Neutral Citation Number: [2018] EWHC 1830 (Ch)

Case No: HC-2013-000527

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

REVENUE LIST

Royal Courts of Justice

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 17/07/2018

Before :

THE HONOURABLE MR JUSTICE ROTH

- -

Between :

Jazztel PLC (as Test Claimant for GLO Issues 9A,9B and 10) **App**

- and -

The Commissioners for Her Majesty's Revenue and Customs **Respon**

- -

- -

Michael Jones (instructed by **PricewaterhouseCoopers LLP**) for the **Applicant**

Rupert Baldry QC (instructed by **the General Counsel and Solicitors for HMRC**) for the **Respondents**

Hearing date: 2nd July 2018

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Judgment Approved

Mr Justice Roth:

1.
This application raises a short point but it is one of some importance having regard to the incidence of the group litigation procedure in claims for restitution of taxes unlawfully levied. In circumstances where claims for recovery of monies paid by way of tax are covered by a group litigation order ("GLO"), once judgment is given on issues in the test case such that the test claimant receives repayments, but that judgment is under appeal, are the other claims within the GLO entitled to seek judgment or payment, having regard to section 234 of the Finance Act 2013?

Background

2.
The background to the litigation lies in the determinations, following rulings of the Court of Justice of the European Union ("CJEU"), that the imposition of stamp duty reserve tax ("SDRT") at the higher rate of 1.5% on the issue of shares into a clearance service or to a depositary receipts issuer was incompatible with EU law. A subsequent ruling of the CJEU meant that the imposition of stamp duty at

that rate on the transfer of shares into a clearance service in certain circumstances was similarly incompatible with EU law. A large number of claims were then brought against the Commissioners for HM Revenue & Customs ("HMRC") for recovery of duties as money paid by reason of a mistake of law and/or damages.

3.
In consequence, on 21 October 2010, the Chief Chancery Master made a GLO covering all such claims (the "Stamp Taxes GLO"), with a procedure for identifying test claims that could proceed on the various specified common or related issues ("GLO issues") while the other claims were stayed. The Stamp Taxes GLO was subsequently amended by order of Proudman J on 26 November 2014, staying some of the GLO issues and replacing the text of some of the others. In particular, GLO issues 9A, 9B and 10 were there defined as follows:

"9A In cases where the relevant SDRT or stamp duty at the rate of 1.5% was paid before 8 September 2003 (but after 8 September 1997) and more than 6 years before the claim was issued, whether the Defendants can rely on s 320 of the Finance Act 2004 ["section 320"], such that s 32(1)(c) of the Limitation Act 1980 does not apply to claims for restitution and/or damages in respect of each cause of action relied upon by a claimant, having regard also to the requirements of EU Law.

This shall be referred to as "the pre 8 September 2003 limitation issue".

9B In cases where the relevant SDRT or stamp duty at the rate of 1.5% was paid on or after 8 September 2003 and more than 6 years before the claim was issued, whether the Defendants can rely on s 320 of the Finance Act 2004, such that s 32(1)(c) of the Limitation Act 1980 does not apply to claims for restitution and/or damages in respect of each cause of action relied upon by a Claimant, having regard also to the requirements of EU law.

This shall be referred to as "the post 8 September 2003 limitation issue".

10 Whether the Defendant is entitled to raise 'change of position' as a Defence to a claim by way of restitution made by the Claimants in respect of charges to SDRT and/or stamp duty which were levied in breach of the requirements of EU law.

This shall be referred to as "the change of position issue".

Further, the present Applicant ("Jazztel") was appointed as the test claimant for determination of those issues.

4.
Jazztel's claim involving those issues, and concerning only SDRT, accordingly came on for trial before Marcus Smith J, who gave judgment on 3 April 2017: [2017] EWHC 677 (Ch). On the three GLO issues, the judge held:

i)
Issue 9A: HMRC cannot rely on section 320 as a defence to repayment of tax paid before 8 September 2003 and more than six years before the claim was issued;

ii)
Issue 9B: HMRC can rely on section 320 as a defence to repayment of tax paid on or after 8 September 2003 and more than six years before the claim was issued;

iii)

Issue 10: The change of position issue was formally left unresolved, on the basis that HMRC accepted that the question of law had been decided in Jazztel's favour by the Court of Appeal in Test Claimants in the FII Group Litigation v HMRC [2016] EWCA Civ 1180 ("FII CA No 2") but a petition to appeal to the Supreme Court against that decision was pending. However, on that issue the judge made factual findings on the evidence in favour of Jazztel. He stated, at [113]:

"If and to the extent that the Supreme Court gives HMRC permission to appeal on change of position, and the law, as presently stated, is changed, then the question of the change of position defence will have to be revisited, on the basis of the facts that I have found and subject to any further factual determinations it is necessary to make."

