

Neutral Citation Number: [2025] EWCA Civ 1271

Case Nos: CA-2024-000713
CA-2024-000717

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS (REVENUE LIST)
MR JUSTICE RICHARDS
[2024] EWHC 195 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2025

Before:

LADY JUSTICE ANDREWS
LORD JUSTICE NUGEE
and
LORD JUSTICE SNOWDEN

- -

Between:

CA-2024-000713

BAT INDUSTRIES PLC AND OTHERS	**Claimants/ Respondents**
- and -	
(1) THE COMMISSIONERS OF INLAND REVENUE **(2) THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**	**Defendants/ Appellants**

and Between:

CA-2024-000717

FCE BANK PLC	**Claimants/ Appellants**
- and -	
(1) THE COMMISSIONERS OF INLAND REVENUE **(2) THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**	**Defendants/ Respondents**

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David Ewart KC, Elizabeth Wilson KC, Barbara Belgrano, Jennifer MacLeod, Frederick Wilmot-Smith and Ben Blades (instructed by **the General Counsel and Solicitor for HM Revenue & Customs**) for the **Appellants in CA-2024-000713 and Respondents in CA-2024-000717 ("the Revenue")**

Graham Aaronson KC and Jonathan Bremner KC (instructed by **Joseph Hage Aaronson & Bremen LLP**) for the **Respondents in CA-2024-000713 and Appellants in CA-2024-000717 ("the FII Test Claimants")**

Hearing dates: 13, 14 and 15 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8th October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. This is the latest episode in long-running group litigation known as the Franked Investment Income ("FII") Group Litigation. The focus of this litigation is on UK-parented groups with foreign subsidiaries, and on the tax treatment of dividends coming into the UK from abroad. The case has been to the Supreme Court three times already. There have also been three references to the Court of Justice of the European Union ("CJEU")[1]. In one of the appeals to the Supreme Court, Lord Reed and Lord Hodge described the amounts of money at stake as "colossal".

2. The issue at the heart of this appeal, namely: "when did the time for bringing these claims start to run under section 32(1)(c) of the Limitation Act 1980?" also potentially affects the claims made under other group litigation orders in which claimants are seeking the restitution of tax paid under a mistake of law.

3. The FII Group Litigation Order ("the FII GLO") was established on 8 October 2003. Under the FII GLO, as amended from time to time, various claims were selected as test claims for the purposes of determining identified common issues, and the rest were stayed.

4. The claimants seek to recover corporation tax which both they and the Revenue (which expression encompasses both the defendants) believed to be payable at the time when it was paid, but which the CJEU subsequently ruled was paid under a domestic tax regime that was incompatible with certain of the fundamental freedoms guaranteed by EU law. That decision of the CJEU ("FII CJEU 1") was promulgated on 12 December 2006. The incompatibility having been established, the CJEU left it to the domestic courts to provide the claimants with a suitable remedy.

5. The FII GLO embraces challenges to the UK tax regime applicable to dividends received by a UK company from non-UK subsidiaries which was already operative in 1973, when the UK joined what became the European Union. The regime was modified in 1999 by the abolition of the system of advance corporation tax ("ACT") but continued until April 2009. This appeal is concerned with two of the three challenges, which were referred to as "the DV Challenge" and "the ACT Challenge" in the court below.

6. The claimants contended that the domestic regime exposed them to a higher tax liability than would have been imposed if the relevant provisions were compatible with EU law, and that they had paid the additional tax in the mistaken belief that the domestic provisions were compatible with EU law. Therefore, they were entitled to restitution of the overpaid tax or damages in lieu. The Revenue contested the claims. In a judgment delivered in November 2008, following a trial in July that year [2008] EWHC 2893 (Ch); [2009] STC 254 ("FII HC 1"), Henderson J found for the claimants on that issue. He rejected the Revenue's contention that the claims were barred by various provisions

[1] For simplicity I will use the expression "CJEU" throughout this judgment even when referring to judgments delivered at a time when it was known as the European Court of Justice ("ECJ").

of the Finance Acts 2004 and 2007 and by section 33 of the Taxes Management Act 1970.

7. Once it had been established that payments of tax had been made under a mistake of law, the question arose as to whether a claim to recover the tax on the basis of unjust enrichment would be time-barred six years after the mistaken payment was made (as would ordinarily be the case under section 5 of the Limitation Act 1980) or whether on the facts the claimant company which made the tax payments could take advantage of section 32(1)(c) of that Act ("the 1980 Act") to postpone the running of the limitation period.

8. Section 32 of the 1980 Act is entitled "Postponement of limitation period in case of fraud, concealment or mistake". It provides, so far as relevant, as follows:

> "(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act…
>
> …
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the… mistake… or could with reasonable diligence have discovered it."

9. A few years before the decision in FII CJEU 1, it had been established by the House of Lords in *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 that section 32(1)(c) of the 1980 Act applies to payments made under a mistake of law. In those circumstances, the issue which fell to be determined in the context of the FII GLO was: on what date did time begin to run for the purposes of that section? That turned on when the claimants discovered the mistake of law or could with reasonable diligence have discovered it.

10. In his second judgment [2014] EWHC 4302 (Ch) ("FII HC 2") Henderson J held that the date on which the claimants could with reasonable diligence have discovered the mistake ("the date of discoverability") was 8 March 2001, that being the date on which the CJEU had delivered its judgment in joined cases C-397/98 and C-410/98, *Metallgesellschaft Ltd v IRC, Hoechst AG v IRC* [2001] Ch 620 ("*Hoechst*") .

