Neutral Citation Number: [2013] EWHC 108 (Ch)

Case No: HC03C02184

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 31/01/2013

Before :

MR JUSTICE HENDERSON

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Between :

GKN HOLDINGS PLC & OTHERS	**Claimants**
- and -	
(1) COMMISSIONERS OF INLAND REVENUE	**Defendants**
(2) COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	

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Mr David Cavender QC (instructed by **Dorsey & Whitney (Europe) LLP**) for the **Claimants**
Mr Rupert Baldry QC and Mr James Rivett (instructed by **the General Counsel and Solicitor to HMRC**) for the **Defendants**

Hearing date: 5 November 2012

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Judgment

Mr Justice Henderson:

1. This is my judgment on two cross-applications in the Franked Investment Income ("FII") group litigation which I heard on 5 November 2012. The first ("the interim payment application") is brought by two of the claimants enrolled in the FII Group Litigation Order ("GLO"), GKN Holdings PLC and GKN Industries Limited (together "GKN"). By it GKN seek an interim payment in the sum of £3.35 million with further interest accruing from 1 July 2012 pursuant to CPR rule 25.7(1)(c). The second ("the stay application") is brought by the Commissioners for Her Majesty's Revenue & Customs ("the Revenue", a term which I shall use to include HMRC's predecessors the Commissioners of Inland Revenue). The main relief sought in the stay application is an amendment to the terms of the FII GLO of 8 October 2003 (as amended), to extend the stay in paragraph 12 thereof so as to prevent any individual claimant from bringing a claim for an interim payment under CPR Part 25 until (a) the claimant in question has served full particulars of claim, and (b) all the common issues identified in Schedule 3 of the GLO which are relevant to the claimant's claim have been resolved. In the alternative, the Revenue ask for appropriate directions to be given for the efficient management of any future interim payment application which may be made by claimants under the FII GLO, and for the interim payment application by GKN to be stayed in the meantime.

2. GKN's solicitors, Dorsey & Whitney (Europe) LLP, represent the majority, but not all, of the claimants enrolled in the FII GLO. Since the stay application potentially affects the interests of all the claimants, it was clearly necessary for notice of it to be given to the solicitors who represent the remaining groups of claimants, namely Pinsent Masons LLP and RPC. This was duly, if belatedly, done by the Revenue, and both firms then confirmed that they adopted the same position as Dorsey & Whitney on the stay application and did not wish to be separately represented at the hearing. I therefore heard argument from Mr David Cavender QC, instructed by Dorsey & Whitney, for the relevant claimants in both applications, and from Mr Rupert Baldry QC, leading Mr James Rivett, on behalf of the Revenue.

3. Viewed historically, the interim payment application may be seen as a sequel to an earlier application for an interim payment by GKN and other claimant companies which was determined by Sir Andrew Park, sitting as a judge of the Chancery Division of the High Court, in a judgment which he handed down on 19 May 2009: see The Test Claimants in the FII Group Litigation v HMRC [2009] EWHC 1599 (Ch), which I will take as read for the purposes of this judgment. Sir Andrew ordered the Revenue to make an interim payment of £4.4 million to GKN, of which £1.5 million represented "water's edge" ACT claims arising within six years of the issue of the claim form, and £2.9 million represented further water's edge ACT claims which arose before that date but within the extended limitation period provided by section 32(1)(c) of the Limitation Act 1980.

4. The Revenue subsequently appealed against Sir Andrew's order to the Court of Appeal, hoping to establish that as a matter of principle GKN were not entitled to any interim payment at all. The Revenue's appeal was, however, comprehensively dismissed by the Court of Appeal: see HMRC v The GKN Group [2012] EWCA Civ 57, [2012] STC 953, also reported at [2012] 1 WLR 2375 under the name Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners (No. 2). I will take that judgment too as read, and would refer any readers coming fresh to this saga to paragraphs [1] to [27] of the judgment of Aikens LJ (with whom Ward and Lewison LJJ agreed) for a concise explanation of the background to the FII group litigation and the history of the interim payment applications which followed my judgment in Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners [2008] EWHC 2893 (Ch), [2009] STC 254 ("FII Chancery").

