Trinity Term

[2021] UKSC 31

On appeals from: [2010] EWCA Civ 103

and [2016] EWCA Civ 1180

JUDGMENT

Test Claimants in the Franked Investment Income Group Litigation (Respondents) v Commissioners for Her Majesty's Revenue and Customs (Appellant)

before

Lord Reed, President

Lord Hodge, Deputy President

Lord Briggs

Lord Sales

Lord Hamblen

JUDGMENT GIVEN ON

23 July 2021

Heard on 7, 8, 9 and 10 December 2020

HMRC	Test Claimants
David Ewart QC	Graham Aaronson QC
Jennifer MacLeod	Jonathan Bremner QC
Elizabeth Wilson	
Barbara Belgrano	
Frederick Wilmot-Smith	
(Instructed by HMRC Solicitor's Office (Bush House))	(Instructed by Joseph Hage Aaronson LLP)

LORD REED AND LORD HODGE: (with whom Lord Briggs, Lord Sales and Lord Hamblen agree)

1.

This is the third occasion on which important legal questions arising out of the Franked Investment Income Group Litigation ("FII Group Litigation") have come before this court. As we explain more fully below, the questions of law arise out of the tax treatment of dividends received by UK-resident companies from non-resident subsidiaries, as compared with the treatment of dividends paid and received within wholly UK-resident groups of companies.

2.
As the issues which have been raised in this appeal are disparate, involving both issues of principle and issues relating to the quantification of the claimants' claims, and in view of the length of the judgment, it may be helpful to explain at the outset how the judgment is structured. The matters raised on these appeals are dealt with in the following order:

(1)
General introduction (paras 3-9).

(2)
Overview of the tax provisions (paras 10-20).

(3)
The history of the proceedings (paras 21-51).

(4)
Matters determined by agreement between the parties following the decision of this court in Prudential Assurance Co Ltd v Revenue and Customs Comrs [2018] UKSC 39; [2019] AC 929 (paras 52-57).

(5)
Res judicata, issue estoppel, no jurisdiction and abuse of process (paras 58-84).

(6)
Whether and on what basis the claimants are entitled to recover interest for tax which they have paid prematurely (paras 85-118).

(7)
The nature of the remedy required by EU law in respect of the set off of group relief and management expenses (paras 119-159).

(8)
Whether the revenue were enriched as a matter of English law taking into account the interaction of ACT with shareholder credits and whether EU law precluded an argument that the revenue were not enriched by reason of that interaction (paras 160-193).

(9)
Does it make any difference that the UK group had a non-resident parent which received double taxation treaty credits? (paras 194-200).

(10)
Are the DV provisions permitted by virtue of the standstill provisions of article 57(1) (now article 64(1) of the TFEU) in light of the Eligible Unrelieved Foreign Tax Rules? (paras 201-222).

(11)
When and to what extent unlawfully charged ACT should be regarded as surrendered (paras 223-232).

(12)
Summary and conclusions (paras 233-234).

1. General Introduction

3.
The FII Group Litigation was established by the FII Group Litigation Order ("the FII GLO") made on 8 October 2003. Since then the Group Litigation has been conducted against the backdrop of perhaps unprecedented developments in the law both domestically and on the plane of the law of the European Union, some of which have been the product of this group litigation.

4.
Under the FII GLO certain claims were selected as test claims and the remaining claims were stayed. The questions which arise in these appeals concern the claims made by various members of the British American Tobacco group ("BAT"), which have been the test claimants for many of the claims in the FII Group litigation. A question also arises in relation to an application by seven claimants enrolled in the FII Group Litigation for summary judgment for the restitution of unlawfully levied tax which we discuss in paras 50-51 below. There is also a question which relates to a claim by FCE Bank plc ("FCE"), a UK registered company which was and is part of the worldwide group of companies ultimately owned by the Ford Motor Company of Michigan, United States of America.

5.
The questions concern now-repealed provisions of the Income and Corporation Taxes Act 1988 ("ICTA") which provided for the system of advance corporation tax ("ACT") under section 14 and Part VI ("the ACT provisions") and the taxation of dividend income from non-resident sources under section 18 (Schedule D, Case V) ("the DV provisions"). ACT was abolished for distributions made on or after 5 April 1999, and the DV provisions were repealed for dividend income received on or after 1 April 2009.

6.
The principal claims in the FII GLO which are the subject of these appeals are claims for the repayment of tax insofar as it was unlawful under EU law. The test claimants claim that the differences in their tax treatment and that of wholly UK-resident groups of companies breached the provisions of article 43 (freedom of establishment) and article 56 (free movement of capital) of the EC Treaty ("EC") and their predecessor articles (now articles 49 and 63 of the Treaty on the Functioning of the European Union ("TFEU")). In this judgment we refer to the provisions of the TFEU, which should be read as including the predecessor provisions. The claims date back to the accession of the UK to the EU in January 1973 and the introduction of ACT in April of that year. As in our judgment of November 2020 we use expressions such as "the EU" and "EU law" anachronistically to include earlier incarnations of what is now known as the EU. We also refer to judgments on references as being made by the Court of Justice of the European Union ("CJEU") whether it or its predecessor court, the European Court of Justice, handed down those judgments. The test claimants also advanced a claim for damages in accordance with the principles of EU law established in Francovich v Italy (Case C-479/93) [1995] ECR I-3843, given effect in our domestic law in R v Secretary of State for Transport, Ex p Factortame (No 5) [2000] 1 AC 524. As we record below, the damages claim failed at first instance. It forms no part of this appeal.

7.
As this court explained more fully in its recent judgment (Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Comrs [2020] UKSC 47; [2020] 3 WLR 1369) there have been several other sets of proceedings that have raised issues which also arise in the FII Group Litigation. The ACT Group Litigation addresses UK legislation which prevented UK-resident

subsidiaries of foreign parent companies from making group income elections, obliging them to pay ACT when they paid dividends to their foreign parents. The Controlled Foreign Companies ("CFC") and Dividend Group Litigation concerns claims that the treatment of dividends paid by foreign subsidiaries to UK-resident companies was contrary to EU law, which are similar to those in the FII GLO, but relate to "portfolio" holdings of less than 10% of the shares of the relevant companies ("the portfolio dividends GLO"). The Foreign Income Dividends ("FID") Group Litigation concerns claims by pension funds or life companies that the absence of a tax credit in respect of foreign income dividends, in contrast to domestic dividends, is contrary to EU law. There are also the Littlewoods proceedings concerning claims to restitution based on the payment of VAT which was paid under a mistaken understanding of EU law. Huge amounts of money have been at stake and have resulted in every arguable point being taken. There has as a result been a very protracted series of related proceedings which have driven the development of both English law and EU law.

8.
Among the developments of English law was the decision of the House of Lords in Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs [2007] UKHL 34; [2008] AC 561 ("Sempra Metals"). This decision, which was reached in the ACT Group Litigation, was to the effect that compound interest was payable on the amounts awarded by the court, whether in damages or in restitution. More recently, this court has refined its approach to restitutionary claims. The first case was Investment Trust Companies v Revenue and Customs Comrs [2017] UKSC 29; [2018] AC 275, a test case concerned with the restitution of VAT charged incompatibly with EU law. Thereafter, in Littlewoods Ltd v Revenue and Customs Comrs [2017] UKSC 70; [2018] AC 869, this court held that common law claims to restitution of VAT, together with any right to compound interest based on Sempra Metals, had been effectively excluded by the statutory provisions governing the recovery of VAT. Significantly, this court also held that the CJEU had recognised that an award of compound interest was not necessary in order to comply with the EU principle of effectiveness. In 2018, this court, having regard to Investment Trust Companies, held that Sempra Metals had been incorrectly decided in that it required compound interest to be paid on restitutionary awards, and departed from it: Prudential Assurance Co Ltd v Revenue and Customs Comrs [2018] UKSC 39; [2019] AC 929 ("Prudential"). In that case this court held (para 73) that no claim arose in unjust enrichment for the time value of money to the restitution of which the claimant was legally entitled: "[t]here is no right to interest on the basis of unjust enrichment: failure to pay a sum which is legally due is not a transfer of value, and does not give rise to an additional cause of action based on unjust enrichment." Prudential was a case in the portfolio dividends GLO. We will return to the decisions in Sempra Metals and Prudential, and the consequences of the latter decision for the FII Group Litigation, in section 6 of this judgment.

9.
Before addressing the substantive questions of law raised in this appeal it may be helpful to give a brief outline of the tax provisions which are the subject of the litigation. It is then necessary to consider some of the history of the proceedings in the FII GLO. This is because the claimants contend that the revenue are barred from denying the claimants' entitlement to compound interest for the time value of money during periods when they have paid tax prematurely ("the period of prematurity"). The claimants argue this bar (i) on the ground of cause of action estoppel, (ii) on the ground of issue estoppel, (iii) because a denial of the claim amounts to an abuse of process and (iv) because this court has no jurisdiction.

2. Overview of the tax provisions: ACT, Corporation Tax and FIDs

10.
Under section 14 of ICTA a UK-resident company which paid dividends to its shareholders was liable to pay ACT, which was calculated by reference to the amount or value of the distribution made. That company had an entitlement to set off the ACT which it had paid on the distribution in a particular accounting period against the amount of mainstream corporation tax ("MCT") for which it was liable in respect of that accounting period, subject to certain restrictions. If the liability of the company for MCT in that accounting period was insufficient to allow it to set off the ACT in full, the surplus ACT could be carried back to a previous accounting period or carried forward to a later one. The surplus ACT could also be surrendered to subsidiaries of that company, which could set it off against the amounts for which they themselves were liable in respect of MCT. Surplus ACT could be surrendered only to UK-resident companies.

11.
When a UK-resident company received dividends from another UK-resident company it was not liable to MCT on those distributions: section 208 ICTA.

12.
If a UK-resident company made a payment of dividends to another UK-resident company, section 231(1) of ICTA conferred a tax credit in favour of the recipient company equal to such proportion of the value of the distribution as corresponded to the rate of ACT in force at the time of the distribution. Section 231(1) also conferred a similar tax credit on individual shareholders resident in the UK.

13.
The dividend so received by a UK-resident company and the tax credit together constituted "franked investment income" ("FII") in the hands of the company receiving the dividend: section 238(1) of ICTA 1988.

14.
A UK-resident company which received dividends from another UK-resident company, the payment of which gave rise to an entitlement to a tax credit, could recover the amount of ACT paid by the latter company by deducting it from the amount of ACT which it itself had to pay when it made a distribution to its own shareholders, with the result that it was liable for ACT only on the excess.

15.
A group of companies comprising UK-resident companies could also elect to be taxed as a group ("group income election"), in which case companies belonging to that group could make distributions up the group hierarchy and postpone payment of ACT until the parent company made a distribution by way of dividend: section 247 ICTA.

16.
From 1 July 1994 a UK-resident company receiving dividends from a non-resident company could elect that a dividend which it paid to its shareholders should be treated as a foreign income dividend ("FID"). ACT was payable on the FID, but, to the extent to which the FID matched the foreign dividends received, the UK-resident company could claim repayment of the surplus ACT. While ACT was payable within 14 days of the end of the quarter in which the dividend was paid, surplus ACT was repayable when the resident company became liable for MCT, namely nine months after the end of the accounting period.

17.

A UK-resident company receiving dividends from a non-resident company was liable to pay MCT (under the DV provisions) on those dividends. If the recipient company or its parent controlled directly or indirectly 10% or more of the voting rights in the company making the distribution, the recipient company was entitled to a tax credit by reference to the foreign tax paid by that subsidiary. The relief was available to the recipient company only by way of offset against that company's MCT payable on the income concerned.

18.
When the UK-resident company, which had received such dividends, itself made a distribution to its own shareholders, it was liable to account for ACT. The tax credit mentioned in para 17 above could not be deducted from the amount of ACT for which the UK-resident company was liable when it paid dividends to its own shareholders. The UK-resident company was therefore liable to accumulate surplus ACT.

19.
As we have said, at the heart of the claims for restitution in the FII GLO litigation are the differences between the tax treatment of the claimants, which have received distributions from subsidiaries resident outside the UK, on the one hand, and the tax treatment of UK-resident companies which received distributions from their UK-resident subsidiaries on the other. It was this differential treatment which resulted in the levying of taxes which were unlawful under EU law.

20.
It can also be observed that the issue of the claim for the time value of money in respect of the period of prematurity has arisen both where ACT was unlawfully levied but was later set off against lawful MCT and where ACT was paid on FIDs and surplus ACT was repaid at a later date.

3. The history of the proceedings

21.
The FII GLO proceedings have been complex and extended. As we have said, they have involved appeals to this court, of which this is the third, and three references to the CJEU. They have raised legal questions of exceptional complexity and novelty.

22.
The FII GLO, which was made on 8 October 2003, defined the type of claims falling within the scope of the GLO, identified the initial claimants, and provided a procedure enabling further claimants to be added to the group register. It set out common issues of fact or law which arose for determination, without prejudice to the power of the High Court to add to or vary them. It also laid down a procedure for selecting claims to proceed as test cases and for amending, removing and adding to the common issues. Claims not selected as test claims were stayed. The FII GLO has been amended on 11 occasions since 2003 by orders of the High Court.

23.
Various issues for determination were listed in Schedule 3 to the FII GLO under the headings (A) to (Q). Among the issues listed was a question (issue (I)) that, if the court concluded that it was contrary to EU law that dividends received from companies resident in another member state of the EU/EEA were unable to be franked investment income:

"… is a company resident in the UK entitled to compensation for the payment of ACT upon the distribution of the funds deriving from those dividends received from companies resident in other member states of the EU/EEA and, if so, in what circumstances and how is that compensation to be calculated?"

Issue (N) asked essentially the same question in relation to dividends received from companies resident in a territory beyond the member states of the EU/EEA.

24.
On 12 December 2003 Park J issued an order that the BAT claim proceed as the test case in relation to issues (A) to (P). He directed that the claim by Aegis Group plc ("Aegis") proceed as the test case in relation to issue (Q). We are not concerned in this appeal with issue (Q), which called into question the legality of retrospective statutory provisions curtailing the period of limitation. That matter was determined by this court in the first FII appeal in 2012. The BAT claim sought inter alia the restitution of tax payments made between 1973 and the issue of the claim, with compound interest, on the basis that the tax had been paid pursuant to a mistake of law or unlawful demands.

The first reference to the CJEU

25.
The trial of the BAT claim began on 28 June 2004 but it was immediately apparent that a preliminary reference to the CJEU would be needed on the many issues of EU law arising. Without delivering a judgment, Park J directed that a reference be made.

26.
On 12 December 2006 the CJEU gave its judgment on the reference: Test Claimants in the FII Group Litigation v Inland Revenue Comrs (Note) (Case C-446/04) [2012] 2 AC 436 ("FII (CJEU) 1"). It said at para 184 that "[i]t is clear from case law that any less favourable treatment of foreign-sourced dividends in comparison with nationally-sourced dividends must be regarded as a restriction on the free movement of capital in so far as it is liable to make the acquisition of holdings in companies established in other member states less attractive". In the absence of EU legislation, it was for the domestic legal system to lay down the relevant procedural rules governing actions for safeguarding EU rights, including the classification of claims, subject to the obligation of national courts and tribunals to ensure that individuals should have an effective legal remedy enabling them to obtain reimbursement of the tax unlawfully levied on them and the amounts paid to the member state or withheld by it directly against the tax. The CJEU made a similar ruling at para 173 of its judgment, in relation to FIDs, holding that the FID regime was precluded by articles 49 and 63 of the TFEU because it obliged companies to pay and subsequently reclaim ACT on FIDs and did not give shareholders a tax credit in respect of those dividends.

Procedure following the first reference

27.
Following the judgment of the CJEU, Rimer J in an order by consent dated 5 July 2007 directed that consecutive trials of the test claims of BAT and Aegis should proceed. The order provided that the first phase trials would try "all GLO issues raised by the test claims, including liability for restitution, save in so far as those issues concern causation or quantification" (para 12 of Rimer J's order). The issues included the claims relating to EU dividends and subsidiaries and non-EU dividends and subsidiaries and included the questions as to whether a company was entitled to compensation and if so, in what circumstances and how that compensation was to be calculated: Issues (F), (I), (L) and (N). In para 1 of the order Rimer J directed the parties to use their best endeavours to agree a list of questions to be

decided by the court in determining the GLO issues. In default of agreement any party was at liberty to apply to the court for directions.

28.
As the Court of Appeal was later to record in para 10 of its judgment in 2016 ([2016] EWCA Civ 1180; [2017] STC 696 (“FII (CA) 2”)), the split between the first and second phases was labelled by way of shorthand as being between “liability” and “quantification”, but that was not quite accurate as the liability trial would consider issues of principle affecting remedy. The shorthand description was also not accurate because issues of principle relating to remedy were also addressed in the second phase: see para 43 below.

29.
The parties thereafter amended their pleadings.

The first trial before Henderson J

30.
The trial proceeded over 13 days before Henderson J in July 2008 and he delivered his judgment in November of that year: Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs) [2008] EWHC 2893 (Ch); [2009] STC 254 (“FII (HC) 1”).

31.
In a discussion in FII (HC) 1 as to whether the test claimants’ remedies were in restitution or damages, Henderson J recorded that it was common ground that in so far as the claims fell within the San Giorgio principle in EU law (Amministrazione delle Finanze dello Stato v San Giorgio SpA (Case 199/82) [1983] ECR 3595) they should be classified in English law as claims for restitution. He also recorded that it was common ground that the English law of restitution, “as interpreted and clarified by the House of Lords in DMG [Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs [2006] UKHL 49; [2007] 1 AC 558] and Sempra Metals,” in general satisfied the EU law requirements of equivalence and effectiveness (para 236). Turning to address which of the claims fell within the San Giorgio principle, he recorded the revenue’s position in these terms (para 238):

“The Revenue argue for a narrow answer to this question. They concede no more than that the claimants are entitled to restitution of … unlawfully levied ACT, together with associated interest and loss of use claims, in cases where the claimant has itself paid the unlawful tax …” (Emphasis added)

As the revenue have pointed out in their submissions to this court, that concession, which supported Henderson J’s finding (para 240) that the San Giorgio principle extended to the repayment of unlawfully levied tax “and to associated interest and loss of use claims”, was consistent with the judgment of the House of Lords in Sempra Metals, which was binding on all courts at that time but which this court later departed from in its judgment in Prudential. Henderson J made similar findings in relation to the time value of the ACT in the FID claims between the dates of payment and repayment (para 268).