11. The Court of Appeal disagreed [2016] EWCA Civ 1180; [2017] STC 696 ("FII CA 2") holding that the date of discoverability was 12 December 2006, the date on which FII CJEU 1 was promulgated. Both those judgments applied the decision of the House of Lords in *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558 ("*DMG*") in which it was held that in a context in which the relevant point of law is being actively disputed in current litigation, the date of discoverability was the date on which a final appellate court states the law as it was at the time of payment. That analysis assumed that a mistake of law could not be "discovered" unless and until it was established.

12. The Revenue appealed, not only challenging the decision in *DMG* but the decision in *Kleinwort Benson* that section 32(1)(c) was applicable to mistakes of law. The Supreme Court, by a majority, allowed the appeal in part, overruling *DMG*. In a judgment handed

down on 20 November 2020 [2020] UKSC 47; [2022] AC 1 ("FII SC 2") Lord Reed PSC and Lord Hodge DPSC (with whom Lord Lloyd-Jones JSC and Lord Hamblen JSC agreed) concluded that:

> (i) in principle, s.32(1)(c) was capable of applying to claims for restitution based on payments made under a mistake of law;
>
> (ii) however, the test in *DMG* was wrong. It created a logical paradox by permitting a claimant to postpone the inception of the limitation period until after he had already commenced proceedings based on the very mistake of which he claimed to be ignorant. Therefore, time did not start to run from the date on which the CJEU gave judgment in FII CJEU 1, but from an earlier date.
>
> (iii) a mistake of law is discoverable from the point of time when a claimant knows (or could with reasonable diligence know) that he made such a mistake "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ such as submitting a claim to the proposed defendant, seeking advice and collecting evidence" or when "he discovers or could with reasonable diligence discover his mistake in the sense of recognising that a worthwhile claim arises".

13. Those two formulations were said to be no different in substance; each was "helpful and casts light on the other" [193]. The latter formulation was derived from the dissenting speech of Lord Brown in *DMG* (which is quoted and analysed at [180] to [183] of FII SC 2) in which he referred variously to a claimant recognising "that a worthwhile claim arises that he should not after all have made the payment" and learning "that there was a serious legal challenge to the legality of the ACT regime."

14. In a case such as this, where an understanding of the law has been later altered by a judicial decision, the limitation period will run from:

> "the date when it was discoverable by the exercise of reasonable diligence that the basis of the payment was legally questionable, so as to give rise to a worthwhile claim in restitution" (FII SC 2 at [210].)

15. The Supreme Court remitted to the High Court the question of when the mistake of law could have been discovered with reasonable diligence in the FII cases, applying what it had determined to be the correct legal test.

16. Four test claims were selected for the purposes of determining the limitation issues. They are broadly representative of various points in time at which members of the FII GLO brought their claims. The claim by the Evonik Group ("Evonik") was the first in time; it was issued on 12 July 2002. The next of the test cases was the claim by the British American Tobacco Group, ("BAT") which was issued on 18 June 2003, followed by the claim by FCE Bank Plc, ("FCE") issued on 2 March 2007, and finally the claim by the EMI Group ("EMI") issued on 18 December 2009.

17. In a judgment handed down on 5 February 2024 ([2024] EWHC 195 (Ch), Richards J ("the Judge") held that the date on which the claimants could with reasonable diligence have discovered the mistake of law upon which their claims for restitution are based was 6 June 2000, that being the date on which the CJEU handed down its judgment in

Staatssecretaris van Financiën v Verkooijen, Case C-35/98 [2002] STC 654 *("Verkooijen")*. The date which the Judge selected was one for which neither the claimants nor the Revenue contended, at least originally, although it appears from [30] of the judgment that the claimants modified their position in oral argument.

18. The Revenue appealed on the basis that the Judge erred in law and that certain of his fact-findings were irrational. They contend that he applied the test laid down by the Supreme Court in FII SC 2 in a manner that was significantly more favourable to claimants than the Supreme Court intended, and that on a proper application of the test, the claimants could have discovered their mistakes by 11 July 1996 at the latest (i.e. more than six years before the earliest of the test claims.)

19. FCE cross-appealed on the basis that the Judge picked too early a date for the date of discoverability of the mistake on which an ACT Challenge was founded. They complain that the Judge erred in his analysis of *Verkooijen* and that there was nothing in the CJEU's decision or reasoning in that case to suggest that a worthwhile claim could be made that the UK's denial of an FII credit in respect of overseas dividend income breached EU law. They contend that the date of discoverability of such a worthwhile claim was when the CJEU handed down its judgment in *Hoechst* (i.e. the date alighted on by Henderson J in FII HC 2).

20. For the reasons set out in this judgment, I would dismiss both the appeal and the cross-appeal. I consider that the Judge made none of the errors ascribed to him. He was entitled to find that on a proper application of the test laid down by the Supreme Court, on exercising reasonable diligence the claimants could not have discovered the mistake of law before 11 July 1996. That was an evaluative judgement made on the evidence adduced at trial. The only matter on which I would respectfully differ from the Judge is that I consider that if, for the reasons that he gave, a properly advised multi-national group would have recognised that there was a worthwhile claim/would have had sufficient confidence to embark on the preliminaries to litigation when the judgment of the CJEU in *Verkooijen* was published, they would also have done so once the second Opinion of the Advocate General in that case was published, in December 1999. However, that minor difference in the date makes no difference to the outcome of this appeal.

BACKGROUND

21. As the Judge observed at [7], the previous 20 years of litigation in the FII GLO subjected the relevant tax treatment to microscopic scrutiny, and it would not be possible to capture the nature of that scrutiny in any short summary. He helpfully set out in his judgment at [8] the aspects of the regime which were of particular significance to his judgment and to this appeal. For present purposes a broad overview of how the regime operated will suffice.

22. The Income and Corporation Taxes Act 1988 ("ICTA") provided for the system of ACT under section 14 and Part VI ("the ACT provisions") and for the taxation of dividend income from non-resident sources under section 18 (Schedule D, Case V) ("the DV provisions").

