by EU law will not impact on the Case V charge, for example because the profits in question were not subject to tax in the EU at all, or were subject to tax at a lower nominal rate than in the UK. While these points need to be borne in mind, I am satisfied that they form only a subsidiary part of the overall picture, which is one of substantial success for the test claimants at all stages in establishing this cornerstone of their claims.

42. Topic 7 is described as Case V tax on third country dividends after the introduction of the EUFT rules (which took effect from the end of March 2001). The topic was considered by the High Court and the Court of Appeal, and resulted in a loss to the claimants. Having discussed the relevant issues in FII (High Court) I at [67] to [108], I said in [109] that the result was that the third country Case V claims failed in their entirety. The claimants' appeals on these issues were dismissed by the Court of Appeal. This is an example of a composite topic where success for the claimants on part of it (the question whether Article 56 EC could apply to dividends from third country subsidiaries) was in practice nullified because I held (and the Court of Appeal agreed) that the standstill protection in Article 57(1) EC continued to apply to such dividends after the introduction of EUFT. The claimants assess their defeat on this topic as "less important" but I agree with HMRC that it should be considered an important loss. The result was to rule out a whole category of claims, albeit only in relation to dividend income received after March 2001.

43. Topic 8 is "corporate tree defences". It seems obvious to me that the comprehensive success of the claimants on the corporate tree issues, following the second reference to the ECJ, must be regarded as a most important win, and as extending to the argument before the two national courts which led to the issues being referred to the ECJ. The importance of the topic lies in the fact that most of the disputed ACT was paid at higher levels in the group than the UK water's edge company which first received the foreign dividends, while the relevant foreign tax was often paid further

down the corporate roots than the EU water's edge company. There was also an important issue whether the tax paid in the corporate branches gave rise only to a damages claim. On any realistic assessment, I consider that the claimants' overall success on these critical issues has been of the greatest significance, both in terms of legal principle and in terms of their established or likely impact on quantum.

44. Topic 9, rather uninformatively labelled "equivalent relief to surrender", refers to the question whether UK companies were entitled under EU law to surrender their ACT to non-resident subsidiaries. The question was referred to the ECJ, which decided it in HMRC's favour. The topic undoubtedly represents another loss for the claimants, but I agree with them that it should be classified as less important. In the overall scheme of the litigation, the question never assumed a role of central significance, and the failure of the ECJ to address it on the first reference was due to a misunderstanding by the ECJ of the scope of the question put to it: see FII (CA) at [113]. Moreover, where the ACT in question was unlawfully levied, the claimants were in any event entitled to recover it, even if it could not be surrendered to non-resident subsidiaries: see FII (ECJ) II at [107] to [109].

45. Topic 10, which relates to third country FIDs, is agreed to be an important win for the claimants. There is nothing I need to add to my discussion of FIDs under Topic 3 above, except that according to the claimants about half of the value of the FID claims lies in third country FIDs.

46. Topic 11 is "disapplication", that is, whether the incompatibility with EU law of the ACT provisions should be remedied by disapplication of the offending UK legislation or a process of conforming construction. At the stage of the High Court liability trial, it was common ground that the directly effective rights of the claimants which had been infringed could not be remedied by adopting a conforming construction of the ACT legislation, so the debate was about disapplication and how it should be effected: see FII (High Court) I at [142] to [153]. In the Court of Appeal, HMRC argued for the first time that a conforming construction was possible, and the Court agreed: see FII (CA) at [97] to [109], but note that these paragraphs mis-describe the way in which the matter had been argued before me at first instance. The claimants characterise their loss on this question in the Court of Appeal as less important, pointing out that as matters have transpired the Court of Appeal's approach in the BAT test claim alone has produced a successful claim in excess of £1 billion. The question is, however, one of conceptual importance, and HMRC estimate that sums of several hundred million pounds may turn on it. I am therefore inclined to classify the claimants' loss on this topic as an important one, while recording my personal view that it should ultimately make little difference to the outcome whether the remedy applied by the English Court is one of strenuous conforming construction or suitably nuanced disapplication.

47. Topics 12 and 13 need to be considered together, because they both involve the underlying question whether reliefs utilised against unlawful Case V tax are recoverable as a *San Giorgio* restitution claim. Topic 12 is whether reliefs other than lawful ACT are so recoverable, while topic 13 asks the same question in relation to lawful ACT. The reason for splitting the question into two topics is that the claimants lost at all levels on topic 12, but won on topic 13. The claimants seek to classify their loss as less important, but their win as important, pointing out that in the BAT quantification trial it has turned out to be worth over £152 million. In my view, each topic should be regarded as important. The effect of the claimants' loss on topic 12 is

to rule out a very significant category of claims for restitution, leaving them to sound only in damages (as to which see topic 15 below). With the limited information now available to me, I am certainly not prepared to assume that, across the group litigation as a whole, the claimants' success in relation to ACT will turn out to be of greater value than their defeat in relation to other reliefs.