32.
Henderson J rejected the claimants’ claim for Factortame damages, holding that they had failed to establish any sufficiently serious breach of EU law on the part of the revenue or any other organ of the UK Government (para 404). This finding is relevant to the interpretation of paragraph 11 of his order which we quote in the next paragraph.

33.

Henderson J in his order dated 12 December 2008 made among others the following declarations:

"11. The Claimants' claims for compensation and/or damages based on the principles set out in San Giorgio (Case 199/82) [1983] ECR 3595 (San Giorgio claims) extend to the repayment of unlawfully levied tax and to all claims for losses which are a direct consequence of the unlawful levying of tax.

…

13. The claims for unlawfully levied ACT referred to in paragraph 11 (and paragraph 12 to the extent it is concluded that Community law has been breached in those circumstances) would as a matter of English law fall within the proper scope of a mistake-based restitutionary claim, which mistake continued to be operative at the time the payments were made.

…

17. To the extent that Claimants paid unlawfully levied ACT and/or corporation tax under Schedule D Case V, such ACT and/or corporation tax was paid under a mistake."

In his order Henderson J also ordered that:

"1. The following claims are successful in relation to the GLO issues determined in the trial:

(a) claims for repayment of corporation tax paid on or after 1 January 1973 on dividends received from companies resident in other EU member states;

(b) claims for the repayment of surplus ACT (including ACT purportedly utilised against unlawful corporation tax on dividends under 1(a)), or the time value of ACT utilised against lawful corporation tax or ACT refunded under the FID regime, paid on or after 1 January 1973, by Claimants which received dividend income from subsidiaries in other member states in so far as the ACT would not have been payable if dividend income from other EU member states had been treated as franked investment income;

(c) claims for the time value of ACT on third country FIDs paid on or after 1 July 1994 and refunded under the FID regime;

(d) claims for the repayment of interest based on claims under 1(a), (b) or (c)." (Emphasis added)

The first appeal to the Court of Appeal

34.
The revenue appealed against Henderson J's order. They did not challenge in that appeal the terms of Henderson J's declaration 13. In a judgment dated 23 February 2010 and date-stamped 19 March 2010 ([2010] EWCA Civ 103; [2010] STC 1251) ("FII (CA) 1") the court addressed 20 of the 23 issues raised in the appeal, the details of which are not relevant to this narrative. The revenue succeeded before the Court of Appeal in defending statutory provisions which purported to reduce the limitation period available in relation to the test claimants' claims based on mistake of law. The Court of Appeal in its order dated 19 March 2010 but date-stamped on 20 April 2010 also directed that a further reference should be made to the CJEU, in order to seek clarification of its judgment in FII (CJEU) 1 [2012] 2 AC 436. The reference was made by order of Henderson J on15 December 2010.

35.
In its order of 19 March/20 April 2010 the Court of Appeal varied Henderson J's order 1, which we have quoted in para 33 above, so that it read:

“The following claims are successful in relation to the GLO issues determined in the trial:

(a) claims for the repayment of surplus ACT or the time value of ACT utilised against corporation tax or ACT refunded under the FID regime, paid on or after 1 January 1973, by Claimants which received dividend income from subsidiaries established in other member states in so far as (i) the ACT paid was not due after taking into account the tax credit available under section 231 ICTA 1988 in respect of those dividends and (ii) claims are made within the applicable limitation periods;

(b) claims for the time value of ACT on third country FIDs paid on or after 1 July 1994 and refunded under the FID regime in so far as (i) the ACT paid was not due after taking into account the tax credit available under section 231 in respect of those dividend and (ii) the claims are made within the applicable limitation periods;

(c) claims for interest based on claims under (a) and (b) above.” (Emphasis added)

The first appeal to the Supreme Court

36.
In November 2010 this court granted both parties permission to appeal on four issues relating to remedy, including the question whether the availability of claims for the repayment of unlawfully levied tax in accordance with the principle set out in Woolwich Equitable Building Society v Inland Revenue Comrs [1993] AC 70 (“Woolwich”) was a sufficient remedy and whether the statutory provisions purporting to curtail without notice the extended limitation period under section 32(1)(c) of the Limitation Act 1980 (“the Limitation Act”) were compatible with EU law. Permission was subsequently granted for a fifth issue also to be argued, concerned with the application of section 32(1)(c) to a Woolwich claim. The revenue did not seek to challenge Henderson J’s first order as amended by the Court of Appeal which we have set out in para 35 above.

37.
This court delivered its judgment on 23 May 2012 ([2012] UKSC 19; [2012] 2 AC 337 “FII (SC) 1”), addressing the matters raised in the appeal. Among other things this court held that section 107 of the Finance Act 2007, which purported to exclude claims made against the Revenue before 8 September 2003 for restitution of money paid by mistake from the scope of the extended limitation period under section 32(1)(c) of the Limitation Act, was contrary to EU law.

38.
As a result of disagreement among the Justices of this court on the effect of EU law on the validity of section 320 of the Finance Act 2004, this court by order dated 25 July 2012 made a further reference to the CJEU asking a question concerning the validity in EU law of legislation curtailing the period of limitation with retrospective effect and without effective notice.

The CJEU judgments on the second and third references

39.
On 13 November 2012 the Grand Chamber of the CJEU delivered its judgment ((Case C-35/11) [2013] Ch 431 “FII (CJEU) 2”) on the reference to which we have referred in para 34 above, clarifying its earlier judgment.

40.
On 12 December 2013 the Third Chamber of the CJEU delivered its judgment ((Case C-362/12) [2014] AC 1161 “FII (CJEU) 3”) on the reference from this court, ruling that legislation curtailing,

retroactively and without any transitional arrangements, the period in which a taxpayer could seek repayment of sums levied in breach of EU law was precluded by the principles of effectiveness, legal certainty and the protection of legitimate expectations.

41.
As a result of this court's ruling and the ruling of the CJEU on the third reference the Revenue's defence based on section 320 of the Finance Act 2004 and section 107 of the Finance Act 2007 failed. The litigation then progressed to its second phase in which the courts addressed the matters that had not been determined in the first phase.

The "quantification" trial before Henderson J

42.
The parties amended their pleadings in 2013 and 2014 in the light of the judgments of this court and the CJEU. The revenue in their re-amended defence admitted that the claimants were entitled to restitution measured by "interest at a conventional rate" from the date of payment of ACT until it was set off.

43.
Among the issues which were to be addressed at the second stage of the FII proceedings and in Henderson J's judgment ([2014] EWHC 4302 (Ch); [2015] STC 1471 "FII (HC) 2") were issues 25 and 26(a) which were in these terms:

"25. … what is the measure of restitution due to the Claimants:

(a) Are the Claimants entitled to restitution of:

(i) The principal sum of unlawfully paid tax;

(ii) The time value of the unlawfully paid tax if paid too early; and

(iii) Interest on both of those sums?

(b) If not, how is the restitution due to the claimants to be computed?

26(a) Should interest be simple or compound?"

A similar issue also arose where ACT had been paid on FIDs and surplus ACT was repaid at a later date. That formed part of issue 10.

44.
Having regard to the judgment of the House of Lords in Sempra Metals, the revenue conceded that the claimants were entitled to compound interest for the period of prematurity. Henderson J recorded this concession in the narrative section of his order dated 30 January 2015 following the quantification trial:

"13. The parties agreeing the following answers to the GLO issues or aspects of them: …

(d) Restitution of the time value of the prematurely paid (ie utilised) ACT, from the dates of payment until the dates of utilisation has to be measured by reference to compound interest."

45.
In that order Henderson J made the following declaration on the measure of restitution:

"23. Issues 25 and 26(a) are answered as follows:

(A) The restitution to which the claimants are entitled has three main elements.

(i) First, the Claimants are entitled to restitution of the full amounts of the principal sums of unlawfully paid tax (both overpaid Case V corporation tax and overpaid and unutilised ACT);

(ii) Secondly, they are entitled to restitution of the time value of the prematurely paid (ie utilised) ACT, from the dates of payment until the dates of utilisation. It is common ground that the time value of these claims has to be measured by reference to compound interest; and

(iii) Thirdly, they are entitled to restitution of the time value of the amounts recoverable under each of the above headings, from the dates of payment (or the dates of utilisation of ACT payments in the second category) until the date when restitution is made." (Emphasis added)

A similar declaration was also made in relation to issue 10, declaring that "[t]he claimants are in principle entitled to recover the time value of all of the ACT which they were obliged to pay under the FID regime, from the dates of payment until the dates when the ACT was repaid to them". Henderson J's finding that there was a claim in restitution for the time value of money in the period of prematurity and that it was to be measured by reference to compound interest was consistent with his judgment in Prudential Assurance Co Ltd v Revenue and Customs Comrs [2013] EWHC 3249 (Ch); [2014] STC 1236, paras 204-208, 241-242, in which he analysed the CJEU's judgment in Littlewoods Retail Ltd v Revenue and Customs Comrs (Case C-591/10) [2012] STC 1714 ECJ as requiring the payment of compensation for the time value of money and treated the question of compound interest as governed by the judgment of the House of Lords in Sempra Metals.

46.
In the same order, Henderson J granted the revenue permission to appeal against this declaration of the measure of restitution (order 9(n)).

47.
The Revenue did not seek to challenge the determination of issue 26(a) before the Court of Appeal as they accepted that that court was bound by its decision in Littlewoods v Revenue and Customs Comrs [2015] EWCA Civ 515; [2016] Ch 373, which applied the judgment of the House of Lords in Sempra Metals. But in para 345 of its judgment dated 24 November 2016 ("FII (CA) 2") the Court of Appeal recorded its understanding that "the parties wish[ed] to reserve their position on one or more of [the remedies issues dealt with by the judge but which had not been the subject of substantive argument] should the matter go, once again, to the Supreme Court."

48.
The Court of Appeal refused the Revenue's application for permission to appeal to this court in an order dated 24 November 2016 but stated in a note at the end of the order:

"The court's blanket refusal of permission should not be taken as an indication that it does not consider any of the points raised worthy of consideration by the Supreme Court; and on Issue 26(a) HMRC should be entitled to take advantage of any success that they may have on this issue in the pending Littlewoods appeal. …"

49.
The revenue applied for permission to appeal to this court. The applications were stayed pending this court's determination of the appeals in Littlewoods and Prudential. After those judgments had been

handed down, this court in an order dated 8 April 2019 granted permission to appeal in respect of issue 10 (insofar as it relates to the Sempra issue) and issue 26(a). Permission was thus given to raise the question whether interest should be simple or compound, and this court expressly permitted the revenue to withdraw their earlier concession in respect of Sempra interest. By directions dated 10 July 2019 this court clarified that the permission to withdraw the concession was without prejudice to the test claimants' entitlement to argue that, even if the revenue were to succeed in their argument as to the law, the consequences should not apply in the present case.

50.
We mention also the summary judgment in relation to FID claims, which has given rise to the same question as issue 10 in this appeal. Several groups of claimants enrolled in the FII Group Litigation applied to Henderson J for summary judgment under CPR rule 24.2 in respect of their claims for restitution of ACT paid on FIDs in the period between 1994 and 1999: see the judgment dated 22 January 2016 (Evonik Degussa UK Holdings Ltd v Revenue and Customs Comrs [2016] EWHC 86 (Ch)). As all but one of the claimants had been repaid the ACT in accordance with the FID scheme the principal issues were the claims for restitution (i) for the time value of money in the period of prematurity and (ii) for the period after utilisation or repayment of the relevant ACT. Before Henderson J it was common ground that compound interest was the appropriate measure of restitution until utilisation or repayment because of the House of Lords' decision in Sempra Metals. Henderson J held that the claims for summary judgment succeeded in relation to the period of prematurity but declined to give summary judgment for compound interest in the periods after utilisation or repayment because of the pending appeal to this court in Littlewoods.

51.
Henderson J refused the revenue's application for permission to appeal this judgment. The Court of Appeal adjourned the revenue's application to appeal to be heard with the substantive appeal. In FII (CA) 2, in its order dated 24 November 2016, the court granted permission to appeal on issue 10 and against the summary judgment, but dismissed the appeals on those matters: see also para 192 of the court's judgment. This court in its order dated 8 April 2019 granted the revenue the limited permission to appeal on issue 10 mentioned in para 49 above. In other words, the revenue were not allowed to challenge the finding that all ACT charged on FIDs was unlawful, but were allowed to raise the question of what was the appropriate remedy for the time value of money during the period of prematurity in relation to unlawfully charged ACT, including ACT levied on FIDs.

4. The matters determined by agreement following this court's judgment in Prudential

52.
This court's judgment in Prudential determined several legal issues which were of relevance to this appeal. In the statement of facts and issues the parties recorded their agreement on the determination of this appeal in relation to the following issues.

53.
On issue 11 in FII (CA) 1, in so far as it concerned the extent to which a remedy was required by EU law in respect of the set off of ACT, the Revenue's appeal should be allowed. A claim in restitution does not lie to recover lawful ACT set off against unlawful MCT.

54.
On issue 11 in FII (CA) 2, which concerned when and to what extent unlawfully charged ACT should be regarded as repaid and utilised, the claimants' appeal should be allowed. The unlawful ACT must be treated as having been utilised first against the unlawful MCT charge. Where there is no unlawful

MCT against which to set the unlawful ACT which has been paid, the residual unlawful ACT is to be treated as utilised against lawful MCT.

55.
On issue 12 in FII (CA) 2, which concerned how ACT is to be treated where FII is carried back to an earlier year, the claimants' appeal should be allowed. Domestic FII which is carried back to an earlier quarter under paragraph 4 of Schedule 13 to ICTA 1988 is to be regarded as having been applied to relieve only lawful ACT.

56.
In their written case the claimants record a further concession which Mr Jonathan Bremner QC confirmed in his oral submissions. Before this court the agreed formulation of issue 26(a) was:

"Should interest be simple or compound? In particular, on what basis can the claimants recover for the periods of prematurity?"

In their case the claimants explain that for the purpose of computing interest the claims comprise three elements: (1) restitution for unlawful ACT utilised against lawful MCT or repaid from the date of payment until the date of utilisation or repayment (ie the period of prematurity); (2) interest thereon until judgment; and (3) surplus unlawful ACT, unlawful ACT which was utilised against unlawful DV tax and cash payments of unlawful DV tax plus interest on each of these from the date of payment of the unlawful tax until judgment. The claimants concede, correctly in our view, that following the judgment of this court in Prudential the claims for interest for elements (2) and (3) above should be computed on a simple interest basis under section 35A of the Senior Courts Act 1981.

57.
In relation to element (1), the period of prematurity, the claimants submit that the revenue are barred from denying their entitlement to compound interest. As a fallback the claimants argue that interest on their mistake-based claims for the period of prematurity should be computed on a simple interest basis under section 35A of the Senior Courts Act. We discuss this issue in section 6 of this judgment.

5. Res judicata, issue estoppel, no jurisdiction and abuse of process

58.
The claimants' case that the Revenue are barred from contesting an award of compound interest for the time value of money in the period of prematurity is that there was a definitive finding in the first phase of the litigation that their claim to recover the time value of money in the period of prematurity succeeded, that that claim was recognised as a claim in restitution, and that the parties had agreed in accordance with the judgment of the House of Lords in Sempra Metals that compound interest should be paid. Mr Bremner points out that Henderson J's declaration 11 (para 33 above) followed the wording of GLO issues (I) and (N) (para 23 above). No challenge was mounted to that declaration in the first phase of the litigation and in particular no challenge was mounted to the judgment of the House of Lords in Sempra Metals when the litigation first reached this court in 2012. They plead alternatively cause of action estoppel, issue estoppel, abuse of process and lack of jurisdiction.

59.
The Revenue in response deny that any of the legal principles which the claimants assert is applicable. The only applicable legal principle which had been in issue was whether the Revenue should be allowed to withdraw their concession concerning compound interest. This court had allowed

the Revenue to withdraw that concession in its order of 8 April 2019, as clarified in its directions dated 10 July 2019 (para 49 above).

60.
The various principles which the claimants invoke are underpinned by the same legal policies, “that there should be finality in litigation and that a party should not be twice vexed in the same matter”: Johnson v Gore Wood & Co [2002] 2 AC 1, 31, per Lord Bingham of Cornhill. Those policies are reinforced by the need for efficiency and economy in the conduct of litigation. In Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46; [2014] AC 160, para 55 Lord Neuberger of Abbotsbury stated:

“The purpose of res judicata is not to punish a party for failing to take a point, or for failing to take a point properly, any more than to punish a party because the court which tried its case may have gone wrong. It is … to support the good administration of justice, in the public interest in general and the parties’ interest in particular.”

Bearing those purposes in mind, we address each of the principles in turn.

61.
In Virgin Atlantic Airways Ltd (above), in a judgment expounding on the law of res judicata with which the other Justices agreed, Lord Sumption described cause of action estoppel thus (para 17):

“… once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings.” (Emphasis added)

He stated that it is “a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings”. He quoted the speech of Lord Keith of Kinkel in Arnold v National Westminster Bank plc [1991] 2 AC 93, which described this estoppel in these terms (p 104D-E):

“Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened. … Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action.”

62.
Lord Sumption stated (para 22) that Arnold was authority for the following propositions:

“(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.”

63.
In para 26 he stated:

"Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

64.
It is not disputed on this appeal that cause of action estoppel can arise from a determination by the court on an admission by a party to the litigation (Thoday v Thoday [1964] P 181, 198 per Diplock LJ). The Revenue did not challenge the claimants' assertion, relying on Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630, 642 per Diplock LJ; Arnold (above), 106, that it can apply not only in subsequent proceedings but at a later stage in the same proceedings. We do not need to address those questions.