    (i) Between 1973 and 2009, corporation tax was levied on UK resident companies under the DV provisions on dividends they

received from non-UK companies, which was subject to credit relief for foreign taxes paid (double tax relief or "DTR"). However, no tax was payable on dividends received by a UK resident company from another UK resident company.

(ii) The DV provisions were repealed for dividend income received on or after 1 April 2009.

(iii) Between 1973 and 1999 a UK resident company was required to account for ACT on any dividends that it paid to its shareholders, but there was an exception for payments to another UK company which was a member of the same group. In that situation a "group income election" could be made which prevented ACT from becoming due.

(iv) If a group income election was not made, and ACT was paid, in principle it would generate a tax credit which could be set off against the paying company's obligation to account for "mainstream" corporation tax on its profits ("MCT"). If the MCT due was less than the ACT paid in a given tax year, the surplus ACT could be carried forward or back by the paying company. It could also be surrendered to a UK resident subsidiary which could use it to offset its own corporation tax liabilities.

(v) The aggregate of the dividend plus the tax credit constituted "franked investment income" ("FII") of the UK resident recipient. Being "franked" by the ACT that was payable when the dividend was declared, FII reduced the obligation of the recipient company to account for ACT on dividends that it paid. A dividend paid by an overseas company could not be treated as FII.

(vi) ACT was abolished for distributions made on or after 5 April 1999.

23. It is unnecessary to set out the nature of the underlying legal challenges in any detail, since they succeeded and it is now common ground that there was an overpayment of tax. Suffice it to say that the test claimants, all of whom are multi-national groups with UK resident parents and EU resident subsidiaries, claimed that the differences between 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 ("the Treaty") and their predecessor articles (now articles 49 and 63 of the Treaty on the Functioning of the European Union ("TFEU")). The "DV Challenge" challenged the difference between the corporation tax treatment of non-UK dividends and the corporation tax treatment of UK dividends; the "ACT Challenge" challenged the proposition that overseas dividends were incapable of constituting FII.

24. As the Judge recognised (at [83] and [97]), both types of challenge raised questions touching on the coherence of the UK's tax system and on double taxation matters. The DV Challenge sought to establish that the UK should refrain altogether from taxing dividends received from EU resident subsidiaries, even though the UK had collected

no tax on the profits out of which those dividends were paid. The ACT Challenge sought to establish that the UK should treat EU dividends as FII, with a consequent reduction in the amount of ACT collected, even though no UK tax was payable on the profits out of which the EU dividends were paid and no ACT had been paid when those dividends were paid. Both challenges therefore struck at the heart of the way in which the UK chose to deal (or not deal) with matters such as economic double taxation, and so with the way in which the UK's tax regime interacted with the tax regimes applicable in other member states.

25. If section 5 of the 1980 Act applied, Evonik's claims would be limited to the period from 12 July 1996, BAT's claims to the period from 18 June 1997, FCE's claims to the period from 2 March 2001 (with the practical effect that all its claims are time-barred), and EMI's claims to the period from 18 December 2003. The limitation issue also affects other GLOs in which claims were made in respect of the overpayment of other types of tax.

THE JUDGMENT

26. The Judge began his consideration of the issue he had to determine by setting out the test he had to apply, as set out in FII SC2. It is worth setting out [21] of the judgment in full:

> "[21] I draw the following conclusions from both FII SC2 and subsequent authorities:
>
> i) The task is to identify when the Claimants could, with reasonable diligence, have discovered "the mistake". That is the mistake that the Claimants have pleaded, and succeeded in establishing, namely that, contrary to what they thought at the time, UK tax law was incompatible with the Treaty (see [199] of FII SC2).
>
> ii) The burden is on the Claimants. Therefore, if the Claimants put forward a time (T) as the earliest date of a constructive discovery, the burden is on them to show that they could not have discovered their mistake earlier than time T without exceptional measures that they could not reasonably have been expected to take ([203] of FII SC2).
>
> iii) The "reasonable diligence" standard is objective. The Claimants are to be judged "by reference to how a person carrying on a business of the relevant kind would act on the assumption that he desired to know whether or not he made a mistake, if he had adequate but not unlimited staff and resources and was motivated by a reasonable but not excessive sense of urgency". ([213(16)] of FII SC2). At [255] of FII SC2 this hypothetical reasonable person was referred to, as a shorthand, as a "well-advised multi-national group in the UK".
>
> iv) Paragraph (iii) above is dealing with a standard of behaviour. The question posed by s.32(1) is what the Claimants (themselves) could have discovered if they had exercised reasonable diligence coming up to that standard ([48] of Males LJ's judgment in *OT Computers Ltd (in liquidation) and others* v *Infineon Technologies AG and others* [2021]

EWCA Civ 501). That invites a consideration of two questions, both of which may shed light on each other:

> a) When, having exercised reasonable diligence, would the Claimants have had sufficient confidence to justify embarking on the preliminaries to the issue of proceedings such as submitting a claim to HMRC, taking advice and collecting evidence ([191] and [193] of FII SC2)?
>
> b) When, having exercised reasonable diligence, would the Claimants have discovered that they had a "worthwhile claim"?

(v) The questions posed in paragraph iv) above are not directed at when the Claimants could have expected that their pleaded claims would succeed (as the discussion in FII SC2 of the "logical paradox" reveals). Nor are they directed at a complex evaluation of chances of success (see [47] of *Gemalto Holding BV and others* v *Infineon Technologies AG* and others [2022] EWCA Civ 782) although, of course, if at time T, all that the Claimants could, with reasonable diligence, have discovered was a claim that would be struck out as disclosing no cause of action, they would not have discovered a "worthwhile" claim.

vi) The question is whether the mistake "could" with reasonable diligence have been discovered rather than whether it "should" have been."