5. Between the hearing at first instance of GKN's application for an interim payment and the hearing of the Revenue's appeal against Sir Andrew's order, the Court of Appeal heard and decided the appeals of both sides from my decision in FII Chancery: see Test Claimants in the FII Group Litigation v Revenue & Customs Commissioners [2010] EWCA Civ 103, [2010] STC 1251 ("FII (CA)"), judgment in which was handed down on 23 February 2010 by Arden, Stanley Burnton and Etherton LJJ. At this stage, the important point to note is that the Court of Appeal disagreed with my view that EU law required English law to afford the claimants a mistake-based restitutionary remedy, as well as the Woolwich remedy for the recovery of unlawfully exacted tax, in relation to their *San Giorgio* claims, with the consequence that the statutory curtailments of the former remedy in section 320 of the Finance Act 2004 and section 107 of the Finance Act 2007 were ineffective in relation to such claims and had to be disapplied accordingly. The Court of Appeal concluded that the Woolwich remedy, shorn of any supposed requirement for a demand, by itself

provided the claimants with an effective remedy for their *San Giorgio* claims, and that EU law therefore had no impact on sections 320 and 107 which took effect in accordance with their terms. It followed that the claimants were confined to bringing claims within a limitation period of six years which began to run when the unlawful tax was paid, because (a) that was agreed to be the limitation period applicable to Woolwich claims, and (b) the application of section 32(1)(c) of the Limitation Act 1980 to the mistake-based restitutionary claims had been validly curtailed by sections 320 and 107.

6. It was as a consequence of this part of the Court of Appeal's decision that in April 2010 GKN made a voluntary repayment to the Revenue of approximately £2.9 million with compound interest, that being the part of the interim payment ordered by Sir Andrew which was attributable to GKN's mistake claims made outside the curtailed limitation period. This repayment was duly reflected in the order made by the Court of Appeal when it dismissed the Revenue's appeal from Sir Andrew's order. By paragraph 2 of the Court of Appeal's order sealed on 8 February 2012, Sir Andrew's order was "amended to reflect the fact that the Interim Payment is for £1,490,932 to GKN Industries Ltd and nil for GKN Holdings PLC".

7. Since then, however, the Supreme Court has ruled on a number of issues in the FII GLO, including the limitation issues: see Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2012] UKSC 19, [2012] 2 AC 337 ("FII (SC)"). The seven members of the Supreme Court were unanimous in holding that section 107 of the Finance Act 2007 was incompatible with EU law in that the circumstances of its enactment had infringed the principle of the protection of legitimate expectations. In the view of two members of the Court, Lord Walker of Gestingthorpe and Lord Reed JJSC, its enactment also infringed the principle of effectiveness. It follows that the Revenue can no longer rely on section 107 as an answer to GKN's extended time limit mistake claims.

8. In relation to section 320 the Court was divided, the majority holding that it too was contrary to EU law as infringing the principle of effectiveness, but the minority (Lord Sumption and Lord Brown of Eaton-under-Heywood JJSC) disagreed, considering that the principle of effectiveness was not engaged because the Woolwich remedy by itself provided the claimants with an effective remedy for their *San Giorgio* claims, and (on the facts) the enactment of section 320 did not infringe the claimants' legitimate expectations. The majority agreed with the minority on this last point, but in view of their disagreement on the fundamental issue of effectiveness the Court decided to make a further reference (the third in the FII GLO) to the Court of Justice of the European Union ("the CJEU"). Accordingly, the position in relation to section 320 remains unresolved. However, this does not affect GKN's interim payment application, because GKN's claim was brought before 8 September 2003 and is therefore not caught by section 320. The claim was only caught by the further element of retrospection introduced by section 107, which the Supreme Court has now unanimously held to be unlawful.

9. In the light of this background, GKN now seek by the interim payment application, in effect, to recover the £2.9 million plus interest which they voluntarily repaid to the Revenue in 2010, and thus to reinstate the original interim payment ordered by Sir Andrew Park. GKN accept that the court has a fresh discretion to exercise in the matter, but they submit that the position remains essentially the same as it was when

Sir Andrew ruled on the original application, and that simple fairness requires the status quo to be reinstated. The sum now claimed of £3.35 million is calculated on the same basis as in 2009, with a few minor refinements, and it includes the 15% discount which Sir Andrew applied in order to ensure an adequate margin of safety rounded to the nearest £10,000: see paragraphs [43] to [45] of his judgment. The figure also includes interest, computed on the same basis as before, down to 1 July 2012.