65.
In our view, there is no such estoppel in the circumstances of this case. While the parties used as shorthand the descriptions of "liability" and "quantification" to describe the two phases of the GLO litigation, it is important to bear in mind the nature of the judicial exercise at the first phase. Henderson J described his task in this phase in para 6 of his judgment in FII (HC) 1 as being to decide "questions of principle which can be stated in fairly abstract terms, without reference to the particular underlying facts". He continued:

"The pleadings play an essential role in defining the issues and laying the necessary factual foundations for the questions of law which have to be decided, but in group litigation of this nature the pleadings tend to recede into the background once the stage of trial has been reached."

66.
Henderson J in declarations 11 and 13 and in order 1(b) (para 33 above) determined that the claims which had been successful included a claim for the time value of money in the period of prematurity. The Court of Appeal in amending his order 1(a) and (b) (para 35 above) also recognised as successful a claim for the time value of money during that period. Those orders were made at a high level of generality to the effect (i) that San Giorgio claims extended to losses which were the consequence of the unlawful levying of taxes and (ii) that they would as a matter of domestic law fall within the scope of a mistake-based restitutionary claim. The statement that the claims were successful in relation to the period of prematurity (para 35 above) was also a statement of abstract principle. Neither Henderson J nor the Court of Appeal made any determination as to the appropriate measure of compensation for the time value of money which EU law required in accordance with the San Giorgio principle. That was left over to the second phase of the GLO litigation.

67.
Issues 25 and 26(a) in the second phase were designed to address the questions of the measure of any restitution and whether interest should be simple or compound in order to satisfy the claimants' San Giorgio claims (para 43 above). It is clear from the formulation of those issues that the parties and the courts did not treat the general declarations made in the first phase of the litigation as determining those matters. The wording of Issue 25, which was not appealed to this court, is informative: it asks whether the claimants are entitled to restitution of among others the time value of the unlawfully paid tax if paid too early.

68.
In light of the judgment of the House of Lords in Sempra Metals the Revenue conceded at trial in FII (HC) 2 that there was a claim in restitution for compound interest in relation to the prematurity period and Henderson J gave effect to that concession. As we have recorded, the Court of Appeal

acknowledged that the question whether interest should be simple or compound was still open in its order of 24 November 2016 (para 48 above), and after this court handed down its judgment in Prudential, it allowed the Revenue to withdraw its concession (para 49 above).

69.
The claimants also plead issue estoppel. In Virgin Atlantic Airways Ltd (para 60 above), para 17 Lord Sumption described this estoppel as:

"the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties."

70.
In Thoday (para 64 above), p 198, Diplock LJ described issue estoppel in these terms:

"There are many causes of action which can only be established by proving that two or more conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was." (Emphasis added)

71.
In Fidelitas Shipping Co Ltd v V/O Exportchleb (above), 642 Diplock LJ expressed the view that in an action in which certain questions of fact or law are tried and determined before others and an interlocutory judgment is given, the parties are bound by the determination of that issue in subsequent proceedings in the same action and their only remedy is to appeal the interlocutory judgment. He saw this as an example of issue estoppel.

72.
In Arnold (above), p 105 Lord Keith said that issue estoppel

"may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue." (Emphasis added)

He referred to the passage in Diplock LJ's judgment in Thoday which we have quoted above and, by reference to Diplock LJ's judgment in Fidelitas Shipping (above), observed that issue estoppel had been extended to cover the case where in subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier proceedings (p 106).

73.
In our view there is no issue estoppel on this question in this GLO litigation. It is clear that the parties proceeded to trial in the first phase under the assumption that, if EU law required compensation to be paid for the time value of money in the period of prematurity, the remedy, in the light of the then

recent decision of the House of Lords in Sempra Metals, was the payment of compound interest. But, beyond a statement of general principle in the courts' orders in the first phase, the availability of compensation by means of restitution was an issue left over to the second phase and appeared in issues 25 and 26(a) in that phase. It is therefore not necessary to consider whether the revenue could with reasonable diligence and should have raised the issue of compound or simple interest in the first phase.

74.
The claimants also argue that the revenue are guilty of an abuse of process in seeking to challenge their entitlement to compensation for the period of prematurity. They found on the judgment of Sir James Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 114-115 which was addressed by the House of Lords in Johnson v Gore Wood. In his speech in the latter case (p 31) Lord Bingham stated that to establish an abuse the court had to be satisfied that "the claim or defence should have been raised in the earlier proceedings if it was to be raised at all" (emphasis added). He stated that this involved:

"a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

75.
Similarly, in Brisbane City Council v Attorney General for Queensland [1979] AC 411, 425, Lord Wilberforce, in delivering the judgment of the Judicial Committee of the Privy Council, stated that the doctrine

"ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

76.
It is not disputed that the doctrine of abuse of process can apply to separate stages within one litigation as well as to separate legal proceedings.

77.
But for the court to uphold a plea of abuse of process as a bar to a claim or a defence it must be satisfied that the party against whom the bar is asserted is abusing the process of the court by oppressing the other party by repeated challenges relating to the same subject matter. It is not sufficient to establish abuse of process for a party to show that a challenge could have been raised in a prior litigation or at an earlier stage in the same proceedings. The party must go further and show that it should have been raised at that earlier stage and that it is abusive to raise the matter at the later stage.

78.
We are satisfied that there is no such abuse on this issue. The FII GLO litigation and the related GLO litigations proceeded against a background in which both domestic and EU law were in a state of significant development and interacted with each other in this GLO litigation. Henderson J in FII (HC) 2 (para 468) correctly spoke of "a complex and evolving legal landscape". The three judgments of the CJEU on references in the FII GLO litigation in 2006, 2012 and 2013 together with judgments on references in other relevant proceedings, and the now three appeals to this court in the FII GLO litigation as well as the appeals to the House of Lords in Sempra Metals and to this court in

Littlewoods and Prudential, are testimony to the evolving nature of that landscape. Issues which affect the FII GLO litigation have been decided in the other legal proceedings such as Littlewoods and the portfolio dividends GLO (including in Prudential) and vice versa. Against that background, it is unsurprising that questions that are of central importance to the claims in the FII GLO litigation have only recently been decided or are yet to be decided.

79.
The final bar which the claimants assert is that this court has no jurisdiction to entertain the revenue's appeal on issue 26(a). The claimants observe that this court's jurisdiction arises under section 40(2) of the Constitutional Reform Act 2005, which provides for an appeal "from any order or judgment of the Court of Appeal in England and Wales in civil proceedings". They correctly submit that no appeal lies to this court where permission to appeal to the Court of Appeal has been refused and refer to section 54(4) of the Access to Justice Act 1999 which provides:

"No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court)."

The claimants submit that a similar bar should apply as a matter of necessary implication where a litigant has not sought permission to appeal to the Court of Appeal.

80.
The short answer to this challenge, as Mr David Ewart QC submits for the Revenue, is that one determines the scope of the Court of Appeal's jurisdiction by reference to the order granting permission to appeal. In para 9 of his order of 30 January 2015 Henderson J granted the Revenue permission to appeal against his declaration 23, which covered issues 25 and 26(a). The Revenue therefore had an unrestricted right to challenge Henderson J's rulings on both issues before the Court of Appeal. In the event, the Revenue did not invite the Court of Appeal to determine the question of the claimants' entitlement to compensation in respect of the period of prematurity in a manner contrary to the decision of the Court of Appeal in Littlewoods, which then bound that court. The Court of Appeal dismissed the Revenue's appeal on, among others, declaration 23, refused permission to appeal to this court but recognised that the Revenue should be able to take advantage of their pending appeal to this court in Littlewoods (para 48 above). There is in any event no basis for implying into section 54(4) of the Access to Justice Act 1999 the term which the claimants advance. The subsection means what it says, and imposes no bar on a party from taking a point on appeal which it has not taken in the courts below. The court uses its common law powers to regulate the taking of such points on appeal.

81.
The claimants also submit that this court should not allow the Revenue to withdraw their concession to the prejudice of the claimants. They advance four grounds. First, they point out that the Revenue had conceded the existence of restitutionary claims for the period of prematurity, and that those claims were to be measured by compound interest, until September 2018. The claimants submit that they would have made different decisions in the FII GLO litigation if they had known that the concession might be withdrawn, as the claim for the period of prematurity is a major portion of the claimants' claims and is the entire claim for some claimants in the GLO. Secondly, previous judgments in the litigation had been made on the basis that there was a restitutionary remedy to recover the time value of utilised ACT in the period of prematurity, and the Revenue had relied on the existence of a restitutionary remedy in its unsuccessful attempt to defend the statutory curtailments of the

limitation period. Thirdly, the exposure of the Exchequer to substantial claims based on that remedy, which the Revenue had conceded, informed the enactment of a 45% tax charge on restitution interest in Part 8C of the Corporation Tax Act 2010. If the Revenue were to succeed in persuading this court that the claimants were entitled only to interest under section 85 of the Finance Act 2019 ("the 2019 Act", which we discuss below) this additional tax charge would result in the claimants being deprived of the effective remedy which EU law mandates. Fourthly, the withdrawal of the concession as against the claimants involved treating them adversely in comparison with the claimants in Prudential, in which this court did not allow the Revenue to resile from its admission that the claimants had mistake-based claims for the period of prematurity.

82.
We are satisfied that none of these points provides a good ground to exempt the claimants from the application of the law as it now stands in the light of the recent developments of the law of unjust enrichment. In the light of this court's judgments in Littlewoods and Prudential the Revenue sought and were granted permission to withdraw their concession. While the claimants might have sought to conduct the litigation in a different manner if the Revenue had withdrawn the concession at an earlier date, it is undisputed that the claims in the FII GLO litigation as a whole remain of very considerable value even if the claims for compound interest are rejected. The statutory initiatives to curtail the period of limitation with retrospective effect and without effective notice were unsuccessful, and the legislation to tax profits based on the receipt of restitution interest applies only if restitution interest is payable. Restitution interest does not extend to interest which is limited to simple interest: section 357YC(4) of the Corporation Tax Act 2010. Payment of interest under section 85 of the 2019 Act therefore would not trigger that charge. In any event, those initiatives reflect Parliament's understanding of the law at a time when, as we have said, it was undergoing significant and continuing development.

83.
Finally, the claimants' circumstances are materially different from those of Prudential. In Prudential (para 79) this court stated that it would have rejected Prudential's claim for compound interest in respect of the period of prematurity but for the fact that the Revenue had accepted it. By contrast, in this appeal the Revenue has sought to resile from its concession in respect of the period of prematurity long before the hearing of this appeal and has been given permission to do so. While it is happenstance that the Prudential appeal reached this court before this appeal, which was stayed in 2016 pending the determination of the former appeal, and while the two appeals have raised common issues, those are not good reasons for disapplying on this appeal the law as it has been determined to be in Prudential.

84.
For the same reasons we are not persuaded that the Revenue are barred from arguing that it was erroneous in law to award compound interest in respect of the period of prematurity in the FID claims and that the summary judgment to which we have referred in para 50 above is open to challenge.

6. Whether and on what basis the claimants are entitled to recover interest for tax which they have paid prematurely

85.
This issue concerns the claim for "restitution for unlawful ACT utilised against lawful MCT or repaid from the date of payment until the date of utilisation or repayment ('the period of prematurity')", as the claimants described it in their written case. It arises primarily under issue 26(a) in the second

phase of the FII GLO litigation. As explained earlier, Henderson J granted a declaration in FII (HC) 2 that the claimants are entitled to restitution of the time value of the unlawful ACT which was utilised by being set off against lawful MCT, so that there was, in effect, a premature payment of tax which was lawfully due. The restitution was to take the form of compound interest on the amounts concerned, from the date of the payment of the ACT until the date of the set-off. That declaration was upheld by the Court of Appeal. The Revenue appeal against that decision, and argue that interest should be computed on a simple interest basis under section 85 of the 2019 Act. In response, the claimants argue, in the first place, that the Revenue are barred from disputing their entitlement to compound interest on the grounds of res judicata, issue estoppel, lack of jurisdiction or abuse of process. We have rejected that argument. Alternatively, the claimants argue that they are entitled to interest computed on a simple interest basis under section 35A of the Senior Courts Act. A similar issue arises in respect of the FID claims, as unlawful ACT was in some circumstances automatically repaid under the FID regime, as explained in paras 43 and 45 above (issue 10 in the second phase of this litigation), and also in respect of the summary judgment discussed at para 50 above.

86.
The practical importance of this issue lies principally in the fact that section 85 of the 2019 Act imposes a six year limitation period for claims under that section, whereas the claimants argue that their claims to interest under section 35A of the Senior Courts Act benefit from the extended limitation period available under section 32(1)(c) of the Limitation Act. The difference is significant. The parties agree that the interest recoverable in relation to the claims falling within issue 26(a) is much greater if section 35A of the Senior Courts Act applies, on the assumption that section 32(1)(c) of the Limitation Act also applies, than if section 85 of the 2019 Act applies.

The decisions in Sempra Metals and Prudential

87.
The starting point is the decision of the House of Lords in Sempra Metals. The case concerned a situation in which the Revenue had unlawfully charged ACT contrary to EU law, and the unlawful ACT had subsequently been set off against a lawful liability to MCT. Sempra then brought a common law claim based on the law of restitution, alleging that the ACT had been paid in response to an unlawful demand and under a mistake of law (so as to rely on the extended limitation period under section 32(1)(c) of the Limitation Act), and seeking (1) compound interest on the ACT as restitution of its value to the Revenue during the period of prematurity, ie the period between the date on which it was paid and the date on which it was set off against the liability to pay MCT (“the primary amount”), and (2) compound interest on the primary amount as restitution of its value to the Revenue during the secondary period, ie the period between the date of set off and the date of judgment (“the secondary amount”).

88.
At first instance, Park J rejected the claim for the secondary amount, holding that Sempra’s only claim for interest after the date of set off was for simple interest under section 35A of the Senior Courts Act: [2004] EWHC 2387 (Ch); [2005] STC 687. That decision was not appealed, with the consequence that the House of Lords was only able to consider the claim for the primary amount. The majority held that Sempra was entitled to restitution of the value of the money during the period of prematurity, on the ground of unjust enrichment. The value to be restored to Sempra was calculated as the amount of compound interest which the Revenue would have had to pay if it had borrowed an equivalent amount for the period in question: see paras 49 (Lord Hope of Craighead), 127-128 (Lord Nicholls of Birkenhead) and 188 (Lord Walker of Gestingthorpe). Lord Nicholls and Lord Walker also indicated

their doubts as to whether Park J had been correct to treat the secondary amount differently: paras 129 and 156.

89.
In Prudential, the Revenue conceded that Henderson J was bound by Sempra Metals to award compound interest to Prudential on unlawfully levied ACT which was subsequently set off against lawfully levied MCT, for the period from the date of payment to the date of set-off, ie the period of prematurity. In contrast to the present case, that concession was maintained in this court. The claim for compound interest for the period of prematurity was referred to in this court as category (a). Henderson J also held that Prudential was entitled to compound interest, on the basis of unjust enrichment, in respect of other unlawfully levied ACT, which had either never been set off against lawful MCT, or had been set off against unlawfully levied MCT. This was referred to in this court as category (b). Henderson J also held that Prudential was entitled to compound interest, on the basis of unjust enrichment, on the amount awarded under category (a), for the period between the date of set off and the date of payment of that amount. This was referred to in this court as category (c). He thus departed from the approach to the secondary amount which had been adopted by Park J in Sempra. As we have explained, Henderson J later followed his Prudential decision in Littlewoods and in the present proceedings (FII (HC) 2), and that approach was also followed by the Court of Appeal.

90.
In its judgment in Prudential, this court held that there was no common law claim to compound interest on unlawfully levied ACT on the basis of restitution. It reasoned that when tax was unlawfully or mistakenly paid to the Revenue, an entitlement to restitution of that money then arose on the ground of unjust enrichment, creating a debt. The elapse of a period of time before restitution was effected did not give rise to an additional claim in restitution: the Revenue had simply failed to pay a debt promptly. The remedy for that failure was normally an award of simple interest under section 35A of the Senior Courts Act, as the court explained at para 77:

“Once it is understood that the claim to interest is not truly based on unjust enrichment but on the failure to pay a debt on the due date, the conclusion inevitably follows that interest can be awarded on the claims within categories (b) and (c) under section 35A of the 1981 Act.”

91.
The court’s reasoning that the delay in effecting restitution of the tax did not give rise to an additional claim in restitution contradicted the reasoning of the majority in Sempra Metals, and the court expressly departed from that reasoning. The court noted, however, at para 78 that there was a difficulty in relation to the award of interest under section 35A in relation to the period of prematurity, ie the category (a) claim. Although the court did not remark on the point, the difficulty also logically bore on the premise underlying the category (c) claim, ie the existence of a primary amount.

92.
The difficulty arose from the fact that section 35A, construed in accordance with normal canons of statutory construction, only applies where proceedings for the recovery of a debt or damages have been instituted before the High Court, and the interest is ancillary to the amount recovered. The first situation in which the section applies is defined by subsection (1):

“Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and -

(a) in the case of any sum paid before judgment, the date of the payment; and

(b) in the case of the sum for which judgment is given, the date of the judgment."

Construed in accordance with ordinary principles of statutory interpretation, that subsection cannot apply to a claim to interest on unlawful ACT in respect of the period of prematurity, since restitution of the tax was effected by set off or automatic repayment, rather than through its recovery in legal proceedings.

93.
The same problem also arises in relation to the second situation in which section 35A applies, defined by subsection (3):

"Subject to rules of court, where -

(a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and

(b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),

the defendant shall be liable to pay the plaintiff simple interest at such rate as the court thinks fit or as rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment."

Construed on the same basis, that subsection also has no application to a claim to interest on unlawful ACT during the period of prematurity, since the revenue did not repay the tax in response to proceedings for its recovery.

94.
EU law requires national law to adopt a different approach to the claim for interest in this context. In essence, rather than interest being ancillary to an award of a principal sum, as is conventional in English law, and is the model underlying section 35A, interest in respect of the period of prematurity is itself the principal sum due, as the CJEU explained in Metallgesellschaft Ltd v Inland Revenue Comrs and Hoechst AG v Inland Revenue Comrs (Joined Cases C-397 and 410/98) [2001] Ch 620, para 88 ("Hoechst" or "Metallgesellschaft"):

"The national court has said that it is in dispute whether English law provides for restitution in respect of damage arising from loss of the use of sums of money where no principal sum is due. It must be stressed that in an action for restitution the principal sum due is none other than the amount of interest which would have been generated by the sum, use of which was lost as a result of the premature levy of the tax."