27. The Judge made it clear at [25] that he would not give either of the questions he summarised at [21] iv) any greater significance than the other, given the guidance from the Supreme Court that both formulations were appropriate and each can shed light on the other.

28. The Judge next set out his approach to making relevant findings of fact. At [29] he identified four issues that he needed to address:

> i) What steps would a well-advised multi-national group based in the UK have taken, throughout the period under enquiry, to seek to discover whether the provisions of UK law that are the subject of the DV Challenge and the ACT Challenge ("Relevant UK Law") were compatible with the Treaty on the hypotheses summarised in paragraph 21 iii) above? To the extent those steps would include taking advice from an appropriately qualified adviser or advisers (the "Appropriate Adviser"), what are the characteristics of that Appropriate Adviser, noting that the characteristics of that adviser might change over time?
>
> ii) What would the Appropriate Adviser have known, or believed throughout the period material to the enquiry, noting that knowledge and beliefs can change and evolve over time?
>
> iii) What would an Appropriate Adviser have advised about the possibility that the Relevant UK Law was not compatible with the Treaty (i.e. the pleaded mistake on which the Claimants rely)

throughout the period under enquiry? Again, it is relevant to note that the hypothetical advice could change over time.

iv) In the light of the answers to the previous questions, when could the well-advised UK multi-national group have either discovered a "worthwhile claim" or had the confidence to embark on the kind of preliminaries summarised in paragraph 21 iv)a)?

29. At [31] the Judge explained the steps he had taken to avoid being unduly influenced by hindsight, identifying certain areas of the parties' cases where that risk arose.

30. At [32] the Judge found that a well-advised multi-national exercising reasonable diligence to ascertain whether it had a worthwhile claim would have had nothing like the wealth of material available to it that was analysed in minute detail by the experts called by the parties. He found that neither an Appropriate Adviser nor a well-advised multi-national would perform anything like that kind of detailed analysis when considering whether there was a worthwhile claim. Instead they would be guided by a high-level appreciation of relevant legal principles, in the expectation that a more detailed analysis would follow the identification of a worthwhile claim.

31. The parties had been given permission to call expert evidence on the subject of "how legal thinking on whether the UK tax treatment of dividends received by UK-resident companies from non-resident subsidiaries in the form of ACT on subsequent distributions and tax on dividend income was compatible with EU law developed in the period to 18 December 2003". The Judge preferred the expert evidence of Mr Gammie, the Claimants' expert, to that of the Revenue's expert, Professor Barnard, among other reasons because Professor Barnard had no expertise in tax matters, whereas Mr Gammie was able to offer expert opinion evidence from the standpoint of a tax practitioner (with expertise in both tax and EU law) on the thinking of tax advisers at all relevant times.

32. The Judge found that the well-advised multi-national exercising reasonable diligence would have taken professional advice as to whether a DV Challenge or an ACT Challenge would be worthwhile (in the sense explained in FII SC2). That professional advice would be given by an adviser or team of advisers having expertise in both the UK tax system applicable to domestic and overseas dividends and in EU law matters. The Judge then considered what such an Appropriate Adviser would have known or believed at different points in time. At [63] he found that the Appropriate Adviser would have been aware at all material times that direct tax was not an enclave to which Treaty freedoms were inapplicable. However, in the period prior to July 1996 there was nothing in the academic or professional literature to suggest that Relevant UK Law was incompatible with Treaty freedoms.

33. The Judge went on to find at [70] that an Appropriate Adviser would not have advised that there was a "worthwhile claim" if asked that question in the period prior to July 1996. At [71] he accepted Mr Gammie's evidence as to the state of legal thinking at that time (namely, that there were fundamental impediments to such a challenge) the key points being that in 1996:

(i) there was an accepted understanding that distortions caused by cross-border dividend taxation systems could only be addressed

by legislation at Community level or by individually negotiated double-taxation treaties;

(ii) the position of a non-UK EU resident subsidiary of a UK parent was not regarded as "comparable" to the situation of a UK subsidiary of a UK parent when it came to evaluating whether the difference between the treatment of UK and non-UK dividends amounted to impermissible discrimination, and

(iii) there was a consensus that the concept of the "cohesiveness" of the UK's tax system set out in *Bachmann* v *Belgian State* (Case C-204/90) [1992] ECR 1-249 ("*Bachmann"*) precluded the possibility of such a challenge.

34. The Judge accepted that the decision of the CJEU in *Finanzamt Koln-Altstadt v Roland Schumacker* (C-279/93) [1996] QB 28 ("*Schumacker*") would have been of real interest to the Appropriate Adviser. That case concerned a Belgian national, resident in Belgium, whose entire income was derived from his employment in Germany, who successfully claimed that he should be treated for income tax purposes by the German tax authorities in the same way as a German resident taxpayer. The Judge noted Mr Gammie's acceptance that this case was "an invitation to probe the extent to which member states were exercising their competence in direct tax matters in a manner that was compatible with EU law." The bringing of the *Hoechst* claims in the UK would also have caught that Adviser's attention. However, for the reasons set out in detail at [93] to [101], the professional consensus described by Mr Gammie was not undermined by those developments.

35. As the Judge pointed out at [95], contemporaneous writing on *Schumacker* emphasised that it set out an exception to the general rule that residents and non-residents were not comparable for direct tax purposes. At [96] and [97] he accepted Mr Gammie's evidence that the *Hoechst* case would have been perceived at the time as a challenge of a very different nature to the ACT and DV Challenges which raised no questions touching on double taxation or the coherence of the UK tax system. At [98] he referred to a 1994 commentary by Professor Tiley which supported the view at that time that the relevant difference in tax treatment could be justified on grounds of "cohesiveness" of the domestic tax system (the principle applied in *Bachmann*). The Judge concluded that section of his judgment by reiterating at [106] that if a well-advised multi-national had consulted an Appropriate Adviser in July 1996, the advice would have been that there was no worthwhile claim.