10. There is one further recent development which I should mention. At the date of the hearing before me on 5 November 2012, the CJEU had not yet delivered its judgment in the second FII reference (Case C-35/11), but the judgment was due to be delivered only eight days later on 13 November. It was not thought likely that the forthcoming judgment would have any direct bearing on the interim payment application, because the application was made in respect of ACT which the Revenue had long ago conceded to be unlawfully levied, and was confined to ACT actually paid by UK water's edge companies which was said to be referable to dividends received from water's edge EU subsidiaries which had themselves paid corporate tax on the distributed profits in their own states of residence. The factual situation was, in other words, the basic one which the CJEU had considered on the first FII reference, and it did not appear to involve any of the "corporate tree" issues which were among the questions referred on the second reference. In those circumstances, neither side asked for the hearing to be adjourned until the CJEU had given its judgment, but I gave permission to the parties to put in brief written submissions dealing with any relevant points which might emerge when the CJEU had delivered its judgment. The parties took advantage of this opportunity, and I received a supplementary note from Mr Cavender QC dated 20 November 2012, some lengthier submissions from Mr Baldry QC and Mr Rivett dated 27 November, and a brief response to those submissions from Mr Cavender.

11. Before moving on, there is one further procedural point which I should clarify. The original interim payment applications were all heard by Sir Andrew Park, rather than myself, because I am the designated trial judge in relation to the FII GLO, and CPR rule 25.9 provides that:

> "The fact that a defendant has made an interim payment, whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided unless the defendant agrees."

At that stage, the Revenue did not agree that any such disclosure should be made to me, so it was necessary for a different judge to hear the interim payment applications, and Sir Andrew's judgments on them were not reported. Since then, however, the Revenue have changed their mind, and it was agreed that I should hear the present application. It also follows that Sir Andrew's judgments are no longer subject to any reporting restrictions and may be freely cited.

12. In considering the matters before me, it is logical to begin with the stay application, because if I were to accede to the primary way in which it is put, the stay would apply to the (present) interim payment application as well as to any subsequent ones which the claimants may be minded to make.

The stay application

13. Paragraph 12 of the FII GLO, as originally made by Chief Master Winegarten and subsequently many times amended, currently provides that:

> "All claims listed in Schedule 1 [*i.e. the claims enrolled in the GLO*] save for those identified to proceed as test claims pursuant to Paragraph 11 above be stayed until further order with permission to apply for the stay to be lifted on giving 14 days' notice in writing to the other parties."

14. GKN's claims have not been identified as test claims, so the stay in paragraph 12 applies to them, and would prima facie appear to prevent any steps being taken in those claims, including applications of an interim nature, unless the court gives permission for the stay to be lifted to the necessary extent. Nevertheless, the Revenue did not rely on this provision, or seek to argue that permission to lift the stay should be refused, in relation to any of the interim payment applications which came before Sir Andrew Park. They presumably took the view that the purpose of the stay in paragraph 12 was to ensure the orderly determination of the common issues of law raised in the GLO, with only the designated test claims proceeding for that purpose, and that it was never intended to prevent individual claimants from making interim applications relevant to their particular circumstances. Alternatively, they may have taken the view that, although an application for an interim payment would technically require a lifting of the stay to enable the application to be made, the court would in practice be bound to grant the application if it were satisfied that the grounds for an interim payment were otherwise made out.

15. Be that as it may, the Revenue did subsequently seek permission to amend their grounds of appeal on the GKN appeal to raise the point, but GKN objected and permission was refused by Lloyd LJ. A related point, which the Revenue were also refused permission to raise, was whether the court should decline to order an interim payment in favour of GKN on the basis that the application was being made by a non-test claimant. It appears that Mr Baldry tentatively sought to argue this point at the hearing of the appeal, despite the refusal of permission to amend the grounds of appeal to raise it. In paragraph [29] of his judgment Aikens LJ said that the point was not open to Mr Baldry, but that it was in any event "a bad point".