95.
In Prudential, this court commented (obiter, since no issue concerning category (a) claims was live before it), at para 78:

"On a literal reading of section 35A, no such interest could have been awarded on the claims under category (a) [ie the claims in respect of the period of prematurity]. That is because section 35A applies only where there are proceedings for the recovery of a debt (or damages), and therefore does not apply where the defendant has repaid the debt (or has set it off) before the creditor has commenced proceedings for its recovery. An award of interest is nevertheless required in such circumstances by EU law, if an effective restitutionary remedy is to be available under English law in respect of San Giorgio claims (Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR 3595): that was the point decided in Metallgesellschaft. It is unnecessary to decide in this appeal how an award of interest should be made available in those circumstances (and the court has heard no argument on the point). But there are a number of potential solutions."

The court added at para 110 (again, obiter):

"When unlawful ACT has been set against lawful MCT, company A has a claim for interest on the ACT so used, as stated in para 78 above."

96.
It is relevant to note that the court did not question, in Prudential, the decision in Sempra Metals that compound interest could in principle be awarded as damages for loss. Such a claim, however, does not fall within the scope of section 32(1)(c) of the Limitation Act, since it is not based on a mistake. In the present proceedings, the claimants failed in any event to establish a sufficiently serious breach of EU law to qualify for an award of damages under the Francovich principle.

Sections 85 and 86 of the Finance Act 2019

97.
The Government responded to para 78 of Prudential by promoting legislation which would provide a statutory basis for awarding interest in respect of the period of prematurity. As the Explanatory Notes on the Bill explain, the intention was to "address uncertainty that has arisen for both taxpayers and HMRC following the recent Supreme Court decision in Prudential". The legislation was enacted by Parliament as sections 85 and 86 of the 2019 Act.

98.
Section 85 applies where a person started proceedings against the Revenue in the High Court or the Court of Session before 12 December 2012, the proceedings include a claim arising out of a "relevant payment", and the claim has not been settled, discontinued or finally determined: section 85(1). The deadline of 12 December 2012 encompasses claims brought within six years of the decision of the CJEU in FII (CJEU) 1, which was handed down on 12 December 2006. A "relevant payment" is defined as "a payment of unlawful ACT that - (a) was made by the person on or after 1 January 1996 or in the period of six years ending immediately before the date the proceedings were started, and (b) was set off or repaid (wholly or in part) before the proceedings were started": section 85(2). Put shortly, the section applies to claims arising out of the payment of unlawful ACT and relating to the period of prematurity: that is to say, claims such as the category (a) claims with which para 78 of Prudential was concerned.

99.
Section 85(3) makes provision for the claimant to be awarded a "principal amount" equal to simple interest on the relevant payment at a prescribed rate for the period of prematurity, together with simple interest at the prescribed rate on the "principal amount" for the period from the end of the period of prematurity until the date when the principal amount is paid.

100.
The effect of section 85 is therefore to provide a statutory remedy in the form of interest on unlawful ACT for the period of prematurity. It is described in the Explanatory Notes as an "interest like

remedy", reflecting the fact that the amount awarded is itself the principal sum: unlike a conventional award of interest, it is not ancillary to another principal sum, such as a debt or an award of damages. It thus reflects the logic of the award under EU law, as explained in Hoechst (para 94 above).

101.
The terms of section 85(2)(a) are of critical importance from a practical perspective. In the present proceedings, the BAT claimants seek to recover interest, for periods of prematurity, on unlawful ACT paid since 1973. The proceedings were started in 2003. Section 85(2)(a) would allow the BAT claimants to recover interest for periods of prematurity, but only on unlawful ACT paid within the limitation period of six years prior to 2003 or (more relevantly on the facts of this case) from 1 January 1996 onwards.

102.
Section 86 is supplementary to section 85. It provides, in particular, that nothing in section 85 limits the remedies that a court may award in respect of the claim: section 86(2).

The parties' contentions

103.
As we have explained at para 56 above, the claimants concede, in the light of Prudential, that the Revenue's appeal against the award of compound interest must succeed in relation to periods after unlawful ACT was set off or repaid, and in relation to cases where there was no set off or repayment. But they contend that, even if the Revenue are not barred from disputing the claimants' entitlement to compound interest in respect of periods of prematurity, the claimants are in any event entitled to simple interest in respect of those periods under section 35A of the Senior Courts Act, and are not confined, as the Revenue contend, to a remedy under section 85 of the 2019 Act. The claimants base their contention on a number of inter-related arguments.

104.
First, they contend that they have a San Giorgio right under EU Law to the payment of interest in respect of the period of prematurity, that that right existed before the enactment of the 2019 Act, that it must have been translated into a corresponding right under domestic law, and that the introduction of a six year limitation period in section 85 of that Act cannot retrospectively have taken that right away.

105.
The flaw in that argument is that, although EU law confers a right to the payment of interest, it does not prescribe a period of limitation, leaving that to the law of the member states, subject to the requirements of equivalence and effectiveness. There is no requirement under EU law that it must be possible to claim interest for periods of prematurity more than six years before the commencement of proceedings. The claimants began these proceedings in 2003. The only basis on which they have ever claimed to be able to recover interest for periods of prematurity more than six years before the commencement of proceedings is that the claims fall within the scope of section 32(1)(c) of the Limitation Act, which applies where "the action is for relief from the consequences of a mistake". That phrase was interpreted by this court in FII (SC) 1 as requiring that a mistake must constitute an essential element of the cause of action. So far as claims for interest in respect of the period of prematurity are concerned, the claimants rightly state that it was the mistaken payment of tax which resulted in their entitlement to recover such interest. But it does not follow that the claim for interest for the period of prematurity is itself based on a cause of action of which mistake forms an essential

element. On the contrary, as this court explained in Prudential, the claim to interest is not itself a restitutionary claim for the recovery of money paid under a mistake of law.

106.
It follows that the six year limitation period in section 85 of the 2019 Act does not retrospectively deprive the claimants of a right to interest which had vested in them more than six years before the commencement of these proceedings. Not only does section 86(2) preserve any existing remedies, but more importantly, the implication of Prudential is that the claimants never had a right to claim interest on the basis of unjust enrichment, and therefore were never able under section 32(1)(c) of the Limitation Act to claim interest for periods more than six years before they commenced these proceedings in 2003. Section 85 of the 2019 Act has not, therefore, shortened any pre-existing limitation period. On the contrary, section 85 benefits claimants such as the test claimants, by making it possible to take claims back further than six years, where the unlawful ACT was paid at any time after 1 January 1996 and the proceedings were begun more than six years after that date, as in the present case. Indeed, someone who started proceedings on 11 December 2012 (the last date for bringing such a claim, under section 85(1)(a)) would be able to go back almost 17 years, to 1 January 1996. We should add that the rates of interest specified in the section are almost all the same as the VAT repayment rates which were held by this court in Littlewoods to provide an adequate indemnity to meet the requirements of EU law.

107.
The decision in Prudential that claims to interest are not restitutionary in nature is therefore the fundamental problem facing the claimants' attempts to avoid a six year limitation period. The other arguments which we consider below, which attempt to establish that the claimants have a right to recover interest under section 35A of the Senior Courts Act or in equity, are of secondary importance.

108.
The claimants' second argument is that this court decided in paras 78 and 110 of Prudential that interest could be awarded under section 35A of the Senior Courts Act on what were there described as category (a) claims, ie claims for interest in respect of the period of prematurity. The short answer is that the court made no such decision. All that it said, in the sentences in para 78 relied on by the claimants, was that:

"It is unnecessary to decide in this appeal how an award of interest should be made available in those circumstances (and the court has heard no argument on the point). But there are a number of potential solutions."

We would draw attention to the words "unnecessary to decide", "the court has heard no argument", and "potential". Para 110 did not depart from that position.

109.
The claimants' third argument, designed to underpin the contention that they possessed a vested right which could not be taken away retrospectively by the 2019 Act, is essentially that the San Giorgio right to interest existed before the 2019 Act was enacted, and that there must therefore have been a corresponding right in domestic law. It is put in a number of different ways, some of which we shall consider shortly. But the fundamental answer to it is that the duty to ensure that directly effective rights under EU law are effectively protected under domestic law is a duty which arises for this court now, when the question of protecting those rights arises before it. If the court can give effective protection to those rights by applying section 85 of the 2019 Act, it does not have to work out how, or whether, it might have done so if that provision had never been enacted. The question is academic.

110.

The claimants argue, however, that section 35A of the Senior Courts Act can and should be purposively construed, or alternatively subjected to a conforming interpretation, so as to encompass claims for interest in respect of the period of prematurity. They suggest that that can be achieved “by interpreting either section 35A(1) or section 35A(3) as being engaged regardless of whether the proceedings are begun before or after repayment of the debt”.

111.

We are unable to accept this argument. Section 35A(1) applies, as was explained in para 92 above, “in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages” (emphasis added). There cannot be proceedings for the recovery of a debt which are begun after the debt has been repaid. The same point applies to section 35A(3), which similarly applies “where - (a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt” (emphasis added). There is no possibility of arriving at a purposive construction of section 35A which overrides the clear language of those provisions.

112.

The question of giving section 35A a conforming interpretation does not arise, even on the highly questionable assumption that the interpretation for which the claimants contend might in theory be adopted. The interpretative obligation imposed on national courts under EU law cannot arise, in relation to a particular provision, unless national law would otherwise fail to conform with the requirements of EU law. In the present case, section 85 of the 2019 Act meets the requirements of EU law in relation to the provision of a remedy enabling claims for interest during the period of prematurity to be recovered, as we have explained. The circumstances in which this court might come under an obligation to give a conforming interpretation to section 35A of the Senior Courts Act therefore do not exist. We should add that, even if section 35A were to be construed as permitting a standalone claim to interest for the period of prematurity, such a claim, being based on statute, would remain subject to a six year limitation period under section 9(1) of the Limitation Act.

113.

Alternatively, the claimants argue that “the size of the debt which was created when the mistaken payment was made must, as a matter of EU law, increase for every day that the debt goes unpaid”, through the accretion of interest. When the tax is reimbursed by set off or repayment, there accordingly remains a debt comprising the interest which accrued during the period of prematurity, which can be recovered under section 35A.

114.

We are unable to accept this argument. Section 35A is based on a distinction between the debt or damages for the recovery of which the proceedings are brought, and interest on that debt or damages: see section 35A(1) and (3) (paras 92-93 above). For that purpose, the mistaken payment of tax gives rise to a debt, for the recovery of which proceedings can be brought, and interest can then be awarded under section 35A on the debt. The interest which can be awarded under section 35A cannot itself be regarded as a debt within the meaning of the section. The claim to interest is ancillary to the claim for the recovery of the debt. The set off or automatic repayment of unlawfully charged ACT extinguishes the claimants’ cause of action for the recovery of the debt arising from the payment of the tax. There is therefore no debt, within the meaning of section 35A, for the recovery of which proceedings can be brought, and no claim for the recovery of a debt, to which a claim to interest can be ancillary. That is the problem which this court identified in para 78 of Prudential. Furthermore, the award of interest is discretionary (albeit the discretion would, in the present context, have to be exercised in accordance with EU law), and is at a rate or rates determined by the court at the end of the proceedings. Interest under section 35A cannot therefore accrue as a debt during the period before it is awarded.

115.
In a further alternative, the claimants argue that interest in respect of the period of prematurity could be awarded by the court in the exercise of its equitable jurisdiction. We reject this argument. It faces serious difficulties as a matter of principle, since there is no common law claim in aid of, or ancillary to which, equity can act. It would also require the court to re-consider the decision of the House of Lords in Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669. But there is in any event no call for the court to invoke its equitable jurisdiction to provide a remedy in circumstances where a suitable remedy has already been provided by Parliament.

116.
As a yet further alternative, the claimants argue that the unlawful ACT should be regarded as a nullity for present purposes, with the consequence that it was not set off against lawful MCT or repaid. On that footing, it is argued, the claimants retain a mistake-based claim to recover the ACT, and can therefore be awarded interest on it under section 35A of the Senior Courts Act. The claimants recognise, however, that if there was no set off of ACT, then they were bound to pay the MCT, with the consequence (as they argue) that the ACT is irrecoverable, and the award of interest is restricted to the period before the MCT was due, ie the period of prematurity. We have difficulty understanding this argument, and are unable to accept it. A claim to restitution of the ACT, and a claim to interest on that amount for the period of prematurity, proceed on the basis that a payment was made. The ACT cannot be regarded as a nullity for this purpose without destroying the premise of the claim. If, per contra, the ACT were to be regarded as a nullity, with the consequence that it was not set off or repaid, we have difficulty understanding how it could be regarded as having been paid in the first place.

117.
The claimants’ fourth argument relies on section 86(2) of the 2019 Act: “Nothing in section 85 limits the remedies that a court may award in respect of the claim”. Accordingly, it is argued, if the claimants are entitled to interest under section 35A of the Senior Courts Act, or alternatively in equity, or alternatively as a result of the concept of nullity, then the remedies available on those bases have not been taken away by section 85 of the 2019 Act. Granted the premise, the conclusion follows. But we have rejected the premise, for the reasons we have explained.

118.
For these reasons, the revenue’s appeal on issues 10 and 26(a) in the second phase should be allowed. The summary judgment should also be set aside, and the cases in question remitted to the High Court.

7. The nature of the remedy required by EU law in respect of the set-off of group relief and management expenses

119.
Issues 11 and 13 in the first phase of the proceedings raised the following questions:

“To what extent is a remedy required by EU law in respect of the set off of group relief and management expenses? Is a restitutionary remedy available for set-off of group relief and management expenses?”

120.

As presented to the courts below, these issues concerned the fact that management expenses of investment companies and group relief were utilised to reduce or eliminate liabilities to pay unlawful MCT, in the mistaken belief that the tax was lawfully due. Restitution was sought in respect of the value of the reliefs. The claims were rejected by the courts below. In the light of a subsequent judgment of the CJEU, the claimants amended their claim so as to add a claim based on their inability to make full use of double taxation relief ("DTR"). It is that claim which has been the focus of the argument before this court.

121.
In broad outline, the claimants reduced their liability to pay MCT during the relevant period by setting off not only ACT but also various reliefs - in particular, relief for management expenses, group relief and DTR - against profits, or against the tax which was prima facie chargeable on those profits, depending on the rules applicable to the relief in question. The order in which the reliefs were applied, as explained below, had the result that the available DTR (and, a fortiori, the DTR which ought to have been available if it had been calculated in accordance with EU law) was not fully utilised. Under domestic law, the unused DTR could not be carried forward, and was consequently lost. In a nutshell, the claimants seek a remedy on the basis that, in order to comply with EU law, unused DTR should have been carried forward, so as to reduce tax paid in subsequent years (or, if no tax was paid, so that the unused relief remains available for set off against tax liabilities). The relevant facts have not yet been established, and the court is therefore asked to determine the issues as a matter of principle, and at a high level of generality.

122.
To set the issues in context, this court's decision in Prudential established that EU law, as laid down in FII (CJEU) 1 and FII (CJEU) 2, requires that claimant companies which received foreign-sourced dividends must be granted a tax credit in respect of those dividends, set by reference to the foreign nominal rate of corporation tax ("FNR"). In that way, economic double taxation can be relieved to a more or less equivalent extent in respect of foreign-sourced dividends and domestic-sourced dividends: the latter benefit from an exemption from corporation tax in the hands of the company which receives them, characterised by the CJEU as being equivalent to a credit at the nominal rate of UK corporation tax. The Court of Appeal held in FII (CA) 2 that EU law required a DTR credit at the higher of the FNR or the foreign tax actually paid, and this court refused permission to appeal against that decision. In principle, and subject to any other issues that might arise, the grant of a tax credit at the FNR rate (or for the tax paid, if higher) should therefore prevent the economic double taxation of the profits underlying the foreign-sourced dividends, and ensure equal treatment with domestic-sourced dividends: provided, of course, that the credit can be fully utilised.

123.
It is argued, however, that the DTR credits could not be fully used, with the result that there was indirect economic double taxation of the profits out of which the foreign-sourced dividends were paid. Since such taxation resulted in less favourable treatment of foreign-sourced dividends than that accorded to domestic-sourced dividends, it follows that it was unlawful under EU law, and that any such unlawful tax is therefore recoverable under the San Giorgio principle. In so far as no such tax has been paid, it is argued that the unused DTR must remain available for use. Before considering these arguments further, it is necessary to provide an explanation of how the relevant reliefs operate and interact.

Reliefs in general

124.
Corporation tax is charged on profits of companies: section 6(1) of ICTA. The starting point is to compute the company's income, under the Schedules and Cases which apply for the purposes of income tax: section 9(1). This includes dividends received from non-resident companies, which fall within the scope of Case V of Schedule D, as explained below. The amounts so computed for the various sources of income, together with any chargeable gains, are reduced by any reliefs applicable to income from each of those sources or to those gains. The total profits are then ascertained by aggregating the income from the various sources and the gains (section 9(3)), as reduced by any reliefs applicable to those total profits, such as management expenses and group relief. The tax prima facie chargeable on the total profits can then be calculated. That amount may then be reduced or extinguished by other reliefs, such as DTR, which are expressed as applying to that tax. The amount of tax payable is then determined.

Management expenses

125.
Under section 75 of ICTA, UK-resident investment companies automatically deducted the management expenses referable to an accounting period when calculating their total profits for that period. The provision was amended from time to time during the relevant period, but the parties have discussed the issue under reference to the version in force in 1997/98, it being agreed that no material distinction arises from later versions. Section 75(1) and (2), as in force at that time, provide:

"(1) In computing for the purposes of corporation tax the total profits for any accounting period of an investment company resident in the United Kingdom there shall be deducted any sums disbursed as expenses of management (including commissions) for that period, except any such expenses as are deductible in computing profits apart from this section.

(2) For the purposes of subsection (1) above there shall be deducted from the amount treated as expenses of management the amount of any income derived from sources not charged to tax, other than franked investment income, foreign income dividends, group income and any regional development grant."