36. The Judge addressed the judgment of the CJEU in *Verkooijen* at [110] to [116]. That case concerned a national tax system in which dividends distributed by companies established in the Netherlands were subject to a deduction of tax at source. If this deduction was made, the Netherlands taxpayer who was liable to income tax on the dividends obtained a limited, relatively modest, exemption from tax. This was apparently designed as an incentive to invest in Netherlands companies. Mr Verkooijen held shares in the parent company of his employer, which was established in Belgium. He received a dividend on those shares from which a deduction of tax had been made at source in Belgium. He complained that he had not been allowed the exemption that he would have received had the dividend been paid on shares in a Netherlands company, and that this was unjustified discrimination.

37. The CJEU held that this difference in treatment was an unlawful restriction on the free movement of capital. Unlike *Bachmann*, in which there was a direct link between the granting of a tax advantage and the offsetting of that advantage by a fiscal levy, both of which related to the same tax and the same taxpayer, there was no link between the grant to shareholders resident in the Netherlands of income tax exemption in respect of dividends received, and the taxation of the profits of companies with their seat in a different Member State, Belgium. They were two separate taxes levied on different taxpayers. The fact that the Netherlands would lose tax revenue by granting such an exemption in respect of foreign dividends was not an overriding reason in the public interest which could be relied upon as justification for a measure which was in principle contrary to a fundamental freedom.

38. The Judge decided that the CJEU judgment in *Verkooijen* was significant because the reasoning adopted by the court struck at the heart of the professional consensus and thereby "dismantled" it, for reasons he set out at [115] and [116], but which are perhaps best expressed in a later passage at [133]:

> "133. The judgment in *Verkooijen* would significantly have undermined the professional consensus that Mr Gammie described. In particular:
>
> i) Despite the aspect of the consensus described in paragraph 71.i), the CJEU felt able to declare the way in which the Netherlands had decided to address issues of double taxation on cross-border dividend flows to be incompatible with Treaty freedoms even in the absence of harmonised action throughout the EU.
>
> ii) Despite an express invitation by the governments of the UK and the Netherlands, the CJEU declined to conclude that the situation where Mr Verkooijen received a dividend from a Netherlands company was not comparable with the situation where he received a dividend from a company resident in Belgium. That clearly called into question the aspect of the consensus described in paragraph 71.ii).
>
> iii) The CJEU expressly rejected arguments based on the "cohesion of the tax system". In their closing submissions, the Claimants characterised the CJEU's reasoning as "short and a little wooden" but, whatever the quality of its reasoning, the judgment clearly dented the aspect of the consensus described in paragraph 71.iii)."

39. Considering the period between 1996 and the decision in *Verkooijen*, the Judge regarded it as significant that there was no written material (authored by either academics or practitioners) that was starting to question the consensus after 11 July 1996. Even in the immediate aftermath of the CJEU's decision in *Verkooijen* on 6 June 2000, commentators were not suggesting that this decision had confirmed something that people had already started to suspect, namely that DV Challenges or ACT Challenges were worthwhile. At [121] the Judge referred to an article written in 1998 by a Swedish academic, Professor Lodin, which raised a number of the issues that the

CJEU came to consider in *Verkooijen*, but concluded that discriminatory tax rules, such as those dealing with cross-border dividends, should be amended in the interests of ongoing European economic integration. Professor Lodin did not suggest that those rules were already incompatible with Treaty freedoms.

40. The Judge rejected the Revenue's argument that because Mr Verkooijen (and those advising him) had sufficient knowledge to bring his claim in the Netherlands, a well-advised multi-national in the UK using reasonable diligence could also have realised that the CJEU might decide that the situations of the EU resident subsidiary and the UK resident subsidiary were "comparable" in this context, and/or reject the application of the concept of "cohesiveness" as a justification for the difference in treatment between them. That argument, in simple terms, was that if a Dutch lawyer could discover a worthwhile basis for challenging the legality of measures of this type on the basis of incompatibility with Treaty freedoms, then so too could a UK lawyer.

41. The Judge accepted Mr Gammie's evidence that thinking in mainland Europe on the potential for CJEU decisions on Treaty freedoms to influence domestic direct tax systems was at that time well ahead of thinking in the UK. He held that even if practitioners in the Netherlands would have thought that Mr Verkooijen had a worthwhile claim before the CJEU gave its judgment, an Appropriate Adviser in the UK would not have thought the same.

42. As to whether an Appropriate Adviser would have realised that there was a worthwhile challenge to the Relevant UK Law as a result of seeing the way in which the case was put in *Verkooijen*, the Judge found that an Appropriate Adviser would not have been aware of the *Verkooijen* proceedings until at least the publication of the Opinion of the Advocate General. There were in fact two such Opinions, delivered on 24 June 1999 and 14 December 1999 respectively. In the earlier Opinion, the Advocate General considered that in principle the measure complained of was an obstacle to free movement of capital and freedom of establishment, but that it could be justified as being necessary to ensure the cohesion of the tax system (as in *Bachmann*). However, that view (which was in line with the third limb of the consensus described by Mr Gammie) was based on a misunderstanding of how the system operated in the Netherlands. In the second Opinion, after the misunderstanding had been corrected, the Advocate General distinguished *Bachmann* on the basis ultimately accepted by the CJEU, namely, that there was not a direct link between the tax, the exemption, and the tax deduction, which was an essential ingredient of justification on grounds of cohesiveness.