16. His reasons for considering it to be a bad point appear from paragraph [47], where he said this:

> "I agree with Sir Andrew Park's general proposition that if the court is satisfied that the conditions in rule 25.7(1)(c) have been fulfilled then the court should order an interim payment to be made unless there is a sufficient specific reason not to do so. The only specific reasons not to do so that were advanced by Mr Baldry are the three identified above. As to the first [*i.e. that the claimant is a non-test claimant in a GLO action*], in my view it is irrelevant that the application for an interim payment was made in the context of a GLO and that the present application and appeal concern a non-test claimant. Nothing in rule 25.7(1) prevents a party to a GLO from making an

> application for an interim payment order. I appreciate that there may be terms of particular GLOs that could prevent such an application being made, but, so far as this court is concerned in relation to this particular application, there is nothing to prevent it being made. Similarly, the fact that GKN is a non-test claimant in the FII GLO cannot, of itself, be a bar to the grant of an interim payment application if the conditions in rule 25.7(1)(c) are otherwise fulfilled. Again, there may be particular terms of particular GLOs that might preclude the court making an interim payment order but that is not so in the present case."

17. Mr Baldry relies on this passage as showing that the Court of Appeal expressly envisaged the possibility of a GLO containing a provision which would prevent an enrolled party from making an application for an interim payment. He submits, now that he is free to raise the point, that paragraph 12 of the existing FII GLO already has that effect; and if that is wrong, he submits that the court should now amend the terms of the stay so as to make it unambiguously clear that it operates to prevent interim payment applications by non-test claimants.

18. Mr Baldry submits that a stay in these terms would be consistent with the basic objective of the FII GLO, which is to ensure that the many inter-related issues of law raised by the claims are dealt with by reference to the test claims. The role of the test claims is to provide a vehicle by which the points of principle on liability can, first, be determined and, secondly, applied to the facts of the test claims. As matters now stand, the main trial on the issues of liability has taken place, although many of those issues are still subject to appeal, but the detailed application of those issues to the facts of the test claims still lies in the future. Until that subsequent stage of the trial has taken place, says Mr Baldry, it is impossible to know how far the test claims have been successful.

19. Mr Baldry illustrates this point by reference to GKN's application for an interim payment. Under the law as it now stands, the Court of Appeal has held that section 231 of the Income and Corporation Taxes Act 1988 ("ICTA 1988") must be given a conforming construction to enable UK resident companies to claim a tax credit in respect of dividends paid by an EU subsidiary "to the extent that they are so entitled": see FII (CA) at paragraph [107]. The Court of Appeal went on to say that "The extent of that entitlement can then be investigated when the section falls to be applied …". The application of the Court of Appeal's decision in principle on this point will therefore need to be dealt with at the quantification stage in the test claims; but it is already clear, from the interim payment application itself, that there is profound disagreement between the parties about the nature and extent of the entitlement which arises under the Court of Appeal's conforming construction of section 231. Furthermore, the scope of the defences available to the Revenue, including in particular the defence of change of position, will not be known until the quantification stage is complete. Mr Baldry points out in this connection that in FII Chancery I held that the Revenue are in principle entitled to rely on the defence of change of position, and formed the preliminary view that the defence was likely to succeed. The Court of Appeal found it unnecessary to rule on this point, while stressing that the defence is highly fact-sensitive: see FII (CA) at paragraphs [189] to [193].

20. Accordingly, submits Mr Baldry, the structure of the GLO is intended to ensure that the individual non-test claims are heard only after the GLO issues have been resolved through the test claims. This structure avoids the great expenditure of time and costs involved in dealing with a series of interim payment claims, with the near certainty that any orders made will have to be varied as the legal landscape shifts at each stage of the appeals process. By contrast, once the final quantification stage of the test claims has been reached, the non-test claimants will then be in a position to plead and prove their individual cases in the normal way. Further, at that stage full disclosure can be made so as to enable the Revenue properly to test the particular claims that are advanced. Mr Baldry gave as an example of a specific factual issue in relation to the GKN application, which the Revenue might wish to test in the light of full disclosure, the question whether one of the water's edge EU subsidiaries of GKN Holdings PLC was actually established in the Netherlands at the relevant time.