126.
Where the profits for an accounting period were not sufficient to absorb the management expenses referable to that period, the excess amount was carried forward to the next accounting period and treated as if it were management expenses referable to that period, in accordance with section 75(3):

"(3) Where in any accounting period of an investment company the expenses of management deductible under subsection (1) above … exceed the amount of the profits from which they are deductible -

(a) the excess shall be carried forward to the succeeding accounting period; and

(b) the amount so carried forward to the succeeding accounting period shall be treated for the purposes of this section, including any further application of this subsection, as if it had been disbursed as expenses of management for that accounting period."

Group relief

127.

Under sections 402 and 403 of ICTA, relief for trading losses and other amounts eligible for relief from corporation tax, including excess management expenses, might be surrendered by one group company ("the surrendering company") to another ("the claimant company") and, on the making of a claim by the claimant company, set off against the claimant company's total profits for the corresponding accounting period. Group relief therefore resembled relief for management expenses in that it was set against total profits, but it differed from relief from management expenses in two material respects. First, it was not automatic, but required the making of a claim for a particular amount of group relief by a claimant company to which the relevant relief had been surrendered by the surrendering company. Secondly, it could not be carried forward, but could only be used by the claimant company in the corresponding accounting period to the one in which the surrendering company's entitlement to the relief accrued.

Double taxation relief

128.
At all material times, tax was not chargeable on dividends and other distributions received by one UK-resident company from another. Nor were such payments taken into account in computing the income of the company making the distributions (with the consequence that management expenses and group relief were not set off against them). This followed from section 208 of ICTA, which provided:

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

The consequence was that tax could only be levied once on the profits forming the source of a distribution. Economic double taxation was always avoided.

129.
A UK-resident company was, by contrast, subject to corporation tax on dividends received from non-resident companies (and such dividends formed part of the computation of its profits). Such tax was charged under Case V of Schedule D, set out in section 18 of ICTA:

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

The company was, however, granted relief for foreign withholding taxes, and also (where it controlled a certain percentage of the voting power of the relevant foreign company, as explained below) for foreign tax paid on the profits out of which the dividends were distributed (rather than for the FNR, as FII (CJEU) 2 subsequently determined that EU law required). Such relief was given either unilaterally under domestic rules (section 790) or under double taxation conventions entered into with other countries (section 788). The unilateral arrangements provided for credit for tax paid under the law of a territory outside the UK and computed by reference to income arising in that territory to be allowed against any UK corporation tax "computed by reference to that income" (emphasis added): section 790(4). Where (put shortly) a UK company receiving a foreign-sourced dividend controlled at least 10% of the voting power of the company paying the dividend, the credit in respect of the dividend was also to take into account any tax paid by the foreign company in respect of its profits: section 790(6). Similar arrangements generally applied under the UK's double taxation treaties with other countries. The UK tax chargeable was then reduced by the amount of the credit: section 793. The relief given was capped at the UK corporation tax rate: a limit which has been accepted by the CJEU as being compatible with EU law, since it suffices to avoid economic double taxation.

130.
Since the DTR relief was given against tax otherwise payable, it came into play only after the taxable profits had been determined. It was therefore applied after other reliefs, such as management expenses and group relief, had been taken into account in the calculation of total profits. If those reliefs reduced the company's taxable profits to the extent that its tax liability for a particular year (if any) was less than its available DTR credits, the consequence was that its DTR credits would not be fully used in that year.

131.
This gave rise to a problem under EU law. That is because, under the system of DTR applicable to dividends arising on or before 30 March 2001, if the credit available in respect of particular income exceeded the company's tax liability in respect of that income, the unused credit could not be carried forward or surrendered to another group company. That was because, as we have explained, the credit was for foreign tax paid on particular income, and it could only be set against domestic tax payable on the same income. As a result of the inability to carry forward unused credits, tax was liable to be paid in a subsequent year which would not have been payable if the unused credits had been carried forward. The consequence was indirect economic double taxation.

132.
Following the introduction of the Eligible Unrelieved Foreign Tax rules ("the EUFT rules", discussed at paras 206-209 below), applicable to dividends arising after 30 March 2001, surplus EUFT could be carried forward or surrendered to another group company. The credit continued to be based on the foreign tax paid rather than the FNR, and it could only be set against particular categories of dividend income.

The claimants' argument

133.
Against that background, the claimants put their case in a number of ways. It is necessary to mention only the first. They argue that the DTR system, as it stood prior to the introduction of the EUFT rules, was in breach of EU law in that it failed to allow unused DTR credits (calculated, as EU law required, on the FNR basis) to be carried forward. That breach of EU law resulted, they contend, in the payment of tax in circumstances where taxable profits were made in a subsequent tax year. That tax was unlawful under EU law, since it constituted indirect economic double taxation, which would not have occurred if, like domestic-sourced dividends, the foreign-sourced dividends had been exempt from UK taxation. A San Giorgio claim is therefore available for restitution of the tax paid. Where, on the other hand, no payment of tax has yet been made, they maintain that the unused DTR credits must remain available for future use.

134.
In relation to this argument, the claimants rely particularly on the judgment of the CJEU in Österreichische Salinen (Case C-437/08), reported with another case as Haribo Lakritzen Hans Rigel BetriebsgmbH (Joined Cases C-436/08 and C-437/08) [2011] STC 917; [2011] ECR I-305 ("Salinen"). As we have explained, this argument was not advanced before the courts below, where the hearings pre-dated the judgment in Salinen. The claimants also argue that this problem was not fully addressed by the EUFT rules. Although the relevant provisions allowed surplus EUFT to be carried forward or surrendered, it could not be offset against other profits, but only against restricted categories of dividend income, with the consequence that it still might not be fully utilised.

135.

One of the issues in the Salinen case was "whether article 63 TFEU obliges a member state which applies the imputation method for dividends distributed by non-resident companies and the exemption method for dividends from resident companies to provide for the credit for the [foreign] tax paid to be carried forward where the recipient company records an operating loss in respect of the tax year in which it receives the dividends" (para 154). The CJEU held that it did. In order to be of equivalent effect to the exemption of domestic-sourced dividends, the imputation system had to permit the carrying forward of unused DTR credits which could not be used immediately because losses had been set off against the foreign dividend income. This decision is directly relevant to the UK, since this country, like Austria, applies an imputation system to foreign-sourced dividends while granting an exemption to domestic-sourced dividends.

136.
The CJEU began its consideration of the question by re-stating, at para 156, a principle established in FII (CJEU) 1, para 72, namely that "article 63 TFEU requires a member state which has a system for preventing economic double taxation as regards dividends paid to resident companies by other resident companies to accord equivalent treatment to dividends paid to resident companies by non-resident companies".

137.
The court continued, at paras 157-158:

"157. … under the imputation system concerned, dividends distributed by non-resident companies are included in the tax base of the company receiving them, thereby reducing, when a loss is recorded for the tax year in question, the amount of that loss by the amount of the dividends received. The amount of the loss that can be carried forward to subsequent tax years is thus reduced to the same extent. By contrast, dividends from resident companies, which are exempt, do not affect the tax base of the company receiving the dividends or, therefore, any losses that it may be able to carry forward.

158. It follows that, even if dividends distributed by a non-resident company and received by a resident company do not have corporation tax charged on them in the member state where the latter company is established in respect of the tax year in which those dividends have been received, the reduction of the losses of the company receiving the dividends is liable to result for that company, if the credit for the tax paid by the company making the distribution is not carried forward, in economic double taxation on the dividends in subsequent tax years when its results are positive. … By contrast, there is no risk of economic double taxation for nationally sourced dividends, because the exemption method is applied to them."

138.
In other words, the later tax liability arising from the failure of the Austrian tax system to enable the unused DTR credits to be carried forward amounted to indirect taxation of the earlier dividend income. It had not been directly taxed, but full relief had not been given for the foreign tax paid (or for the FNR). The result was unlawful economic double taxation, equivalent in effect to the postponement of an unlawful tax charge on the dividend income until a later year.

139.
The court concluded that there was consequently a lack of equivalent treatment:

"159. Where national legislation, such as that at issue in the main proceedings, does not provide for the credit for the corporation tax paid in the state where the company distributing the dividends is established to be carried forward, foreign-sourced dividends suffer, in a system such as that at issue in the main proceedings, higher taxation than that resulting from application of the exemption method for nationally-sourced dividends."

It followed, as the court stated at para 160, that "article 63 TFEU must be considered to preclude such legislation."

140.

In the light of this decision, it is clear that in so far as UK law prevented the carrying forward of unused DTR credits, prior to the introduction of the EUFT rules (and to the extent, if any, that those rules may themselves have prevented the carrying forward of unused credits in full), it was in breach of article 63 of the TFEU. It is not suggested that the position would be any different under article 43, which is also relevant in the present proceedings, and the same reasoning would appear to apply, mutatis mutandis.

141.

A question then arises as to the appropriate remedy. As we have explained, the claimants argue that where tax has been paid in a subsequent tax year which would not have been paid if unused DTR credits had been carried forward, that tax is recoverable on the San Giorgio basis. Where no tax has yet been paid, they argue that the unused DTR credits remain available for use. The Revenue, on the other hand, argue that in order to comply with EU law, the DTR credits must be treated as having been used to relieve tax, in priority to management expenses. That result can be achieved, according to the Revenue, by giving section 75 of ICTA what they describe as a conforming interpretation, so as to exclude Case V income from "total profits". The use made of group relief need not be taken into account, according to the Revenue's argument, because it was not the result of legislation but of a choice made by the companies in question.

142.

We are unpersuaded that the solution proposed by the Revenue is appropriate. The problem which arises in this case under EU law is not the result of an incompatibility between the rules governing management expenses or group relief and the requirements of EU law: so far as appears from the arguments in this appeal, the provisions governing management expenses and group relief are fully compliant with EU law. The problem which was identified in Salinen, and which is relevant also in the present case, is that legislation which prevents the carrying forward of unused DTR credits is precluded by EU law, since it results in a difference in treatment between domestic-sourced dividends, which are fully protected against economic double taxation, and foreign-sourced dividends, which are indirectly subject to economic double taxation if the applicable credit cannot be fully used. It is therefore the DTR legislation which is contrary to EU law; and if the problem can be resolved by addressing the DTR legislation, that is the appropriate place to find the solution.

143.

It is also necessary to bear in mind that the obligation to interpret national law in conformity with the requirements of EU law is subject to the qualifications explained in European cases such as Criminal proceedings against Kolpinghuis Nijmegen BV (Case 80/86) [1987] ECR 3969 and Impact v Minister for Agriculture and Food (Case C-268/06) [2008] ECR I-2483, as well as domestic cases such as Duke v GEC Reliance Ltd [1988] AC 618. Having regard to those qualifications, there is a question, which this court need not answer, as to whether the words "the total profits", where they appear in section 75 of ICTA, could in any event properly be "interpreted" as meaning "the total profits (excluding any income falling within Case V of Schedule D)".

144.

Focusing instead on the DTR legislation, the problem results from the rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income. That rule is contrary to EU law, to the extent that it prevents unused DTR credits from being carried forward and applied against other income in subsequent years. The requirement arising under EU law, that it must be possible to carry forward unused DTR credits for use against tax liabilities arising in subsequent years, was at all material times directly applicable as law in the UK, and had to be given effect in priority to inconsistent domestic law, whether legislative or judicial in origin.

145.
In principle, therefore, the problem can be resolved by disapplying the domestic rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income, to the extent that it prevents unused DTR credits from being carried forward and applied against tax liabilities arising in subsequent years, and giving effect instead to the EU rule that unused DTR credits (calculated on a FNR basis) can be carried forward for use against tax liabilities arising in subsequent years. The disapplication of the domestic rule is in accordance with the approach which has been taken to legislation which is incompatible with directly applicable EU law since R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) [1991] 1 AC 603. As Lord Bridge of Harwich stated in that case at p 659:

"Under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law."

Looking to the future, therefore, any unused DTR credits (calculated on a FNR basis) must in principle be regarded as remaining available to be applied against other income in subsequent years, notwithstanding any statutory provisions or other domestic rules of law to the contrary effect. That result is consistent with the treatment of unutilised (lawful) ACT in Prudential, para 103.

146.
What, however, of the situation where tax has already been paid as a result of the inability under domestic law to carry forward unused DTR? In that situation, the continued availability of the unused DTR credits cannot be considered to meet the EU requirement of "effective legal protection", since the state has received a payment of unlawfully levied tax at some point in the past and has had the use of the money since then, while the claimants have been out of pocket. Such circumstances fall within the San Giorgio principle, and call under EU law for the restitution of the tax, together with an award of interest: see, for example, the CJEU's judgment in Littlewoods (Case C-591/10) [2012] STC 1714, paras 25-26.

147.
The revenue argue, however, that the only remedy lies in damages (for which the claimants do not qualify, as the conditions laid down for Francovich liability are not met), relying in that regard on the CJEU's judgment in FII (CJEU) 1 and the judgments of the High Court and the Court of Appeal in FII (HC) 1 and FII (CA) 1 respectively. It is necessary therefore to consider those authorities, together with some more recent cases.

148.
In FII (CJEU) 1, the question was asked whether, in the event that the national measures in question were incompatible with EU law, claims brought in order to remedy that incompatibility should be classified as claims for the repayment of sums unduly levied or as claims for compensation for damage suffered (para 197). The claims in question included claims arising from the payment of tax that was

levied in breach of EU law, claims arising from the loss of use of money due to premature payment of taxes, and claims seeking the reinstatement of tax reliefs which had been disclaimed (para 199). In relation to reliefs, in particular, the national court had asked about “a claim for repayment of corporation tax paid by the company or by another group company where any of those companies incurred a corporation tax liability by disclaiming other reliefs in order to allow its ACT liability to be set off against its corporation tax liability (the limits imposed on set-off of ACT resulting in a residual corporation tax liability)”.

149.
The court responded (at paras 201-202):

“201. It must be stated that it is not for the Court of Justice to assign a legal classification to the actions brought before the national court by the claimants. In the circumstances, it is for the latter to specify the nature and basis of their actions (whether they are actions for repayment or actions for compensation for damage), subject to the supervision of the national court: see Metallgesellschaft Ltd v Inland Revenue Comrs (Joined Cases C-397 and C-410/98) [2001] Ch 620, para 81.

202. However, the fact remains that, according to established case law, the right to a refund of charges levied in a member state in breach of rules of Community law is the consequence and complement of the rights conferred on individuals by Community provisions as interpreted by the Court of Justice: see, inter alia, Amministrazione delle Finanze dello Stato v SpA San Giorgio (Case C-199/82) [1983] ECR 3595, para 12 and Metallgesellschaft [2001] Ch 620, para 84. The member state is therefore required in principle to repay charges levied in breach of Community law.”

The court added at paras 207:

“207. However, contrary to what the claimants contend, neither the reliefs waived by a taxpayer in order to be able to offset in full a tax levied unlawfully, such as ACT, against an amount due in respect of another tax, nor [FID enhancements], can form the basis of an action under Community law for the reimbursement of the tax unlawfully levied or of sums paid to the member state concerned or withheld by it directly against that tax. Such waivers of relief or increases in the amount of dividends are the result of decisions taken by those companies and do not constitute, on their part, an inevitable consequence of the refusal by the United Kingdom to grant those shareholders the same treatment as that afforded to shareholders receiving a distribution which has its origin in nationally-sourced dividends.”

In the operative part of its judgment, the court reiterated at para 6 that national courts are “obliged to ensure that individuals should have an effective legal remedy enabling them to obtain reimbursement of the tax unlawfully levied on them”.

150.
For present purposes, the critical passage is para 202, which reaffirms the duty of the member state to refund charges levied in breach of EU law, in accordance with the San Giorgio principle. The Revenue, however, rely on para 207, which was concerned not with the recovery of amounts of tax unlawfully paid, but with claims in respect of financial loss arising from the disclaimer of reliefs. It should be said at once that this has nothing to do with the claims presently in issue.

151.
In FII (HC) 1, Henderson J interpreted the judgment of the Court of Justice as meaning that the San Giorgio principle applies not only to the repayment of tax unlawfully levied, but also to amounts paid

to the state, or retained by it, which relate directly to that tax. He interpreted para 207 (so far as concerned with reliefs) as being concerned with situations where the company had disclaimed available reliefs in order to set off surplus ACT against its liability to pay lawful MCT, as a result of which it had to pay lawful tax on the relevant profits at the difference between the MCT and ACT rates. As he noted, the CJEU dealt with the issue as raising a question of causation: the chain of causation stemming from the unlawful ACT regime was broken when the company made an independent decision to disclaim the reliefs. The implication, he noted at para 235, was that the test of causation under the San Giorgio principle was strict:

"The Advocate General used the phrase 'direct consequences', and the ECJ used the phrase 'an inevitable consequence' (in French, 'une conséquence inévitable')."

152.
Henderson J went on to hold that a claim in restitution, based either on Woolwich or on payment under a mistake of law, would lie to recover tax which had been levied unlawfully. On the other hand, a claim in respect of the value of reliefs which had been set off against unlawful tax liabilities could only lie in damages, since the link between the unlawful tax regime and the loss of the value of the reliefs was insufficiently direct to found a claim to restitution.

153.
The Court of Appeal reached the same conclusion in FII (CA) 1, observing at para 149 that "[t]he use of group relief and management expenses to reduce tax was the result of tax planning and commercial decisions that were entirely within the discretion of the claimants". That was not, in fact, true of management expenses: as we have explained, their deduction from total profits is required by law. The principle, however, reflected the reasoning of the CJEU.

154.
The point now raised in this case is clearly distinguishable. We are concerned with the payment of tax, not with its non-payment. The payment of tax as a result of the claimants' inability to carry forward unused DTR credits was the direct consequence of the failure of the UK tax regime to comply with EU law by permitting unused DTR credits to be carried forward. The present issue falls within the ambit of FII (CJEU) 2, para 84, where the CJEU reiterated that "the right to a refund of charges levied by a member state in breach of European Union law is the consequence and complement of the rights conferred on individuals by provisions of European Union law prohibiting such charges. The member state is therefore required in principle to repay charges levied in breach of European Union law". The same point was repeated in FII (CJEU) 3, para 30 (para 40 above). Finally, in relation to the authorities, in Prudential this court stated that "an entitlement to repayment or restitution in this context requires that there has been an unlawful charge to tax as a result of incompatibility with EU law": para 97. That requirement is plainly met in the present case.