43. Finally the Judge rejected the argument that the date on which a claimant could have discovered they had a worthwhile claim on an ACT Challenge was different from, and later than, the date on which they could have discovered that they had a worthwhile claim on a DV Challenge. He held that because the judgment in *Verkooijen* was inconsistent with a substantial proportion of the professional consensus that Mr Gammie had described, that in itself would have given a well-advised multi-national sufficient confidence to embark on the preliminaries referred to in paragraph [21] iv) a) of the judgment in respect of both types of challenge. He said at [134] that he would have needed some clear basis, grounded in contemporaneous evidence as to the state of legal thinking, for concluding that, despite the clear dent to the professional consensus that must have arisen following the *Verkooijen* judgment, a well-advised multi-national would have concluded that there was no worthwhile ACT Challenge on 6 June 2000. The claimants' evidence was insufficient for him to reach that conclusion.

THE REVENUE'S APPEAL

44. The Revenue appealed on four grounds, namely:

    i) The Judge misapplied the test set out in FII SC 2. He required a greater level of certainty about the truth of the law for the date of discoverability than the Supreme Court envisaged.

    ii) The Judge adopted a flawed approach to ascertaining the date of discoverability. In asking what advice an "Appropriate Adviser" would have given, the Judge erred in finding that such an adviser would have conducted a "high level" analysis, in assuming that such an adviser would have been assisted by the lack of any publicly available consideration of the issue in question, and in relying on the consensus among UK tax advisers to the exclusion of the views of EU law practitioners;

    iii) There was no rational basis for the finding that there was a professional consensus that a DV Challenge and/or an ACT Challenge would not be worthwhile, nor for the finding that the consensus was "dismantled" by the judgment in *Verkooijen.*

    iv) The Judge did not take account of all relevant evidence.

45. To the extent that any challenge is made to the Judge's fact-findings based on his evaluation of the evidence, as Lewison LJ said in *Volpi v Volpi* [2022] EWCA Civ 464 at [2]: "the approach of an appeal court to that kind of appeal is a well-trodden path." He then set out a series of well-settled principles derived from numerous authorities of the Supreme Court and Court of Appeal, including *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 and *Perry v Raleys Solicitors* [2019] UKSC 5; [2020] AC 352, which are worth repeating in the light of the nature of the Revenue's case, particularly on Grounds 3 and 4:

    i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

    ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

    iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

    iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced

> account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

46. Lewison LJ went on to say at [4]:

> "4. Similar caution applies to appeals against a trial judge's evaluation of expert evidence: *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22. It is also pertinent to recall that where facts are disputed it is for the judge, not the expert, to decide those facts. Even where expert evidence is uncontroverted, a trial judge is not bound to accept it: see, most recently, *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, [2022] 1 WLR 973 (although the court was divided over whether it was necessary to cross-examine an expert before challenging their evidence)."

47. Grounds 1 and 2 are inextricably linked. It was accepted by Mr Ewart KC, on behalf of the Revenue, that the Judge correctly set out the test articulated by the Supreme Court, but he contended that in substance he failed to apply it. Four points were made in support of that submission, namely:

> i) The Judge did not analyse in detail the meaning of "worthwhile claim" and whatever meaning he gave it was wrong and set the bar for the date of discoverability too high;
>
> ii) The Judge mixed up what a claimant *could* have discovered and what they *would* have discovered and failed to focus on the former, which was the correct test;
>
> iii) The Judge presented the question as being a search for the date of "constructive discovery" which was unhelpful, as "constructive knowledge" usually connotes a situation where someone ought to know something rather than when they could have known it;
>
> iv) The Judge failed to give proper weight to the burden of proof.

In my judgment all those criticisms are unsustainable. None of the Revenue's submissions came anywhere near establishing that the Judge misdirected himself in law; those submissions failed to grapple with the quintessentially evaluative nature of the test that the Supreme Court had set.

48. There is no need to dwell on criticisms (iii) and (iv) of Ground 1, which were not developed by Mr Ewart in his oral submissions. The Judge used "constructive discovery" as a shorthand for the point at which the claimants could with reasonable diligence have discovered their mistake, as he stated at [18] (i.e. what is referred to elsewhere as "the date of discoverability"). He made it clear at [21] vi) that the question was not whether the mistake *should* have been discovered earlier, and he did nothing in his judgment that would indicate that he had treated that as the test. Whilst it might have been better if the Judge had continued to use "date of discoverability" instead of choosing terminology which means something different in another context, there was no confusion about what he meant. Indeed, there are examples of similar language being used within FII SC 2 itself, see e.g. [195] and [236]. The Judge was entitled to approach the matter in the way in which he did.

49. As to the burden of proof, the Judge correctly directed himself at [21] ii) and applied that direction consistently throughout the judgment, see for example [117] and [129].

50. I shall therefore turn to consider the remaining facets of Ground 1, which were developed orally by Mr Ewart in conjunction with Ground 2.

51. Having set out at [21] iv) a) and b) the two ways in which the Supreme Court had put the test at FII SC 2 [193], the Judge stated in terms that he was not going to give either any greater significance than the other. He was as good as his word (as demonstrated for example at [139] and [140]). There was no need for the Judge to carry out a detailed analysis of what was meant by a "worthwhile" claim, and there would have been obvious dangers in seeking to paraphrase a test that has been laid down by the Supreme Court. All the sub-paragraphs of [21] indicate that he understood very well what the Supreme Court meant, and that he was not equating "worthwhile" with having a good prospect of success (let alone with thinking you were going to win).