21. I have some sympathy with the general approach advocated by Mr Baldry, but on balance I am satisfied that it would be wrong to order a stay of the non-test claims in the manner which he proposes. Quite apart from the fact that many applications for interim payments by non-test claimants have already been determined within the FII GLO, it seems to me that very strong grounds would be needed to deprive a non-test claimant of the right to make such an application if the necessary conditions for an interim payment are satisfied. The relevant condition for present purposes is that contained in CPR 25.7(1)(c), which requires the court to be satisfied that:

> "if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment …"

22. As the Court of Appeal has now confirmed (in paragraph [38] of the judgment of Aikens LJ), this means:

> "that the court must be satisfied that if the claim were to go to trial then, on the material before the judge at the time of the application for an interim payment, the claimant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money. The court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an interim payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial … The court must be satisfied (to the standard of a balance of probabilities) that the claimant *would* in fact succeed on his claim and that he *would* in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) it was "likely" that the claimant would obtain judgment or that it was "likely" that he would obtain a substantial amount of money."

If this fairly stringent test is satisfied, one may ask rhetorically how it could be fair to deprive a non-test claimant of the opportunity to invoke the interim payment jurisdiction, which is of general application to claims of all kinds, merely because for good case management reasons the claimant has been enrolled in a GLO but has not been designated as a test claimant.

23. Nor, in my judgment, is it a sufficient answer to say that the legal issues involved are ones of great complexity and difficulty, or that the relevant legal landscape is likely to change as appeals work their way up the system and further references are made to the CJEU. These possibilities are matters for the court to take into account in forming its view whether the test in rule 25.7(1)(c) is satisfied, and (if it is) in exercising its discretion as to the amount of the interim payment to be awarded. But to rely on these difficulties as a reason for refusing to entertain the application at all would, in my opinion, be an abdication of judicial responsibility. On this point I respectfully agree with what Sir Andrew Park said in paragraphs [23] of his judgment at first instance:

> "… it would, in my opinion, be an abdication of the judicial role were I, considering as I do that it is in principle right that there should be interim payments, nevertheless to refrain from making an order for them on the ground that it is difficult to decide what the right amounts should be."

24. A further very relevant consideration is the sheer length of time that is likely to elapse before the test claims will have been fully resolved. Even though six years have now passed since the original decision of the CJEU on the first reference in the FII GLO, it is still likely to be a number of years before final determinations are made. Furthermore, now that section 107 of the Finance Act 2007 has been definitively held to infringe EU law, the sums which many of the claimants seek to recover stretch back as far as the 1970s. It is right and proper that all arguable questions relating to liability should be exhaustively investigated in group litigation of this magnitude, but it is important not to allow the very exhaustiveness of that investigation to defeat the ends of justice by keeping the claimants out of their money if they are able to demonstrate that the necessary conditions for the making of an interim payment are satisfied.

25. It is also important to remember that an interim payment is, by its very nature, interim. If it subsequently transpires that a payment which has been ordered can no longer be justified, the court may make appropriate adjustments pursuant to CPR rule 25.8, including an order that all or part of the interim payment be repaid. The voluntary repayment which GKN made in April 2010 merely pre-empted an order for repayment which the court would undoubtedly have made, had the matter been contested. All, or virtually all, of the claimants are members of large multi-national groups, so the risk of inability to repay is relatively low; and the risk can be reduced still further, as it has been in the present case, by requiring undertakings from the ultimate parent company to guarantee the repayments.

26. For these reasons I consider that it would be wrong to impose a blanket stay in the terms proposed by the Revenue. With regard to paragraph 12 of the FII GLO in its current form, I consider that on its true construction the stay does apply to any interim applications made by non-test claimants, including applications for interim payments; but that the stay should be lifted by the court to the extent necessary to permit

meritorious interim payment applications to be made and determined. In practice, I envisage that an application for an interim payment should be accompanied by an application for the stay to be lifted, and if the court is satisfied that an interim payment should be made, it will then, in the absence of good reason to the contrary, lift the stay to the necessary extent.

27. Even if I had been satisfied that it was right to order a stay in relation to future interim payment applications, I would still have thought it appropriate to deal with GKN's interim payment application. In view of the history which I have outlined above, it seems to me to follow on naturally from the earlier round of applications dealt with by Sir Andrew Park, and represents something of a final tidying-up exercise brought about by the judgment of the Court of Appeal in FII (CA). Since the Revenue took no point about the existing stay in relation to those applications, I think it would on any view be unfair to impose a stay in relation to this final instalment of the current round of applications. I should add that it was confirmed to me that GKN's present application is indeed the last one connected with those originally heard by Sir Andrew, and that there are no other similar applications in the pipeline.