48. HMRC also point out that the claimants' success in the Court of Appeal on topic 13 was the only issue on which they improved their position in that court. This is true as far as it goes, but has to be considered with the far more significant point that nearly all of the issues on which the Court of Appeal disagreed with the judgment in FII (High Court) I have subsequently been restored either by the Supreme Court or by the ECJ on the third reference.

49. Topic 14 is change of position, which the claimants classify as a most important win. HMRC object to this, on the footing that all the High Court and the Court of Appeal actually decided was that HMRC were entitled to maintain a change of position defence. The fact that the defence comprehensively failed in the quantification proceedings is said to be irrelevant. In my view this is an area where it would be unrealistic to disregard the failure of the defence, on the facts, in the quantification trial. Viewed from that perspective, the many and difficult questions of law relating to the defence which I have had to consider in FII (High Court) I and other cases can reasonably be seen as complex and expensive distractions from a defence that was anyway never going to succeed on the facts. Furthermore, it needs to be remembered that I have consistently held the defence to be precluded as a matter of EU law in relation to *San Giorgio* claims, although the higher courts have yet to rule on this question. Looking at the position in the round, I conclude that the claimants are justified in regarding their ultimate success on this topic as a most important win.

50. By contrast, topic 15 (damages/sufficiently serious breach) is rightly acknowledged by the claimants to be a most important loss. Its resolution occupied a substantial amount of time at the liability trial, and 49 paragraphs of my judgment were devoted to the issue ([353] to [404]). The issue also occupied considerable time in the Court of Appeal, including an application to adduce fresh evidence: see FII (CA) at [196] to [216]. The effect of the rejection of the claimants' damages claims was to rule out all their claims for breaches of EU law other than those which are properly classified as *San Giorgio* claims.

51. Topic 16 is limitation, broadly conceived so as to include the sufficiency of the Woolwich cause of action to satisfy the claimants' EU rights, and the lawfulness under EU law of both section 320 of the Finance Act 2004 and section 107 of the Finance Act 2007. The claimants have ultimately succeeded on all these hard-fought issues, and their overall win on limitation is again rightly conceded by HMRC to be most important. This was the gateway which unlocked the claims dating back to 1973, and in terms of quantum the significance of this topic could hardly be over-stated. HMRC's only point is that the ultimate success of the claimants on these issues in the Supreme Court and on the third reference to the ECJ merely restored the position as found by the High Court, which is already reflected in the order for costs which I made in March 2009.

52. Finally, topic 17, dealing with jurisdiction and section 33 of the Taxes Management Act 1970, is agreed to be a less important win for the claimants. I concur with that

assessment. HMRC again make the same point as they do on topic 16, namely that the claimants' ultimate success on this question in the Supreme Court merely restored the position as found by the High Court.

Conclusion

53. I was told at the hearing that the total amount of the claimants' costs now in issue was estimated to be of the order of £12 million. Following detailed work by the claimants' costs team, I was later informed on 8 September 2015 that the correct figure is in fact unlikely to exceed £9 million.

54. Taking all the circumstances into account, and adopting the approach discussed earlier in this judgment, the conclusion which I have reached is that HMRC should pay to the test claimants:

    (a) 75% of their costs of the first reference to the ECJ; and

    (b) 65% of their costs of the liability proceedings in the High Court and the Court of Appeal.

55. There is little which I wish to add by way of further explanation for my decision. In relation to the costs of the first reference to the ECJ, I think it is legitimate to treat them separately, partly because the costs of the second and third references have been the subject of separate costs orders, but more fundamentally because it was the first reference which laid the crucial foundations for the successful claims subsequently established by the test claimants. They did not succeed on all of the issues referred to the Court, and the Court itself developed and modified its original conclusions in important respects on the second reference. Overall, however, I feel no doubt that the test claimants were substantially the successful party on the first reference, and I do not think this would be adequately reflected by an award of less than 75% of their costs. Such an award is also in line with the costs orders made on the second and third references, when they enjoyed a similar level of success.

56. I do not consider it appropriate, however, to differentiate between the costs of the liability proceedings in the High Court and the Court of Appeal. I think it is better to aggregate them, and to form a global estimate of the degree of success achieved by the test claimants. For that purpose, I have exercised my discretion afresh in the light of all the circumstances as they appear to me in 2015, including the outcome of the quantification trial, but giving appropriate weight to the uncertainties and reservations articulated by HMRC in their written and oral submissions. I have had regard to the earlier costs orders made following the proceedings in the High Court and the Court of Appeal, but I have not taken those orders as my starting point, and I do not consider myself to be bound by them in any way. If it is objected that my conclusion today sits uncomfortably with the award to the test claimants of only 20% of their costs which I made in March 2009, I can only reply that an enormous amount has happened over the last six years, and the court is now immeasurably better placed to form a just estimate of how the costs of the liability trial should be borne. At all events, I have now done the best I can to discharge the task given to me by the Supreme Court, and I will make an order accordingly.