155.
Against this background, it is clear that a San Giorgio claim lies for the recovery of tax which was paid as a result of the impossibility of carrying forward unused DTR credits. The levying of the tax in question was unlawful under EU law, because it involved the less favourable treatment of foreign-sourced dividends than domestic-sourced dividends. It was for that very reason - because it would result in taxation which was incompatible with EU law - that the inability to carry forward the DTR credits was held in Salinen to be contrary to article 63 TFEU.

156.

In domestic law, it is well settled that claims based on the San Giorgio principle should be classified as claims for restitution. They can be pleaded as Woolwich claims, since the levying of the tax was unlawful. But they can also be pleaded as claims for the recovery of money paid under a mistake of law, provided that the tax was paid under a mistaken belief as to the lawfulness of the relevant aspects of the tax regime.

157.
The Revenue argue in response that the tax was lawfully due. But that is incorrect. EU law does not permit the indirect double taxation of foreign-sourced dividends, when domestic-sourced dividends are exempt from tax: Salinen. The fact that the tax was lawful under domestic law, if the European Communities Act 1972 were left out of account, is nothing to the point. A second point made by the Revenue is that the proposed solution is contrary to the UK tax system, which does not recognise the carrying forward of DTR relief. That is no answer, since it is clear from Salinen that that aspect of the UK tax system is unlawful under EU law. As we have explained, elements of the UK legislation which are inconsistent with directly applicable EU law must be disapplied. Another point made by the Revenue is that there was no direct transfer of value from the claimants to the Revenue, if unused DTR credits arose in year 1 and tax was paid in the next year when a tax liability arose. That also is incorrect. The payment of tax is plainly a direct transfer of value from the claimants to the Revenue. The causation requirement is met, for the purposes of a claim based on a mistake of law, if the payment was made under the mistaken belief that the unused DTR credits could not lawfully be carried forward and set against the tax liability.

158.
Accordingly, we conclude that, in so far as tax was paid as a result of the inability to carry forward unused DTR credits, calculated at the higher of the FNR rate and the tax paid, a claim lies in restitution to recover that tax, together with interest, subject to the law of limitation. Since the claim for repayment proceeds on the basis that the DTR credits would (but for the claimants' mistake) have been carried forward and used, those credits cannot be regarded as remaining available in addition to the restitution of the tax: otherwise, there would be double recovery. To the extent, however, that the inability to carry forward unused DTR credits did not result in the payment of tax, the unused credits must be regarded as remaining available.

159.
For these reasons, the claimants' appeal on issues 11 and 13 in the first phase should be allowed.

8. Whether the Revenue were enriched as a matter of English law, taking into account the interaction of ACT with shareholder credits, and whether EU law precluded an argument that the Revenue were not enriched by reason of that interaction?

160.
This issue, which is a combination of issues 17 and 18 in the second phase of the FII GLO litigation, is an appeal by the Revenue against the determination of the Court of Appeal in FII (CA) 2 on a question of remedies. The Revenue's case in summary is that although they received the money which the claimants paid in the mistaken belief that it was due as ACT, those payments triggered shareholder tax credits that the Revenue were bound to recognise. The Revenue argue that as a result they were not enriched by the claimants' payments, because the value of their gain was matched by the value of the loss that they suffered as a result of their obligation to recognise the shareholder tax credits.

161.

Henderson J rejected those arguments in FII (HC) 2. He held that the Revenue were immediately enriched by the receipt of sums of unlawful ACT which were paid into the Consolidated Fund. He referred to the Revenue's argument that the 1972 White Paper, Reform of Corporation Tax (Cmnd 4955), and Pirelli Cable Holding NV v Inland Revenue Comrs [2006] UKHL 4; [2006] 1 WLR 400 ("Pirelli") vouched the essential links between a company's liability to corporation tax and the shareholder's entitlement to a tax credit which was designed to avoid tax being paid twice on the same dividend. But he observed that the link between the payment of ACT and the grant of tax credits to the ultimate shareholders merely explained the part that the receipts were intended to play in the scheme of corporate taxation then in force. He held that the entitlement of UK-resident shareholders in receipt of qualifying distributions to tax credits under section 231 of ICTA was not conditional upon the levying of ACT in corresponding amounts. The obligation of the company making a distribution to pay ACT (section 14 of ICTA) and the entitlement of the shareholder to tax credits (section 231 of ICTA) were the subject of independent statutory provisions, neither of which was made conditional upon the other.

162.
Henderson J also stated that the Revenue's approach made no allowance for three complexities. First, the company which paid ACT might be a company far down the corporate hierarchy, and, by the operation of the franked investment income system, the profits would be passed up to the top of the corporate hierarchy and distributed to its external shareholders at a much later date. Secondly, even where the company paying the ACT also made the relevant external distributions, there might often have been a considerable delay between the payment of the ACT and the allowance of the tax credit. Thirdly, a recipient of the external dividend might be outside the United Kingdom and therefore not entitled to the tax credit.

163.
In relation to issue 18 (whether EU law precluded the argument that the revenue was not enriched) Henderson J held that the EU principle of effectiveness required the claimants to be given a remedy under national law which reimbursed the whole of the unlawfully levied ACT. It was irrelevant whether the Revenue were correspondingly enriched by the payments. EU law therefore precluded the Revenue from arguing that they were excused from making restitution of the unlawful tax on the basis that they were not enriched by its receipt.

164.
The Revenue appealed against these decisions to the Court of Appeal which (in FII (CA) 2) dismissed their appeal. The court's reasons differed from those of Henderson J. It accepted the Revenue's argument that it was "the central principle of the ACT regime was that part of the corporation tax paid by a company was imputed to its shareholders by giving them an appropriate tax credit". They held that the link between ACT and tax credits "was, in practice and in law, so strong that in our judgment it would be right to take account of tax credits in determining the benefit received by [the Revenue] through the unlawful payment of ACT", but for the argument which the test claimants had advanced which the court accepted. That argument was in summary that EU law required the foreign corporation tax paid by a subsidiary resident in the EU/EEA to be treated in the same way as ACT paid by a UK-resident subsidiary, so that the UK-resident subsidiary which received the foreign dividend would have obtained an ACT credit which would have been passed on to the shareholders of the parent company who received the ultimate distribution. As a matter of EU law the tax credit granted to the ultimate shareholders was the quid pro quo for the payment of foreign corporation tax at the bottom of the hierarchy by the EU/EEA subsidiary. The Court of Appeal held that one had to consider

why the tax credit was given: "[i]f the credit would have arisen even without the payment of ACT in the reformulated world of compliance with EU law, then it follows that it cannot be set off against the proper value of the restitution [the Revenue] must make".

165.
In any event, the Court of Appeal also dismissed the Revenue's appeal under issue 18, holding that EU law precluded the Revenue's argument that it was not enriched. It referred to the reasoning of Lord Reed in FII (SC) 1, which it considered to be both binding and correct, and stated that the EU law principles of effectiveness and equivalence required that the claimants' mistake-based remedy be moulded to vindicate the claimants' San Giorgio rights to recover unlawfully levied tax.

166.
In their appeal on issue 17, the Revenue advanced their argument in five steps. First, Mr Ewart submitted that the mistake-based claim was a claim for unjust enrichment and the claimants needed to show that the Revenue were enriched. Secondly, in assessing whether a defendant was enriched the law applied an objective test, looking at the circumstances of the defendant, which in this case included the structure and operation of the scheme for corporate taxation. Thirdly, that scheme provided that a tax credit to a shareholder who received a dividend was triggered by the payment by the company of ACT. Unless there was a liability to pay ACT there could be no tax credit: Pirelli. Fourthly, the inextricable link between the liability to pay ACT and the allowance of a tax credit to the shareholder under section 231 meant that the Revenue's enrichment was properly assessed as the value of the money paid by the claimants in the belief that it was due as ACT minus the value of the liability incurred by the Revenue in allowing a matching credit under section 231.

167.
Turning to issue 18, the Revenue submitted that EU law did not mandate a different result. What EU law required was that credit be given for foreign tax paid by a subsidiary resident outside the United Kingdom at the greater of the foreign nominal rate or the amount of the foreign tax paid against MCT and ACT charged in the United Kingdom, in order to reduce the level of taxation borne by the foreign profits. This had the effect of reducing the ACT which a UK-resident company had to pay in making a distribution. The principles of equivalence and effectiveness did not require an alteration of the domestic law remedy by ignoring the requirement of enrichment.

168.
In our view the Revenue's appeal on both issues is without merit. We consider each in turn.

169.
Dealing first with the position under domestic law, it is not in dispute that unjust enrichment is designed to correct normatively defective transfers of value and that it usually does so by restoring the parties to their pre-transfer positions. The recipient of the value transferred must have benefited, or in other words have been enriched, by the transfer of value. The transfer of value must have been at the expense of the claimant. In other words, the claimant must have suffered a loss, in the sense that he or she has given up something of value by providing the benefit to the claimant in the normatively defective transfer. See Investment Trust Companies [2018] AC 275, paras 42-45 per Lord Reed.

170.
There is no dispute but that the claimants suffered loss in this sense in paying the sums that have been held to be unlawfully levied ACT. The question on this appeal is the measure of restitution: what was the Revenue's enrichment? Where the transfer involves the provision of services, difficult

questions can arise as to the valuation of those services in order to correct the injustice which has arisen by the defendant's receipt of the claimant's services on a basis which was not fulfilled. This court considered such a case in Benedetti v Sawiris [2013] UKSC 50; [2014] AC 938. Where, as here, the transfer of value is the payment of money, such complex questions do not arise. But the court in ascertaining the defendant's enrichment cannot always conclude its enquiry by saying that because the claimant transferred £X to the defendant, the defendant's enrichment is £X. The court may, as the Revenue argues, have to have regard to liabilities which the defendant incurs as a consequence of the receipt of the money.

171.
This point is recognised in academic commentaries. Thus, Professor Virgo, The Principles of the Law of Restitution, 3rd ed (2015), p 73 states:

"In assessing whether the defendant has been enriched by the receipt of money it is necessary to have regard to the net transfer of value. So, where there have been payments between the claimant and the defendant, the net amount will constitute the enrichment. Further, any consequent liabilities which might negate the enrichment also need to be taken into account." (Emphasis added)

Similarly, Edelman and Bant, Unjust Enrichment, 2nd ed (2016), observe that a defendant is not inevitably benefited by the receipt of money, giving as an example:

"a circumstance where a defendant has assets amounting to $95,000 in value. The defendant receives $15,000 annually in government income support. One condition of the annual income support is that the defendant's assets are valued at less than $100,000. The defendant subsequently receives a mistaken payment of £6,000. This mistaken payment has the effect of removing the $15,000 annual benefit. … There is no enrichment of the defendant from the mistaken payment."

Lord Burrows in "The Law of Restitution", 3rd ed (2011), p 50 makes the same point citing other examples.

172.
The point is also recognised in judicial authority. In Jeremy Stone Consultants Ltd v NatWest Bank plc [2013] EWHC 208 (Ch) Sales J addressed a claim to recover from the defendant bank money which it was induced by a third party to pay into a company's bank accounts when the company, unbeknown to the claimants, was part of the third party's fraudulent Ponzi scheme. One of the claims against the bank was for restitution of the moneys in those accounts on the basis of NatWest's unjust enrichment as a result of the moneys having been paid on the basis of a mistake. Sales J rejected the claim based on unjust enrichment on two grounds. First, he held that the defendant bank had not been enriched. He stated (para 242):

"it is true that when the Claimants paid sums to NatWest for the account of SEWL, NatWest received those sums and added them to its stock of assets as moneys to which it was beneficially entitled. However, the increase in its assets was matched by an immediate balancing liability, in the form of the debt which NatWest owed SEWL reflected in the increase in SEWL's bank balance as a result of the payments."

He held that the claimants' unjust enrichment claim properly lay against the company, whose assets were increased by the payments into its bank accounts. Secondly, even if there had been enrichment, he held that the bank had a defence of good faith change of position and a defence of ministerial receipt, because it had a contractual obligation to pay out the sums in SEWL's account in accordance with its customer's instructions and had done so.

173.
On this appeal the Revenue do not assert any defence of change of position. Their case is premised on the submission that their obligation to allow tax credits under section 231 of ICTA was a consequence of the payment of ACT by the companies which made the relevant distributions or at least of the liability of those companies to pay ACT in those sums. It is a central component of the Revenue's argument that the tax credit under section 231 is triggered by the liability of the company making the distribution to pay ACT. The Revenue accept, correctly, that there are no express statements to this effect in the statutory provisions of ICTA. Section 14(1) provided:

"Subject to section 247, where a company resident in the United Kingdom makes a qualifying distribution it shall be liable to pay an amount of corporation tax ('advance corporation tax') in accordance with subsection (3) below."

Section 231(1) provided:

"Subject to sections 247 and 441A, where a company resident in the United Kingdom makes a qualifying distribution and the person receiving the distribution is another such company or a person resident in the United Kingdom, not being a company, the recipient of the distribution shall be entitled to a tax credit equal to such proportion of the amount or value of the distribution as corresponds to the rate of advance corporation tax in force for the financial year in which the distribution is made."

On the face of those provisions there is no explicit connection between the section 14 obligation on the company making the distribution to pay ACT and the obligation of the Revenue to allow the ultimate shareholders a tax credit under section 231.

174.
In support of the submission that there was an inextricable link between the payment of ACT and the tax credit the Revenue relied on the White Paper to which we referred in para 161 above, which in paragraph 9 described ACT and the shareholder's tax credit as the core of the system and "the essential link between the company's corporation tax and the shareholder's own tax liability". It continued that it would be wrong to give the shareholder a credit for corporation tax which had not been paid and that a preliminary payment was an essential element in the imputation system. By itself the White Paper is merely an indication of how the corporate taxation scheme was proposed to operate, as Henderson J stated in FII (HC) 2 (para 277). But the Revenue also found on the Pirelli case, which it is necessary to examine in more detail.

175.
At the heart of the Pirelli judgment was section 247 of ICTA. Subsection (1) provided for the paying subsidiary and the recipient company jointly to make a group income election. Subsection (2) provided:

"So long as an election under subsection (1) above is in force the election dividends shall be excluded from sections 14(1) and 231 …"

176.
In Pirelli UK-resident companies in a group of companies paid dividends to parent companies in the Netherlands or Italy. Their complaint was that section 247 of ICTA did not allow a group income election to be made where the parent company was not resident in the United Kingdom. As a result,

the UK-resident company or its UK-resident subsidiary had to pay ACT in respect of its dividends. The parent companies were not entitled to tax credits under section 231 of ICTA but were entitled to tax credits under double-taxation agreements with the Netherlands and Italy ("convention tax credits").

177.
Their challenge came about in the following manner. In Hoechst, the CJEU ruled that affording groups of companies the right to make a group income election where they were resident in the United Kingdom but denying them that right where the parent companies were not resident in the United Kingdom was contrary to the treaty obligation of freedom of establishment: now article 49 TFEU. The CJEU held that the claimant companies were entitled to compensation for loss of the use of the money paid as ACT between the date of payment and the date when the ACT was used by being set off against the subsidiary company's MCT liabilities. This ruling resulted in claims for compensation and the Pirelli group were selected as a test case for a category of claims in the ACT Group litigation.

178.
The question in Pirelli which we have to consider in this appeal is the first question, namely whether, on the hypothesis that they had been entitled to make a group income election and had done so, the parent companies resident in other member states of the EU would have been entitled to the convention tax credits which they in fact received under the double taxation treaties. The answer to that question determined whether it was necessary to make allowance for the convention tax credits in calculating the compensation due to the UK-resident subsidiaries for the breach of the treaty obligations. If the parent companies were entitled to the convention tax credits, no deduction would be made in respect of those tax credits when calculating the compensation. If they were not so entitled, then in principle allowance would have to be made for those credits in calculating compensation.

179.
The effect of section 247 of ICTA, which provided for the group income election, was that an election dividend was excluded from entitlement to a tax credit under section 231 and from attracting liability to ACT under section 14 as a "qualifying distribution". But Hoechst had the effect that section 247 had to be applied in a circumstance for which it was not designed, so as to give the parent company resident overseas the option of a group income election. The members of the House of Lords addressed the problem through a combination of construing the double taxation agreements and interpreting the statutory provision which gave those agreements effect in the law of the United Kingdom, section 788 of ICTA, which provided for tax relief by agreement with other countries. The relevant provision was section 788(3), which provided:

"(3) Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide - …

(d) for conferring on persons not resident in the United Kingdom the right to a tax credit under section 231 in respect of qualifying distributions made to them by companies which are so resident."

180.
The House of Lords unanimously determined that on the hypothesis set out in para 178 above, the Dutch and Italian parent companies were not entitled to the convention tax credits which they had received, with the result that those credits would have to be taken into account as a countervailing financial benefit in calculating the compensation due to the subsidiary companies for the breach of article 49 of the TFEU. But their Lordships' reasoning differed.

181.
Lord Nicholls, who agreed with Lord Hope, Lord Scott of Foscote and Lord Walker, saw the way to answer the question as one of the purposive interpretation of the relevant provisions of the relevant double taxation agreements, which were so far as relevant in similar form (paras 12-16). The Netherlands Convention had been agreed on the basis that section 247 of ICTA did not allow a non-resident group of companies to make a group income election. The convention now had to be applied in a circumstance for which it had not been designed, namely that a Netherlands-resident company could receive a dividend which had not attracted payment of ACT. If the relevant provision of the Netherlands Convention were given a literal meaning, a parent company resident there would receive a tax credit to which a UK-resident parent was not entitled because of the operation of section 247 of ICTA. There was an implicit assumption in the relevant provision of the Netherlands Convention that the dividend whose receipt attracted a convention tax credit would also have attracted liability to ACT, with the result that that provision did not apply to election dividends.