28. As to the future, in view of the judgment of the CJEU on the second reference, which has now established the unlawfulness of the Case V charge, and has also decided the corporate tree points in the claimants' favour, it seems all but inevitable that a substantial number of fresh interim payment applications will soon be made. I expressed the view in the course of the hearing that it was important to learn from experience, and that any such applications should not be allowed to proceed in a piecemeal fashion, but should be the subject of active case management. To that end, I suggested that the parties should first try to agree suitable directions to ensure the fair and orderly resolution of the applications, and there should then be a directions hearing to deal with any points which could not be agreed. I do not think it is helpful to try to give directions in advance, before it is known how many applications will be made or on what grounds they will be made. The principle that appropriate directions should be given is not controversial, and past experience leads me to hope that the parties, with their highly experienced advisers, will be able to reach agreement on many, if not all, of the case management issues that will arise, subject of course to the approval of the court. I therefore say no more at this stage about the Revenue's alternative application for directions, save that in principle I agree that there should be active case management of the next round of interim payment applications.

The interim payment application

29. GKN's basic case in relation to the interim payment application is simplicity itself. As I have already said, the application is presented as one to reinstate the part of the interim payment originally ordered by Sir Andrew Park relating to those of GKN's mistake-based claims which depended for their validity on the extended time-limit in section 32(1)(c) of the Limitation Act 1980. The Court of Appeal had held in FII (CA) that section 107 of the Finance Act 2007 was unaffected by EU law, with the consequence that GKN's extended time-limit claims could not succeed, but the Supreme Court has now reversed the Court of Appeal on that issue and unanimously held that section 107 infringed the EU principle of protection of legitimate expectations. Accordingly, the Revenue can no longer rely on section 107 as a defence to the relevant claims. The continuing uncertainty about the validity of

section 320 of the Finance Act 2004 is immaterial, because all of GKN's extended time-limit claims were made before the cut-off date in September 2003.

30. Mr Cavender further emphasises the minimalist nature of the interim payment now sought. No "corporate tree" questions are directly involved, as the claims are all based on distributions made by EU-resident water's edge companies to their UK-resident water's edge parents, and on amounts of ACT actually paid by the latter. As to the unlawfulness of the ACT, Mr Cavender relies on the admission contained in paragraph 13(a) of the Revenue's amended defence to the BAT test claims, the terms of which I will quote:

> "It is admitted that ACT was unlawful and unduly levied in circumstances where a resident company received a dividend from a non-UK resident company resident within the EU/EEA and was obliged to account for ACT when distributing that dividend to its own shareholders, to the extent that the ACT would not have been payable had a deduction been allowed in the amount of the corporation tax levied on the underlying profits distributed by the non-UK resident company plus the withholding tax levied on that distribution in the source state."

31. Mr Cavender couples this admission with the guidance given by the Court of Appeal in FII (CA) on the appropriate conforming construction that needs to be given to section 231 of ICTA 1988, including in particular paragraph [107]. The result, he submits, is that GKN are entitled to treat the relevant distributions as though they were FII, but with the associated tax credit being capped at the level of the tax paid by the EU subsidiary paying the dividend.

32. At this point, however, it seems to me that Mr Cavender's approach is in some danger of becoming over-simplified. Neither the Revenue in their admission, nor the Court of Appeal in FII (CA), have said in terms that the dividends in question are to be treated as though they were domestic FII. That was indeed what I had held in FII Chancery, when (I would add) nobody argued that a conforming construction of section 231 was possible: see FII Chancery at paragraphs [142] to [153]. However, my judgment on that part of the case has clearly been overruled – the Court of Appeal allowed the Revenue's appeal on Issue 6 (see FII (CA) at paragraph [109]) – and they appear to have deliberately left the question of the extent of the entitlement to a tax credit, in a cross-border case, to be investigated when the section falls to be applied.

33. There was not much discussion before me about precisely what the Court of Appeal envisaged in paragraph [107] of FII (CA), but it is I think common ground that the whole question of the conforming construction of section 231 is a difficult and complex one which will before long have to be grappled with at a further substantive hearing in the FII or a related GLO. The difficulty and complexity of the subject is, if anything, increased by the recent decision of the CJEU on the second reference, since to judge from the written submissions which I received widely differing positions will be adopted by the claimants and the Revenue about the implications of the Court's reasoning in holding that the Case V charge infringed EU law.