52. Perhaps the simplest and clearest explanation of what the Supreme Court meant by a "worthwhile claim" appears in FII SC 2 at [178]:

> "It is therefore *possible to investigate how legal thinking on a particular question* (for example, in the present case, whether the UK tax treatment of dividends received by UK-resident companies from non-resident subsidiaries was compatible with EU law) *developed over time, and to ascertain, by means of evidence,* the time by which a reasonably diligent person in the position of the claimant (such as, in the present case, a UK-based multi-national company) could have known of a previous mistake of law, *to the extent of knowing that there was a real possibility that such a mistake had been made, and that a worthwhile claim could therefore be made on that basis*…" [emphasis added].

That is precisely the exercise which the Judge carried out.

53. At one stage the Revenue sought to equate a "worthwhile claim" with "a claim that is worth *investigating*," though Mr Ewart resiled from that position to an extent in his oral submissions. He was right to do so, as that is plainly not what the Supreme Court was referring to. They meant a claim which is worth raising/pursuing (in the sense of being legally, as opposed to economically, viable). The mere identification of a possible legal

argument that the payment had been made under a mistake of law would not suffice. A claimant would not have sufficient confidence to embark on the preliminaries to litigation or to submit a claim to HMRC for repayment of the tax, if he or his advisers had not yet taken any steps to investigate whether the argument would even get off the ground.

54. Any scintilla of doubt about this is dispelled by the express espousal by the Supreme Court in FII SC 2 of what was said by Lord Walker at an earlier stage of this litigation, when he referred to the time when "a well-advised multi-national group based in the UK would have had *good grounds for supposing that it had a valid claim to recover* ACT levied contrary to EU law" (see FII SC 2 at [211] and [255]) [Emphasis added]. It would not have good grounds for supposing that it had a valid claim if it was told by an Appropriate Adviser that the argument was hopeless or that such a claim was vulnerable to being struck out. To the extent that the Revenue's arguments under either Grounds 1 or 2 involved the proposition that the Appropriate Adviser would be tasked with giving advice upon whether a claim was worth investigating to see if it was worthwhile pursuing or raising with the Revenue, they were based on a fallacious premise.

55. Although the Supreme Court referred to a "well-advised multi-national group" without spelling out what was meant by "well-advised", it is self-evident that in order to discover whether there was a "real possibility" that a payment of tax was made under a mistake of law, (or that the basis for the payment was "legally questionable") and thus recognise that a claim would be worthwhile pursuing, or to feel confident enough about it to embark upon the preliminaries to litigation, one would need to take legal advice from a suitably qualified lawyer or lawyers. That would be part and parcel of the exercise of reasonable diligence.

56. Consequently, when in FII SC 2 Lord Reed and Lord Hodge referred to the time at which a claimant, having exercised reasonable diligence, would have had sufficient confidence to justify embarking on the preliminaries to the issue of proceedings such as submitting a claim to HMRC, taking advice and collecting evidence, the "advice" to which they were referring must have been something other than the legal advice that is a necessary ingredient of the exercise of reasonable diligence. The advice at the "preliminaries" stage would no doubt include advice as to the prospects of success, possibly involving some form of risk/benefit analysis, which would require a more in-depth analysis and consideration of the merits of the legal argument, as the Judge envisaged at [32].

57. Limb (ii) of the Revenue's criticism under Ground 1 involved the type of pedantic textual analysis of the judgment that was rightly deprecated in *Volpi v Volpi*. Upon carrying out that analysis it was also demonstrably unjustified. There are references in the judgment to what the claimants "would" have known or "would" have been advised, but it is clear from reading the judgment as a whole that the Judge applied the correct test, and that there was no confusion about what the claimants had to prove, namely, that they could not have discovered (by exercising due diligence) that they had a worthwhile claim earlier than a particular date. He did not require the claimants to have some greater degree of certainty about the truth of the law than the Supreme Court did.

58. If one asks, what *could* have been found out by a claimant exercising reasonable diligence? the answer is: what an Appropriate Adviser *would* have told them (and

therefore what they *would* have discovered about the viability of the claim in consequence of that advice). Lord Reed and Lord Hodge themselves refer to "the point in time when the test claimants could with reasonable diligence have discovered, *to the standard of knowing that they had a worthwhile claim*, that they had paid tax under a mistaken understanding that they were liable to do so" (FII SC 2 at [255]). [Emphasis added].

59. In determining whether the well-advised multi-national *could* have discovered with reasonable diligence that there was a worthwhile claim, or (to use the alternative formulation) whether it *would* have had sufficient confidence in a prospective ACT Challenge or DV Challenge to embark upon the preliminaries to litigation, it was necessary to investigate what (initial) legal advice it *would* have received at the relevant time from an appropriately qualified adviser or advisers who were sufficiently expert and competent to be able to provide it – to use the Judge's shorthand, an Appropriate Adviser – and therefore what the claimant *would* have known in consequence of taking that advice.

60. As the Supreme Court recognised, that in turn would depend on what such an adviser would have known and believed about the state of the law, and what the state of professional thinking (both among academics and practitioners) was *at that time*, without using hindsight based on later developments in the law and in legal thinking. The Judge was astute to avoid this trap. As he said at [28]:

> "It is all too easy to make assertions as to what could have happened in the light of knowledge of the ultimate outcome of the litigation. Assertions as to what a well-advised multi-national could have discovered between 20 and 30 years ago need to be tested carefully against evidence of what people were thinking and doing at the time."

61. How legal thinking developed over time, and therefore what the law was thought to be at a particular time, are questions of fact. One difficulty in the present case was that it was established on the evidence that nobody in the period with which the court was concerned actually considered the specific legal issue which, for these purposes, the court had to assume the multi-national company would have asked the Appropriate Adviser to advise it upon.