182.
Lord Hope, who agreed with Lord Nicholls, Lord Scott and Lord Walker, found the answer to the question in the domestic tax legislation as well as in the double taxation agreements. Lord Hope observed that section 788(3)(d) of ICTA gave domestic effect to the arrangements set out in double taxation agreements by conferring a right to a tax credit under section 231 in respect of qualifying distributions. He analysed sections 14, 231 and 247 of ICTA and stated (para 35):

“The payment of ACT was not enacted as a condition that had to be fulfilled before a shareholder could become entitled to a tax credit, as Park J [2003] STC 250, 265-266 para 36 was right to point out. But the link between the two provisions - imposing the liability to ACT and giving the right to a tax credit - could not have been more clearly expressed.” (Emphasis added)

The reason in the domestic context for the exclusion by section 247(2) of the right to a section 231 tax credit was that the tax credit was designed to avoid tax having to be paid twice on the same dividend when the parent company paid tax on its own profits. Where no ACT was payable by a subsidiary under a group income election, there was no risk of double taxation. It was the payment of the ACT that made the giving of the tax credit to the recipient necessary (paras 36-37). He concluded (para 39) that reading sections 231 and 247 together “it is clear that the prerequisite for the giving of a tax credit was the making of a qualifying distribution which was liable to ACT”. The group income election extinguished that liability and with it the right to the section 231 tax credit with the result that there was no entitlement to a tax credit under section 788(3)(d) of ICTA.

183.
Lord Scott, who agreed with Lord Walker, opined that the issue depended upon the construction of the relevant provision of the double taxation agreements in the context of the statutory provisions (para 63). He reasoned (i) that sections 231(1) and 247(2) had the effect that, where a group income election was in force and dividends were paid by a UK-resident company, a section 231 credit could not be claimed by the recipient of the dividends (para 67), (ii) the relevant provision in the double taxation agreements fell to be interpreted as entitling the parent company to a tax credit only if a UK-resident individual, who had received the dividends which it received, would have been entitled to the section 231 credits (paras 68 and 69), and, therefore, (iii) on a proper construction of the double taxation agreements, the Pirelli parent companies would not have been entitled to tax credits in respect of dividends paid to them by the UK holding company as there had been a group income election under section 247 and the UK holding company had not incurred any liability to pay ACT (para 72).

184.
Lord Walker, who agreed with Lord Nicholls, Lord Hope and Lord Scott, saw the correct starting point as being to identify the extent to which the double taxation agreements had been incorporated into domestic law by section 788(3) of ICTA. What the double taxation agreements conferred on persons not resident in the United Kingdom was “the right to a tax credit under section 231 in respect of qualifying distributions made to them by companies which are so resident”: section 788(3)(d) of ICTA. He saw the central question to be the interpretation of the phrase “a tax credit under section 231” in section 788(3)(d), asking (para 100):

“Is it an essential characteristic of ‘a tax credit under section 231’ that it is conditional on a qualifying distribution in respect of which ACT is payable (so that if a company paying the dividend is not liable to pay ACT, there is no tax credit for the shareholder)? Or is the liability to pay ACT simply a practical necessity in the domestic context of a United Kingdom shareholder obtaining a tax credit on the payment of a dividend by a United Kingdom company but not a prerequisite (because of the ‘notwithstanding anything in any enactment’ (section 788(3)) rubric) when the concept of ‘a tax credit under section 231’ is transferred to the international context (or parallel universe) of the DTAs [double taxation agreements]?”

185.
Lord Walker recorded (paras 101-102) that Park J had decided that there was no requirement for ACT to be payable, in a passage to which we will return in para 188 below, and that the Court of Appeal ([2004] STC 130, paras 46 and 47) had agreed with him, reasoning that specific provisions limiting the conferring of tax credits in domestic tax legislation were not intended to qualify the entitlement conferred by the double taxation agreement. Lord Walker considered the question to be a difficult point of statutory construction and disagreed with the judges below because they did not give enough weight to two factors (para 103):

“One is that in applying the DTAs it is necessary to look, not only at their terms, but also at the language of section 788(3)(d), which uses a technical expression of domestic tax law, ‘qualifying distribution’. The other is that the clear scheme of the 1988 Act is that the payment of a dividend should be accompanied by a payment of ACT if a tax credit is to come into existence, and if exceptionally (because of a [group income election]) the payment of a dividend is not accompanied by a payment of ACT, the dividend would not give rise to a tax credit, because of section 247(2). Section 247(2) does not directly affect the meaning of ‘tax credit’, but it does to my mind affect the meaning of ‘qualifying distribution’; a dividend paid under a [group income election] is in terms excluded from section 14(1), and section 231 is in terms made to take effect subject to section 247.” (Emphasis added)

186.
Lord Brown of Eaton-under-Heywood agreed with the reasoning of each of their Lordships.

187.
In our view, Pirelli does not support the Revenue’s case for three reasons. First, Pirelli was concerned with the construction of two tax conventions and the interpretation of section 788(3) of ICTA which gave effect in domestic law to double taxation agreements. Secondly, all of their Lordships were addressing the deemed effect of a group income election on the hypothesis which Hoechst required and which we have described in para 179 above. It was central to their determination that sections 14 and 231 of ICTA were subject to section 247 and were excluded by section 247(2). In other words, there was no entitlement in UK tax law to a section 231 tax credit if there were a group income

election. Thirdly, the recognition in particular by Lord Hope (para 35) and Lord Walker (para 103) that the scheme of the Act envisaged that a shareholder would receive a section 231 tax credit as a result of the paying company having made a qualifying distribution (ie paid a dividend) did not involve any disagreement with Park J's analysis in para 36 of his judgment ([2003] EWHC 32 (Ch)) that it was not a condition of the payment of a section 231 tax credit that there was a liability to pay ACT in amounts that would match the tax credit.

188.
In that paragraph, Park J stated:

"In any case the link between the company's payment of ACT and the shareholder's entitlement to a tax credit, though present as a policy factor to the minds of the architects of the system, is nowhere enacted as a statutory requirement. For example, section 231(1), the main provision in the Act itself which confers tax credits, entitles a recipient of a distribution (typically a dividend) to a tax credit where:

'a company resident in the United Kingdom makes a qualifying distribution and the person receiving the distribution is another such company or a person resident in the United Kingdom, not being a company, …'

There is no requirement there or anywhere else that ACT must have been paid, or at least must be payable. It is probably true that the draftsman in 1972 assumed that, in any case where a recipient of a dividend would be entitled to a tax credit under the predecessor of section 231(1), there would have been a liability on the part of the paying company, or one or more lower tier companies, to pay ACT in amounts which would match the amount of the tax credit. Further, in all the circumstances which the draftsman could realistically have anticipated at the time, his assumption would have been correct. It remains the case, however, that the policy considerations which influenced the architects of the imputation system and the assumptions which the draftsman probably made were nowhere enacted as conditions which had to be fulfilled before a shareholder could be entitled to a tax credit."

189.
Far from disagreeing with this analysis, Lord Hope expressly accepted it in para 35 of his judgment (para 182 above). Lord Scott did not disagree. His identification in para 69 of his judgment of the error in Park J's judgment focused on the following two paragraphs of that judgment, in which Park J discussed the requirement of the Italian double taxation agreement read with section 788(3) of ICTA, and entailed no criticism of his analysis which we have just quoted.

190.
We agree with Park J's analysis of the requirements of section 231. It is not a precondition of the availability of a tax credit under that section that there has been payment of, or a liability to pay ACT. Where a UK-resident company pays a dividend and the person receiving that dividend is a UK-resident company or another UK-resident person, the recipient is entitled to the tax credit which that section mandates. The payment of the tax credit is not a consequence of the payment of ACT on the dividend or of the existence of a liability on the part of a company in the corporate hierarchy to pay ACT. In this regard we respectfully agree with Henderson J in FII (HC) 2 where he stated (para 279): "[t]he obligation to pay ACT on the one hand, and the entitlement to tax credits on the other, were the subject of independent statutory provisions, neither of which was made conditional upon the other". Where, in the circumstances which we are considering, the payment of the dividend is valid but ACT has unlawfully been levied on that distribution, it is the valid distribution that creates the entitlement to the tax credit. The unlawfulness of the levy of ACT has no bearing on the shareholder's entitlement

to the tax credit. In our view, it follows that the tax credits paid to the ultimate shareholders should not as a matter of domestic law be taken into account in the calculation of the claimants' compensation.

191.
Further, as Mr Aaronson submitted and as the Court of Appeal has held in FII CA 2, EU law defeats the Revenue's argument. In order to achieve the equivalent elimination of double taxation of a dividend, which the domestic tax regime was designed to bring about in relation to UK-resident companies, EU law requires that, where a dividend was originally paid by a foreign company, a UK company in receipt of the foreign-sourced dividend which has been subject to tax in the relevant foreign jurisdiction was entitled to receive a section 231 tax credit to the extent that EU law required a tax credit to be given. The Revenue, which had advanced this conforming interpretation of the ACT provisions, sought to appeal to this court the acceptance of its conforming interpretation by the Court of Appeal in FII CA 1 at para 107. This court refused them permission to do so both because they were appealing against a decision which had accepted their submissions and because the decision had formed the basis of subsequent proceedings, including in this court in Prudential. The conforming interpretation is therefore not open to challenge.

192.
The Court of Appeal in FII CA 2 paras 247-249 has correctly held that the section 231 credit, which is the result of the conforming interpretation, not only franked onward dividend payments within the group of UK-resident companies, reducing or eliminating the need for a recipient company to pay ACT, but also provided a credit to the ultimate shareholders. Only thus could the differential treatment of foreign-sourced dividends, which EU law prohibited, be avoided. See para 164 above. The Revenue were therefore obliged by EU law to pay the shareholder credits, notwithstanding that no ACT was paid on the foreign-sourced dividend. For this reason also, the tax credits paid to the ultimate shareholders should not be taken into account in calculating the compensation due to the claimants.

193.
Having reached these conclusions with the result that the Revenue's challenge fails, we do not need to address the further argument, which was issue 18, which asks whether the requirements of EU law in relation to remedy preclude the argument that the Revenue were not enriched.

9. Does it make any difference that the UK group had a non-resident parent which received double taxation treaty credits?

194.
This issue, which was issue 15 in FII (CA) 2, arises in the test claim by FCE. FCE is a UK-resident company. About 78% of its shares are owned by Ford Motor Company or its US-resident intermediate holding companies (which we describe in aggregate as "Ford US") and the balance are owned by Ford Werke AG, a German-resident company which is ultimately owned by Ford Motor Company. FCE was paid dividends by Ford's overseas subsidiaries resident in Germany, Denmark and Austria, on which foreign corporation tax had been paid. FCE in turn paid dividends to Ford US and Ford Werke AG. The payment by FCE of those dividends attracted the payments of ACT which are in issue in this litigation. Ford US were entitled to a tax credit under article 10(2) of the UK-US double taxation convention of 31 December 1973 (SI 1980/568). The credit was calculated as one half of the ACT paid less UK tax, which was computed at 5% of the sum of the dividend plus the half ACT credit. The UK-German double taxation convention made no provision for such a credit, with the result that we are not concerned in this issue with the dividends paid to Ford Werke AG.

195.
FCE has sought repayment of the ACT on the dividends which it paid to its parent companies to the extent that they related to the dividends it had received from the subsidiaries resident in Germany, Denmark and Austria. It is no longer in dispute that the ACT which it paid was unduly levied to that extent. The question which this issue raises is whether the Revenue in calculating the proper restitutionary award can deduct from the amount of overcharged ACT the tax credit which was granted to Ford US.

196.
In FII (HC) 2 the Revenue relied strongly on Pirelli for its assessment of compensation on a group basis in support of their contention that credit should be given for the tax credit paid under the double taxation convention. But Henderson J distinguished Pirelli on two grounds. First, he pointed out that in the FCE claim there was no parallel to the group income election which the Pirelli parent and subsidiary had made. Secondly, Ford US, unlike the EU-resident parent companies in Pirelli, have no rights of establishment protected by EU law. He held (para 241) that FCE was entitled to restitution of the ACT which it paid on the onward distribution of its EU dividend income without having to give credit for the tax credits paid to Ford US.

197.
The Court of Appeal reversed Henderson J’s decision on this issue. In summary, the court accepted the Revenue’s submission that the tax credit under the double taxation convention would never have been paid but for FCE’s payment of the unlawful ACT. The relevant unlawfulness in EU law was the failure of the UK tax legislation to treat a UK company receiving dividends from companies resident in other EU member states on which foreign corporation tax had been paid in the same way as a UK-resident company in receipt of domestic dividends on which ACT had been paid. If the UK tax provisions had operated in a way that was consistent with EU law, FCE should have been in a position in which it could distribute its dividend income, even if derived from subsidiaries resident in other member states, to Ford US without paying ACT, because the foreign corporation tax paid exceeded FCE’s ACT liability on its dividends to Ford US. Had FCE paid those dividends without incurring liability to pay ACT, Ford US would not have received the tax credit under the double taxation convention. The English law of restitution looked to the enrichment of the recipient and the Revenue were entitled to take credit for the tax credits which they would not have had to pay but for the unlawful payment of ACT. The court therefore held that the Revenue could claim a credit against the repayment to FCE of the overpaid ACT in respect of the credits which they had granted to Ford US.

198.
We are persuaded that the Court of Appeal erred in so finding. As we have already explained in our discussion of issues 17 and 18 of FII (CA) 2, section 788(3)(d) of ICTA gave domestic legal effect to double taxation agreements and operated by conferring on a parent company the right to receive a section 231 tax credit in respect of qualifying distributions made to it by companies resident in the United Kingdom. Article 10(2)(a)(i) of the UK-US double taxation convention gives a US-resident parent company an entitlement to “a tax credit equal to one-half of the tax credit to which an individual resident in the United Kingdom would have been entitled had he received the dividend. …”. That tax credit is by virtue of section 788(3)(d) the same section 231 tax credit as an individual resident in the United Kingdom would receive. As we have stated (paras 187-194 above), that tax credit is not conditional upon the company which made the qualifying distribution incurring a liability to pay ACT. On FCE’s payment of the dividends to Ford US the Revenue were obliged to pay that

credit to Ford US regardless of whether FCE incurred a liability to pay ACT in respect of the dividend payments.

199.
This conclusion involves a straightforward application of domestic law, uncomplicated by the adjustments which are required to make the relevant UK tax provisions comply with the principles of EU law.

200.
The claimants’ appeal on this issue therefore succeeds.

10. Are the DV provisions permitted by virtue of the standstill provisions of article 57(1) EC (now article 64(1) of the TFEU) in light of the Eligible Unrelieved Foreign Tax Rules?

201.
This issue, which was issue 3 in FII (CA) 1, is raised in this appeal by the claimants. It is concerned with the interpretation and application of article 64(1) of TFEU (formerly article 57 EC).

202.
Article 63 of TFEU (formerly article 56 EC), as is well known, provides for the free movement of capital and prohibits all restrictions on the movement of capital between member states and between member states and third countries. But that prohibition is subject to article 64(1), which Henderson J in FII (HC) 1 described as “the standstill provision”, which provides:

“The provisions of article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment - including in real estate - establishment, the provision of financial services or the admission of securities to capital markets …”

203.
The context of this question is the Case V charge on dividends from companies not resident in the United Kingdom which existed for many years before 31 December 1993. This charge, as the claimants concede, would be protected by the standstill provision unless legislation after that date introduced a new approach or established new procedures which did not have the effect of reducing or eliminating an obstacle to the exercise of EU rights and freedoms in the earlier legislation. The introduction of new restrictions on those rights and freedoms would not be protected by the standstill provision.

204.
As Henderson J explained more fully in paras 102-107 of FII (HC) 1, as at 31 December 1993 and for some time thereafter, the Case V regime in Chapter II of Part XVIII of ICTA gave a credit for foreign taxes on a source by source basis. The credit was subject to an upper limit equal to the amount of UK corporation tax chargeable on the dividend. As a consequence, unless the group of companies with a UK-resident parent re-organised its arrangements as described below, the underlying foreign tax on a dividend from a country with a higher rate of national corporation tax than the UK rate would be capped at the UK rate, and any excess tax from one source could not be credited against the UK tax liability on a dividend from another source, such as a country with a national corporation tax rate lower than the UK rate.

205.

This disadvantage was, however, mitigated by the practice of “offshore pooling”, by which groups with UK-resident parent companies were free to arrange their affairs so as to pay dividends from low tax countries and high tax countries through a non-resident “mixer” company. A single dividend could then be paid to a UK-resident company from the mixer company with an averaged rate of tax, thereby minimising the loss of double tax credit. This became a standard procedure for most UK multi-national groups and was adopted by BAT which, after the abolition of ACT for dividends paid after 4 April 1999 and its acquisition in that year of the tobacco business of the Rothmans group, used a Netherlands holding company, BAT International BV, to pay its foreign dividends into the United Kingdom.

206.
In 2000 the UK Government announced its intention to abolish the practice of offshore mixing and thereafter introduced the EUFT rules in sections 806A - 806M of ICTA in relation to dividends received after 31 March 2001. The rules are complex but we gratefully draw on Henderson J’s neat summary of them in para 106 of his judgment.

207.
The EUFT rules introduced a “mixer cap” which operated to restrict the amount of underlying foreign tax that could be credited against the liability to UK corporation tax on foreign dividends. The cap applied not only where a dividend was paid by a non-resident company direct to a UK-resident company, but also, and critically, where a cross-border dividend was paid at any earlier stage within the group by one non-resident company to another. The mixer cap limited the credit on the underlying foreign tax to the UK corporation tax rate. Any unrelieved foreign tax (EUFT) would then be eligible for onshore pooling, and could be offset against the UK corporation tax payable on certain dividends from low tax countries. However, as Henderson J recorded:

“The dividends against which EUFT could be offset (‘qualifying foreign dividends’, or ‘QFDs’) excluded certain important categories of dividend, including in particular:

(a) dividends paid indirectly to the UK in respect of which EUFT had arisen at any point in the corporate chain, subject to a right to disclaim the underlying tax concerned in order to prevent EUFT from arising at that point and thereafter ‘tainting’ the dividend; and

(b) dividends paid by a controlled foreign company (‘CFC’) which escaped the application of the CFC rules by pursuing an ‘acceptable distribution policy’ which in practice meant distributing 90% or more of its profits.

Furthermore, the amount of EUFT which could be relieved was subject to an upper limit of 45% of the aggregate amount of the dividend declared and the underlying tax (including any withholding tax incurred by an intermediate company). There were, however, some countervailing advantages, which had not been available under the previous regime. For example, surplus EUFT could be carried back and set off against tax payable on QFDs of the same company in the previous three years, and could also be carried forward indefinitely by the same company or surrendered to another group company.”