34. There is one particular respect in which this wider debate does in my view impinge on the present application. Although not immediately apparent, it is clear on analysis

(and was not disputed by GKN) that for several years the relevant dividends received by one of the claimants were the subject of onward distribution under a group income election, with the result that no ACT was paid by the claimant at that stage. What GKN wish to do, in relation to those dividends, is to carry forward the credits for tax paid by the subsidiaries, as though the dividends had been FII, and to deduct them from subsequent payments of ACT made in respect of different distributions. This would no doubt be permissible if the dividends in question could indeed be treated for all purposes as equivalent to domestic FII; but the Revenue's argument, as I understand it, is that the effect of the Court of Appeal's ruling in FII (CA), and the latest judgment of the CJEU, is that the tax credit referable to a particular distribution may only be set against the ACT payable on the onward distribution of the same profits; and if the onward distribution is made under a group income election, the only person entitled to take advantage of the credit is the parent company further up the corporate tree which finally pays ACT in respect of the distribution.

35. It would be quite wrong for me to express any concluded views about the merits of this argument, on which I have had the benefit of only very preliminary submissions. I am, however, satisfied that the Revenue's argument is one which cannot be dismissed out of hand, and it leaves me unable to conclude, on a balance of probabilities, that, if GKN's claim went to trial, GKN would obtain judgment for this part of their claim, i.e. the part which depends on the carry forward of notional FII. On the other hand, having heard and considered the rival submissions, both oral and written, I am prepared to conclude, again on a balance of probabilities, that GKN would prima facie be entitled to judgment for the remainder of their claim, that is to say where the claim is for ACT paid on the immediate onward distribution of the relevant profits, albeit capped at the level of the tax paid by the EU subsidiary. Fortunately, GKN have been able to recalculate their claim on this alternative basis, and at the date of the hearing the Revenue did not, as I understand it, dispute either the methodology employed or the resultant figures, although they had had very little time to consider them. In broad terms, and assuming that the calculation remains uncontroversial, its effect is to reduce the amount sought by way of interim payment as at 1 July 2012 by approximately £594,000 (before discounts).

36. The next question I need to consider is whether, assuming GKN to have a good prima facie claim in the reduced amount which I have indicated, the Revenue would nevertheless have an effective defence to it of change of position. Mr Baldry placed this point at the forefront of his oral submissions, and it requires careful consideration.

37. The possible availability of a defence of change of position did not feature in the argument before Sir Andrew Park on GKN's original application for an interim payment. The reason for this may be found in paragraphs [303] and [304] of my judgment in FII (Chancery), where I recorded a concession by the Revenue that the defence could not be relied upon in relation to the claimants' Woolwich claims, because to allow it would breach the EU law principle of effectiveness. I then expressed the view that the concession must logically extend to mistake-based claims in so far as they were needed to give full effect to the claimants' *San Giorgio* rights. My reasoning depended on the proposition, which I had accepted, that the Woolwich cause of action alone was not enough to provide the claimants with an effective domestic remedy for their *San Giorgio* claims: see paragraph [260]. Or in other words, the requirement under EU law to provide an effective remedy for *San Giorgio*

claims had to prevail over any domestic defence, such as change of position, which might otherwise have prevented full recovery of the unlawfully levied tax: see paragraph [307].

38. The Court of Appeal subsequently held that Woolwich alone (without any requirement for a demand) was enough to provide the claimants with an effective remedy for their *San Giorgio* claims, with the result that the principle of effectiveness did not impinge in any way on their mistake claims. The Revenue therefore now argue that there is nothing to prevent reliance on change of position as a defence to the mistake claims, and that their concession has no application save in relation to Woolwich claims.

39. In my judgment, however, this approach is again an over-simplification of the present position, now that the Supreme Court has also considered the question. I cannot ignore the fact that five out of the seven judges who heard the case have come to the conclusion that the EU principles of effectiveness and/or equivalence required domestic law to make both remedies available to the claimants, and that the immediate retrospective application of a curtailed six year limitation period to the mistake claims was unlawful because it infringed those principles, whether or not it also infringed the principle of legitimate expectations: see in particular the judgments of Lord Hope of Craighead DPSC at paragraphs [20] to [21], Lord Walker of Gestingthorpe JSC at [113] to [115], Lord Clarke of Stone-cum-Ebony JSC at [136], Lord Dyson JSC at [140] and Lord Reed JSC at [217] to [240].