5.
Further, the judge found that the various amounts of SDRT in issue had been paid by or on behalf of Jazztel; and that Jazztel had made those payments in the mistaken belief that the relevant statutory provisions were lawful.

6.
Marcus Smith J concluded his judgment as follows, at [114]:

"At the hearing, it was agreed by the parties that to the extent that Jazztel was successful, the fact that the change of position defence remained undetermined in these proceedings should not preclude restitution of the Payments that I have found Jazztel is entitled to recover, subject to a condition subsequent that Jazztel will repay these monies should HMRC ultimately establish a change of position defence."

The order made following the judgment included provision accordingly for conditional repayment of the sums to be made by HMRC.

7.
The time for application for permission to appeal was extended by reference to the proceedings in FII CA No 2. The current position is that both sides have submitted applications for permission to appeal, respectively on Issues 9A and 9B, i.e. the pre- and post 8 September 2003 limitation issues, but the determination of those applications has been stayed pending the decision of the Supreme Court as regards permission to appeal in FII CA No 2. That in turn appears to await the judgment of the Supreme Court in the appeal against the Court of Appeal decision in another tax repayment case, Prudential Assurance Co Ltd v HMRC [2016] EWCA Civ 376, which was argued in February and raises a number of common issues with FII CA No 2. It is anticipated that once the Supreme Court gives judgment in the Prudential case, it will move to consider the permission application in FII CA No 2.

The Application

8.
That is the background to the present application. It has the unusual feature that it is brought by Jazztel, although the relief sought is not for Jazztel but for other claimants within the GLO. It seems that it is brought by Jazztel because the other claims are stayed. I was told that there are now some 27 other claimants covered by the GLO (the number of individual claims is higher since some claimants filed more than one claim) and that this application covers 25 other claimants. The remaining claimants have had their tax repaid, since they submitted their claims within six years of payment so that no limitation issue arose.

9.

In these circumstances, the order sought by the present application is that in relation to those claimants in the GLO other than Jazztel whose claims raise GLO Issues 9A and/or 10 (described as an "Affected Claimant"):

"1. Subject to an Affected Claimant being entitled to restitution from HMRC of the SDRT it has claimed in the proceedings to which the GLO relates, an Affected Claimant shall be entitled upon request to payment by HMRC of the principal amounts of SDRT claimed and simple interest thereon, on the same terms as those agreed between HMRC and Jazztel Plc following the trial of the Test Claim and recorded in paragraphs 4 and 5 of the Order of Marcus Smith J dated 25 April 2017, namely that:

a.
Payment, shall be made together with simple interest at the per annum rate of 1% above the Bank of England base rate the for the period up to 5 February 2009 and at the per annum rate of 2% above the Bank of England base rate thereafter, such interest to run from the date of each respective payment of SDRT until the date of payment by HMRC to a Claimant.

b.
In the event that:

i.
The Supreme Court grants HMRC permission to appeal in relation to its change of position defence in FII CA (No 2);

ii.
The Supreme Court allows that appeal in terms such that, on the facts as found in the Test Claim, HMRC have (or arguably have) a change in position defence; and

iii.
The validity of such a defence is either agreed by the Affected Claimant or upheld at a future hearing.

any Affected Claimant who has received a payment pursuant to the terms of this Order shall repay those sums to HMRC."

And in the event that an Affected Claimant does not receive such payment following its request, it shall be entitled to serve a notice which will have the effect of lifting the stay on the determination of those issues. Thus, if it is not paid on request, any Affected Claimant will be able to pursue its individual claim to seek a judgment and order in the same terms as were obtained by Jazztel.