208.
Henderson J found that the introduction of the EUFT rules would have increased the UK tax liability of the BAT group by about £60m per year if it had not undertaken a complex restructuring, and that the EUFT rules established new procedures for the relief of foreign tax.

209.

Nonetheless, he concluded that the introduction of the EUFT rules did not cause the protection of the standstill provisions to be lost. He characterised the relevant restriction on the movement of capital to be the exclusion of third country-sourced dividends from the exemption given to UK-sourced dividends by section 208 of ICTA (para 99). He concluded (para 108) that the EUFT rules had not changed the general legislative approach upon which the Case V charge was based. He held that the focus should be on the main features of the structure rather than on fine points of detail.

210.

The Court of Appeal in FII (CA) 1 agreed with Henderson J's analysis, holding (para 84) that the contravention of what is now article 63 of TFEU was the exclusion of third country-sourced dividends from the exemption conferred on domestic-sourced dividends by section 208 of ICTA and that that exclusion had existed on 31 December 1993. Alternatively (para 85), if the restriction were analysed to be that the effective rate of tax applied to domestic-sourced dividends could and would normally be lower than the rate on foreign-sourced dividends, that restriction also existed on 31 December 1993 and continued unchanged thereafter.

211.

The claimants appeal against those findings.

212.

The answer to this challenge lies in the case law of the CJEU which identifies the correct approach to the standstill provision. The starting point, as the Court of Appeal recognised in FII (CA) 1 (para 74), is that the derogation in article 64 of the TFEU is to be interpreted strictly as it is a derogation from the fundamental principle of free movement of capital. In Konle v Austria (Case C-302/97) [1999] ECR I-3099; [2000] 2 CMLR 963, the CJEU was addressing Austrian legislation which was designed to control the acquisition of second homes by imposing administrative authorisation of such purchases, and which exempted only Austrian nationals from the authorisation scheme, and interpreting a temporary derogation from Treaty obligations in respect of national legislation in existence at the time of Austria's accession to the EU in 1995. The pre-accession legislation was passed in 1993 and was replaced after a constitutional challenge by legislation in 1996 after the accession. The CJEU in its judgment on the reference from the Regional Civil Court in Vienna gave advice on the interpretation of the derogation, stating:

"52. Any measure adopted after the date of accession is not, by that fact alone, automatically excluded from the derogation laid down in article 70 of the Act of Accession. Thus, if it is, in substance, identical to the previous legislation or if it is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation.

53. On the other hand, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the time of the accession. That is true of the TGVG 1996 which includes a number of significant differences when compared with the TGVG 1993 and which, even if it brings to an end, in principle, the dual scheme of land acquisition which existed before, does not thereby improve the treatment reserved for nationals of member states other than Austria, since it lays down detailed rules for examining applications for authorisation which are designed, in practice … to favour applications from Austrian nationals.

54. Accordingly, the relevant provisions of the TGVG 1996 cannot, in any event, be covered by the derogation laid down in article 70 of the Act of Accession."

213.
In FII (CJEU) 1, in its discussion of the FID regime and the interpretation of the concept "restrictions which exist" in the predecessor article to article 64 TFEU, the CJEU referred to and confirmed its judgment in Konle at paras 190-192. It stated (para 192): "legislation based on an approach which is different from that of the previous law and establishes new procedures cannot be regarded as legislation existing at the date set down by the Community measure in question …".

214.
The Grand Chamber of the CJEU gave further guidance in Statteverket v A (Case C-101/05) [2007] ECR I-11531; [2009] STC 405. This case was concerned with the predecessor of article 64 TFEU and the concept of "restrictions which exist on 31 December 1993" in that provision. Swedish legislation enacted in 1992 gave an exemption from income tax for distributions by Swedish companies in the form of shares in a subsidiary if certain conditions were met. No such exemption was given to distributions by companies which were not resident in Sweden. The exemption for Swedish companies was repealed in 1994 but restored in 1995. In 2001 the exemption was extended to include distributions by foreign companies resident in the EEA or in any state with which Sweden had concluded a double taxation treaty providing for exchange of information. Advocate General Bot opined that the restriction did not fall within the standstill provision because the exemption had been repealed in 1994 and reintroduced in 1995. The Grand Chamber disagreed, holding that, while the standstill provision required the restriction to have formed part of the member state's legal order continuously since 31 December 1993, the relevant restriction was (para 52) "the preclusion, since 1992, from the exemption … of dividends paid by a company established in a third country outside the EEA which had not concluded a convention with the Kingdom of Sweden providing for the exchange of information" and that restriction "must be regarded as a restriction which existed on 31 December 1993". In other words, the legislation which prevented the non-Swedish company from making such tax-free distributions of shares in its subsidiaries had not altered since 31 December 1993, regardless of the temporary removal of the exemption from Swedish companies and regardless of the amelioration by the 2001 legislation of the position of other foreign companies which met the criteria of that legislation.

215.
This court is therefore enjoined to address the question whether a restriction has existed continuously since 31 December 1993 by reference to the tax regime which governed the foreign-sourced dividends received by the claimants.

216.
In the present case the restriction on the free movement of capital guaranteed by article 63 of TFEU was analysed in FII (CJEU) 1 as qualified by FII (CJEU) 2 as the failure of the UK tax provisions to give foreign-sourced dividends a tax credit which had substantially the same economic effect as the exemption which section 208 of ICTA gave to UK-sourced dividends. To achieve that equivalence of effect, Henderson J in FII (HC) 2 declared that

"The unlawfulness of the Case V charge lay in its failure to provide a dual credit for whichever was the higher of (i) tax at the foreign nominal rate ('FNR') on the gross amount of the dividend, and (ii) the foreign underlying tax actually paid in respect of the dividend subject to a cap at the UK nominal rate of corporation tax."

That ruling on issue 1 in FII (HC) 2 was upheld on appeal by the Court of Appeal and forms no part of the appeal to this court.

217.
While it is correct to say that that failure existed on 31 December 1993 and continued thereafter, such a characterisation of the restriction does not provide an answer to the application of the standstill provision. It may be correct in fact to say that the restriction from which the claimants suffered was the failure to give the foreign-sourced dividends the exemption afforded to domestic-sourced dividends under section 208 of ICTA, as Henderson J did in FII (HC) 1 para 99. Alternatively, one can characterise the restriction as a failure to give foreign-sourced dividends a tax credit at the foreign nominal rate as the equivalent of the exemption given to domestic-sourced dividends: this follows from his declaration in FII (HC) 2 which we have quoted in the immediately preceding paragraph. But the answer does not lie in the selection of an apposite characterisation.

218.
The approach which the CJEU has adopted is different. The CJEU looks at the legislated tax regime to which the claimants were subjected and asks whether that regime had existed continuously from 31 December 1993. It is that tax regime which has brought about the absence of equivalence which is the restriction on the free movement of capital. Thus, in FII (CJEU) 1 the CJEU (para 196) stated:

“article 57(1) EC is to be interpreted as meaning that where, before 31 December 1993, a member state has adopted legislation which contains restrictions on capital movements to and from non-member countries which are prohibited by article 56 EC and, after that date, adopts measures which, while also constituting a restriction on such movements, are essentially identical to the previous legislation or do no more than restrict or abolish an obstacle to the exercise of the Community rights and freedoms arising under that previous legislation, article 56 EC does not preclude the application of those measures to non-member countries …”

219.
A similar focus on the legislative regime which created the restrictions by giving a less favourable tax treatment to foreign-sourced dividends, and an exploration whether that regime has remained the same since 31 December 1993 or has been amended in ways which have reduced those restrictions, can be seen in Statteverket (para 214 above), paras 48-52. In particular, the focus on the continuity of the legal provisions, rather than the characterisation of the restrictions which those provisions created by their lack of equivalence to the provisions relating to domestically sourced dividends, is clear in para 48:

“the words ‘restrictions which exist on 31 December 1993’ presuppose that the legal provision[s] relating to the restriction in question have formed part of the legal order of the member state concerned continuously since that date. If that were not the case, a member state could, at any time, reintroduce restrictions on the movement of capital to and from third countries which existed as part of the national legal order on 31 December 1993 but had not been maintained.” (Emphasis added)

220.
The question whether the standstill provision applies is answered, as it was in Konle (para 212 above) at paras 52-54 by asking whether on the one hand the legislation has remained unchanged or has been amended to reduce the restrictions, with the result that the standstill provision applies, or, on the other hand the legislation has been amended to be based on a different approach or to establish new procedures, in which case it cannot be treated as having been in existence on 31 December 1993. The courts below did not adopt this approach and as a result fell into error.

221.

Adopting the approach mandated by the CJEU case law, it is clear from Henderson J's findings in FII (HC) 1, which we have summarised in paras 209-213 above, that the adoption of the EUFT rules in 2001 did not mitigate the lack of equivalence between the regime for taxing foreign-sourced dividends and that applying to UK-sourced dividends. It is also clear that the EUFT rules involved materially different procedures for the calculation of the tax credits which would be available for foreign-sourced dividends and that the claimants would have incurred a significantly increased tax burden as a result of the new rules if they had not reorganised their group. In our view the only conclusion is that the enactment of the EUFT rules meant that the tax regime governing the foreign-sourced dividends of the claimants was not that which existed on 31 December 1993 and that the standstill provision ceased to have effect as from 31 March 2001 when the EUFT rules were brought into operation.

222.
The claimants' appeal on this issue therefore succeeds.

11. When and to what extent unlawfully charged ACT should be regarded as surrendered?

223.
This issue, which was a component of issue 11 in FII (CA) 2, is raised in this appeal by the claimants. It is a computational issue, like several of the issues which this court considered in Prudential. In FII (CA) 2 the claimants' appeal was dismissed without oral argument because the Court of Appeal was bound by its own judgment in the Prudential litigation ([2016] EWCA Civ 376; [2017] 1 WLR 4031 "Prudential CA"). The claimants and the revenue now agree that some of the matters covered by issue 11 have been determined by this court's judgment in Prudential, in which (in paras 106-121) this court took a different view on issue V in that appeal from that of Prudential CA. The remaining issue which comes before this court in this appeal concerns the appropriate computational method when a parent company surrenders surplus ACT to one or more of its subsidiaries.

224.
The statutory context of this issue, which we have described in summary form in para 10 above, is as follows. Under section 239(1) of ICTA the ACT paid by a company was automatically set off against its MCT liability. If the company did not have sufficient profits and thereby sufficient liability to MCT in the relevant accounting period to use up its ACT, it could carry back the surplus ACT to set off against MCT in an earlier accounting period (section 239(3)) or carry it forward to set off against MCT due in relation to the next accounting period (section 239(4)). Section 240(1) provided a further method of using up surplus ACT. It provided:

"Where a company ('the surrendering company') has paid an amount of advance corporation tax in respect of a dividend or dividends paid by it in an accounting period, it may under this section surrender the benefit of so much of that amount as is available for surrender, or any part of that amount that is available for surrender, to any company which was a subsidiary of it throughout that accounting period."

A parent company, which had paid ACT in an accounting period, could thus surrender so much of its ACT as was available for surrender to any company which was a subsidiary of it throughout that accounting period. Subsection (1A) provided that the surrender took effect on the surrendering company making a claim. By virtue of subsection (2) the surrender had the effect that the subsidiary was treated as having paid the surrendered amounts of ACT which were thereby available to be set off against its own MCT liability.

225.

The claimants submit that the provisions for group income election (sections 247-248) and these provisions for the surrender of surplus ACT to a subsidiary or subsidiaries show that Parliament intended that a group of companies should be able to utilise ACT on a corporate group basis. They submit that the computation of compensation in relation to the utilisation of surplus ACT by means of the surrender under section 240 should operate in the same way as this court has held in Prudential that it should operate in relation to the automatic set off by a company of its ACT against its MCT liability under section 239. A company's ACT in the context of these claims comprised an undifferentiated combination of lawfully charged ACT and unlawfully charged ACT, which was purportedly set off against that company's undifferentiated MCT liability comprising both lawful and unlawful MCT or surrendered to a subsidiary. In the operation of section 239, which addressed the use by a company of its ACT against its own liabilities to MCT, this court held in Prudential that unlawful ACT was to be regarded as having been utilised first against its unlawful MCT liability. The claimants submit that under section 240, which, in their submission, operated the ACT system on a group corporate basis, unlawful ACT was likewise to be treated as having first been surrendered to those subsidiaries which had unlawful MCT against which it would be utilised.

226.
In order to address this submission it is necessary to look in more detail at what this court decided in Prudential, before considering whether the approach adopted in that case can properly be applied to surrenders of ACT within a corporate group.

227.
In Prudential this court addressed questions concerning the utilisation of ACT on the hypothesis that an undifferentiated fund of lawful and unlawful ACT was purportedly set off against an amount of MCT which was itself in part lawful and in part unlawful. In this context, the first question which this court addressed was whether the unlawful ACT in the undifferentiated pool of ACT, which was (purportedly) utilised against an unlawful MCT liability, was to be regarded as a pre-payment of the unlawful MCT liability, or was to be regarded as partly lawful ACT and partly unlawful pro rata. This court decided that a charge to MCT that was unlawful was a nullity because there was no liability to pay that tax. As a result, ACT, whether lawful or unlawful, which the company had paid, could not automatically be set off against unlawful MCT under section 239(1). The court held that the lawful ACT which had not been set off against a lawful MCT liability had remained available to the paying company to be set off against lawful ACT in the same or other accounting periods. The unlawful ACT was to be treated as if it had been purportedly utilised first against the unlawful MCT liability and was therefore recoverable by the claimants, except in so far as, in the absence of sufficient matching unlawful MCT, it was to be treated as utilised against a lawful MCT liability.

228.
In our view this reasoning cannot be applied to the surrender by a parent company to its subsidiary or subsidiaries of surplus ACT under section 240.

229.
It is not disputed that, as the claimants submit, the ACT system was to a degree intended to work on a corporate group basis. As Henderson J explained in FII (HC) 1 (paras 34-36) in his summary of the evidence of Mr Kenneth Hardman, head of tax at BAT Industries plc, BAT would arrange its affairs so that dividends would be paid between UK resident members of the group up to the level of the ultimate parent company under a group income election. As a result, when the ultimate parent company made a distribution to its shareholders, it alone had to pay ACT. The ultimate parent could then take advantage of section 240 to surrender its surplus ACT to whichever companies within the

group had available unrelieved MCT liabilities against which parts of the parent's surplus ACT could be utilised. But the fact that BAT operated in this way does not assist the claimants.

230.
The use of the option of surrender of ACT in section 240 will as a matter of historical fact have involved the parent surrendering parts of its surplus ACT to a particular subsidiary or subsidiaries. Those subsidiaries will have received the surplus ACT, some of which will have been lawfully levied and some of which will not. The statutory mechanism in section 240 deems the particular subsidiary, to which the parent company has surrendered all or part of its surplus ACT, to be the person who has paid the surrendered ACT. That is the extent of the deeming provision. It did not treat the parent company's ACT liability as if it belonged to the corporate group as a whole. It provided for the parent's surplus ACT to be surrendered to particular subsidiaries and to be set off against each subsidiary's individual liability to MCT. As a matter of historical fact parent companies used the option available in section 240 of ICTA to surrender particular sums of their surplus ACT to particular subsidiaries. There is no basis for treating the undifferentiated pool of the parent company's surplus ACT surrendered to each particular subsidiary otherwise than as partly lawful and partly unlawful pro rata.

231.
There is a further practical difficulty with the claimants' suggestion of a regime by which unlawful ACT is first attributed to unlawful MCT. That can be illustrated by an example which the revenue put forward. Parent company A has paid £100 ACT, of which £70 is lawful and £30 unlawful. Company A then surrenders £50 ACT to each of two subsidiaries, Companies B and C. Company B has £20 unlawful MCT and Company C has none. If £20 of the unlawful ACT were matched with the £20 unlawful MCT paid by Company B, it would be necessary to decide which company was to be treated as receiving the residual £10 unlawful ACT. There would be no obvious basis to treat the surrender of that residue of unlawful ACT as made to Company B or Company C.

232.
For these reasons we are satisfied that surrenders of ACT which actually took place should be treated as having been composed of lawful and unlawful ACT on a pro rata basis. The claimants' appeal on this issue fails.

12. Summary and conclusion

233.
As we have dealt with disparate grounds of appeal in this judgment it may be useful to summarise our conclusions at its end. We have concluded:

(1) Matters agreed or conceded as a consequence of related litigation (paras 52-57): effect will be given to those agreements and concessions in the court's order.

(2) Res judicata and abuse of process (paras 58-84): the claimants' submissions are rejected.

(3) The basis on which the claimants are entitled to recover interest for tax which they have paid prematurely in relation to the period of prematurity (issues 10 and 26(a) of FII (CA) 2) (paras 85-118): the Revenue's appeal succeeds.

(4) The remedy in respect of group relief and management expenses (issues 11 and 13 of FII (CA) 1) (paras 119-159): the claimants' appeal succeeds.

(5) Enrichment: whether credits allowed to the ultimate shareholders under section 231 of ICTA are to be taken into account in reduction of the Revenue's enrichment (issues 17 and 18 in FII (CA) 2) (paras 160-193): the Revenue's appeal fails.

(6) Enrichment: whether credits paid to a non-resident parent under a double taxation convention are to be taken into account in reduction of the Revenue's enrichment (issue 15 in FII (CA) 2) (paras 194-200): the claimants' appeal succeeds.

(7) Whether the DV provisions are protected by article 64 TFEU after the EUFT rules were brought into operation in 2001 (issue 3 in FII (CA) 1) (paras 201-222): the claimants' appeal succeeds.

(8) When and to what extent should unlawfully charged ACT be regarded as surrendered to a subsidiary (Issue 11 in FII (CA) 2) (paras 223-232): the claimants' appeal fails.

234.
Having upheld the Revenue's appeal in relation to issue 10 above, we would recall the summary judgment of 22 January 2016 pronounced by Henderson J in Evonik Degussa UK Holdings Ltd v Revenue and Customs Comrs: see para 50 above.