40. It is of course true that, in view of the dissent by Lords Sumption and Brown of Eaton-under-Heywood JJSC, the Supreme Court did not regard the question as *acte clair*, and made the third reference to the CJEU. The first question referred by the Supreme Court, as set out in Schedule 1 to its Order of 25 July 2012, is in the following terms:

> "Where under the law of a Member State a taxpayer can choose between two alternative causes of action in order to claim restitution of taxes levied contrary to Articles 49 and 63 TFEU and one of those causes of action benefits from a longer limitation period, is it compatible with the principles of effectiveness, legal certainty and legitimate expectations for that Member State to enact legislation curtailing that longer limitation period without notice and retrospectively to the date of the public announcement of the proposed new legislation?"

41. It is clearly possible that, when the CJEU answers this question, it may agree with the analysis of the minority in the Supreme Court, or may make it clear in some other way that the claimants' mistake claims were never protected by the principles of effectiveness and equivalence. Unless and until the CJEU delivers such a ruling, however, I consider that I should in practice follow the views expressed with varying degrees of confidence by the majority. Even if I am not technically bound by their conclusions, given the third reference, they nevertheless represent the carefully considered views of five members of our highest domestic court. Accordingly, in the present state of the law I am satisfied, on a balance of probabilities, that the claimants' mistake claims would succeed at trial on the basis that they are protected by the principles of effectiveness and/ or equivalence. On that footing, I see no reason to

depart from the view which I expressed in FII (Chancery) that the Revenue would be unable to rely on change of position as a defence to the claims.

42. Both sides made interesting submissions to me about the ingredients of the defence, and whether it should be applied to all the claims collectively or on an individual claim-by-claim basis, if it were in principle open to the Revenue to rely on it. I prefer, however, to say nothing about these issues, because they do not arise if I am right in my conclusion that, as matters now stand, the defence is not open to the Revenue in relation to the mistake-based *San Giorgio* claims. It is common ground that the working out of the details of the defence in cases of the present type, if one reaches that stage, is still at a very early stage of development, and there are important points of principle which remain unclear. Anything that I said about them would be obiter, and would suffer from the additional disadvantages of being based on very limited argument and an absence of detailed evidence.

43. Subject to the points which I have discussed, however, I consider that GKN's application for an interim payment remains as strong as it was when Sir Andrew first considered it in 2009. The doubts which the Revenue have sought to raise about the establishment of one of the relevant subsidiaries in the Netherlands seem to me wholly speculative at this stage, and unsupported by any firm evidence. Not only is it a wholly new point, which should arguably have been raised (if at all) in the course of the trial on liability, albeit that GKN are not test claimants, but on the evidence now available all the indications are that the subsidiaries were indeed duly established in their states of residence. Since, *ex hypothesi*, they paid corporate tax on substantial profits in their states of residence, it seems hard to escape the conclusion that they had a substantial presence there. If the Revenue seriously wished to rely on this argument as one for refusing, or reducing the amount of, an interim payment, it was in my view incumbent on them to provide a much fuller explanation of the argument and cogent reasons for accepting it, together with relevant figures and evidence. As matters stand, the most I can do is to note it as a possible point which may one day become live, and on that basis I am amply satisfied that it falls comfortably within the 15% margin for contingencies prudently allowed by Sir Andrew.

44. To conclude, for the reasons which I have given I consider that the interim payment application succeeds, subject to a reduction, in what I hope is an agreed amount, to reflect the continuing uncertainty about the carrying forward of the relevant tax credits. My intention is that the quantum of the interim payment should be fixed by reference to ACT actually paid in respect of dividends which were then distributed on upwards by the UK water's edge companies within the same tax year, otherwise than under a group income election. Apart from that, the calculation should be made on the same basis, and with the same deductions and rounding, as before. I trust that the parties will be able to agree the figures, but if there are any difficulties they can be raised when this judgment is handed down (or, if more convenient, in correspondence beforehand).