10.
The opposition to the application is not concerned with the fact that it is made by Jazztel for the benefit not of itself but of others in the GLO, but is based on section 234 of the Finance Act 2013 ("section 234"), of which the material parts are as follows:

"**Restrictions on interim payments in proceedings relating to taxation matters**

(1) This section applies to an application for an interim remedy (however described), made in any court proceedings relating to a taxation matter, if the application is founded (wholly or in part) on a point of law which has yet to be finally determined in the proceedings.

(2) Any power of a court to grant an interim remedy (however described) requiring the Commissioners for Her Majesty's Revenue and Customs, or an officer of Revenue and Customs, to pay any sum to any claimant (however described) in the proceedings is restricted as follows.

(3) The court may grant the interim remedy only if it is shown to the satisfaction of the court—

(a) that, taking account of all sources of funding (including borrowing) reasonably likely to be available to fund the proceedings, the payment of the sum is necessary to enable the proceedings to continue, or

(b) that the circumstances of the claimant are exceptional and such that the granting of the remedy is necessary in the interests of justice.

…

(9) For the purposes of this section, proceedings on appeal are to be treated as part of the original proceedings from which the appeal lies."

Submissions

11.
For the applicant, Mr Michael Jones submitted that the purpose of the application was simply to achieve parity of treatment for the other members of the GLO with the test claimant. In that regard, he relied on CPR rule 19.12(1) which provides:

"Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues –

a)
that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise;…"

12.
Here, there had been no suggestion that a contrary order should be made so the judgment of Marcus Smith J on GLO Issues 9A and 10 binds all the claims. It follows that for each Affected Claimant all that remains to be determined is (i) the sums of duty that it in fact paid, and (ii) whether that payment was made under a mistake of law. As regards (i), the evidence filed for HMRC states that verifying this might require about a day's work for a case officer, which was not an excessive burden in view of the sums involved. As regards (ii), Mr Mark Whitehouse of PricewaterhouseCoopers LLP, who has been involved in handling other such restitution claims governed by a GLO, states that in his experience HMRC have been content to accept confirmation in a witness statement from an employee of the relevant claimant that no relevant individuals within the claimant company were aware that the relevant rules breached EU law at the time when the disputed tax was paid. But in any event, the order proposed incorporates a mechanism such that if a real dispute emerged on either (i) or (ii), the stay would be lifted and the individual Affected Claimant would then be entitled to seek to prove its entitlement.

13.
For the applicant, it was pointed out that it was now over a year since the judgment in the test claim and all the Affected Claimants were being kept waiting for their money. I was referred to some of the objectives of the GLO procedure set out in Lord Woolf's final Access to Justice report, as helpfully set out by Henderson J in Europcar UK Ltd v Revenue and Customs Commrs [2008] EWHC 1363 Civ (Ch) at [231]:

"b) to provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the

nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; and (c) to achieve a balance between normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner."

In his skeleton argument, Mr Jones submitted that "rather than using the GLO as a means to resolve the other claims, HMRC appear to seek to use it to seek to stymie them and to delay meeting their obligations to repay taxes which they now accept were unlawfully levied."

14.
Mr Jones submitted that section 234 was not engaged by the present application since it was not seeking any form of interim remedy but a final order, which was subject to a condition subsequent depending on possible development of the change of position defence. In the alternative, if section 234 did apply, he argued that the circumstances here were "exceptional" within s. 234(3)(b) since there had been a trial of a test claim under a GLO which had resolved the relevant legal issues in favour of the test claimant, and the other claimants were now being asked to wait a long time for any relief.

15.
For HMRC, Mr Rupert Baldry QC submitted that section 234 clearly applied to the present application. "Interim remedy" is given a broad not a technical meaning in the statute, as shown by the express clarification "(however described)". The points of law concerning GLO issues 9A and 10 had not been finally determined since for the former there was a pending application for permission to appeal and for the latter the judge expressly stated that the issue remained open and undetermined. Therefore, however the applicant chose to formulate the terms of the order, the remedy sought was of an interim nature on claims where the facts had not yet been found. Jazztel was in a different position since it had been through a trial, and it therefore could enjoy the benefit from having been the test claimant.

16.
Mr Baldry argued that, as a matter of principle, there could be no justification for lifting the stay. It is inherent in the procedure of a GLO that while the test claim is proceeding through to final determination, which includes determination of any appeal, the other claims in the GLO remain stayed to await the outcome. That is shown by the position regarding summary judgment. If the stay were lifted, an Affected Claimant would not be able to obtain summary judgment against HMRC: see Six Continents Ltd v Revenue Commissioners [2015] EWHC 2844 (Ch) at [27]-[35], where Henderson J held that summary judgment could not be granted if permission to appeal had been given in a parallel case where HMRC raised the same point. The grant of permission to appeal meant that the appeal had a real prospect of success, which was effectively the same test as for refusal of summary judgment. If an Affected Claimant could not obtain summary judgment, then it could only either seek an interim payment, which section 234 clearly precluded (subject to the exceptions in s. 234(3)); or seek to take its case to trial, which was entirely contrary to the objective of a GLO.

17.
HMRC had offered to agree to an interim order in favour of an Affected Claimant that could bring itself within s. 234(3)(a). But the matters relied on did not engage s. 234(3)(b), which looks to the circumstances of the particular claimant. Section 234 had been introduced into the Finance Act 2013 precisely to protect HMRC from having to pay out potentially very large sums in such group claims while a test claim was under appeal, that would then have to be paid back if the appeal succeeded.

Discussion

18.
In my judgment, the order now sought is clearly an interim remedy within the scope of section 234. There has not been a trial of the claims of the Affected Claimants. Nor can it be said that this a technical or formalistic approach on the basis that if the stay were to be lifted the Affected Claimants could recover summary judgment. I consider that summary judgment would be inappropriate, even assuming that any factual issues concerning the sums paid and mistake made could be resolved, for the reasons given by Mr Baldry. Although the Six Continents case was one where the claim lay outside a GLO and permission to appeal on the point of law had already been given, I do not see that it can make a difference here that the question of permission to appeal has not yet been decided. There has been a hiatus in resolving the permission application because of the particular sequence of events before the Supreme Court. But no one could pretend that the points regarding section 320 and its interaction with principles of EU law are straightforward. That is highlighted by the fact that both sides are seeking to challenge the judge's decision regarding section 320, conversely on Issue 9A and Issue 9B. I was indeed told that in another case concerning the application of section 320, the Chancellor has deferred giving judgment until the outcome of the applications for permission in the present case have been determined.

19.
In this regard, s. 234(9) is significant. The statute specially provides that proceedings on appeal are to be treated as part of the original proceedings. As already mentioned, I consider that proceedings for which a permission to appeal application is pending cannot be in a different position from proceedings where permission has been granted. Thus, for the purpose of this application, the order sought for the Affected Claimants in the GLO is founded on points of law which have not been finally resolved in those GLO proceedings. I do not see that there is scope for some middle form of remedy between an interim remedy and a final remedy; since what is being sought is therefore not a final remedy it must be an interim remedy within the scope of that expression in section 234, even though it would not constitute an interim payment under CPR Part 25.

20.
It follows that the court may not make the order sought unless either of the two conditions under s. 234(3) is satisfied. In that regard, the applicant seeks to rely on the second condition, which itself has two elements: that the circumstances of the claimant are exceptional and that the remedy is necessary in the interests of justice. I can see force in the argument that the second element is satisfied since the order would prevent the other Affected Claimants being in a less favourable position than the test claimant. But I am wholly unpersuaded that the first element is satisfied. That requires exceptional circumstances of the claimant. The relevant claimant for this purpose is accordingly the claimant seeking a remedy, i.e. here, the Affected Claimants. The mere fact of being in a GLO relating to a taxation claim cannot in my judgment be regarded as exceptional, and the fact that the test claimant under the GLO has succeeded at trial and been paid is not in my view a circumstance of the Affected Claimants. As for the delay experienced by the Affected Claimants in recovering their money, that seems to me an inescapable consequence of treating proceedings as not final until an appeal has been resolved, as specified by s. 234(9). I do not regard it as giving rise to exceptional circumstances, in particular where the Affected Claimants should recover interest if they are successful at the end of the day (and indeed they are seeking to claim compound interest).

21.
In consequence, this application is dismissed.