62. If such advice had been sought, in order to answer the question, a competent adviser would have needed to carry out the type of research that all lawyers would when asked to give an initial opinion on a point of law. They would no doubt have looked at the leading textbook, Farmer & Lyal on EC Tax Law, at academic writings, and at such of the case law as they considered to be relevant, to ascertain whether there was a viable argument that the provisions under which the charges to tax were made were incompatible with EU law, or whether the carve-out which gave Member States a wide degree of autonomy over matters of this nature would apply. On the Judge's findings, they would have found nothing in any commentaries or textbooks to support the contention that the provisions in question were incompatible with EU law, and some limited evidence pointing the other way. He found that, as at July 1996 there was no obvious "general direction" in the CJEU's jurisprudence [80] – [90] (an assessment with which I respectfully agree). Against that background, the question of what the Appropriate Adviser would have told the multi-national company is a question of fact.

63. The Judge accepted the evidence of Mr Gammie that there was a professional consensus that there were three fundamental difficulties facing any argument of this nature, which he identified at [71]. Based on that evidence the Judge found as a fact at [70], reiterated at [85] and [106], that in July 1996 an Appropriate Adviser would have advised that there was no worthwhile claim. He was entitled to do so, based on the evidence of the state of legal thinking at that time. Mr Gammie was particularly well-qualified to give direct evidence on that subject and about how (if at all) legal thinking developed in the light of the various relevant decisions of the CJEU. He had been a partner in Linklaters & Paines for ten years, specialising in tax matters (particularly cross-border corporate taxation) before leaving in 1997 to join the tax bar. He also had a distinguished academic career in the UK and abroad, with expertise in tax law and European law. He had taught and written on those subjects during his period as Professor at the University of Leiden between 1998 and 2019. He also sat as a fee-paid judge in both the First-Tier Tribunal and Upper Tribunal (Tax Chamber).

64. The Judge did not just take Mr Gammie's evidence about the professional consensus at face value, but tested it rigorously against all the contra-indications argued for by the Revenue. He found support for it in a passage in Chapter 16 of the contemporaneous edition of Farmer & Lyal (a Chapter entitled "The Prohibition of Discrimination and the Fundamental Freedoms: Their Impact in the Sphere of Direct Taxation") which he quoted at [81]; and in the Ruding Committee's report, as well as to some extent in the Parent/Subsidiary Directive, with which the UK's system was compliant, and which he addressed at [84].

65. All these sources supported Mr Gammie's evidence of a general perception (even among the distinguished members of the Ruding Committee) that the problem of double taxation arising from conflicts of tax jurisdiction must be resolved by convention or harmonisation. The remit of the Ruding Committee was to consider every means by which the frictions (i.e. detrimental effects on business) of cross-border flows could be reduced, and yet there was no suggestion in its report that the answer lay in the Treaty freedoms, but rather, an assumption that there would have to be Community-wide measures. Whilst it is true that case-by-case challenges based on the Treaty freedoms would not give rise to a Community-wide solution to the problem, that does not blunt the force of the point that the Ruding Committee report does not suggest that the discriminatory taxation of dividends from profits earned in another Member State was contrary to EU law. Insofar as the Revenue sought to suggest otherwise, I respectfully disagree. What the Judge found was also consistent with what was said at [34] of FII SC 2.

66. In those circumstances, the Revenue faced an uphill struggle in establishing that the Judge was "plainly wrong" to make the fact-findings that he did. They sought to get around this difficulty by criticising both the Judge's use of the concept of an Appropriate Adviser and his findings as to the approach that the Appropriate Adviser would have taken. It is convenient to consider these aspects of Ground 1 in conjunction with Ground 2 of the Grounds of Appeal, which contends that the Judge adopted a "flawed approach" to how an Appropriate Adviser would have behaved and that this led to a mistake in his analysis of the date of discoverability.

67. At one stage in his oral submissions Mr Ewart went so far as to describe the Judge's findings at [58] to [65] as to what the Appropriate Adviser would know or believe, as "legally irrelevant" to the question whether the mistake of law could have been

discovered with reasonable diligence. He submitted that the Court was in as good a position as the Judge to evaluate the case law of the CJEU and decide, based on the principles established at the time, and such contemporaneous commentaries as existed, whether there was a viable argument that the Relevant UK Law was incompatible with EU law. He asserted that there should be no difference between what a judge would conclude was the legal position at the time and what the well-advised multi-national would have been advised at that time.

68. Quite apart from the fact that this argument appears to me to go well beyond the scope of the Grounds for which permission to appeal was granted, it flies in the face of the evidence-based evaluative exercise which the Supreme Court had in mind at FII SC 2 [178] and [255] which, as I have said, was the exercise which the Judge carried out. If Mr Ewart's submission were right, the Supreme Court would have carried out the exercise for itself. Instead, it made it clear that this was a matter which could not be decided in the abstract and which required evidence of the very nature that Mr Gammie gave, and was pre-eminently qualified to give.

69. Mr Ewart took issue with the Judge's finding at [32] that an Appropriate Adviser would have been "guided by a high-level appreciation of relevant legal principles" and argued that any such adviser would have conducted an analysis based upon the cases already decided by the CJEU at the relevant time, particularly *Commission v France,* Case C-270/83 [1986] ECR 273 ("*Avoir Fiscal"), R v Commissioners of Inland Revenue, ex parte Daily Mail,* Case C-81/87 [1989] QB 446 *("Daily Mail"); R v Inland Revenue Commissioners, ex parte Commerzbank*, Case C-330/91 [1994] QB 219 *("Commerzbank")* and *Bachmann*. But the Judge was not suggesting that the Appropriate Adviser would not have considered the case law. The point he was making was that at the stage with which he was concerned - i.e. before one got to the preliminaries to litigation - where the advice which was being sought was designed to enable the claimant to decide if it was worthwhile embarking on those preliminaries, the Appropriate Adviser would not have carried out the same in-depth analysis of vast quantities of wide-ranging materials that the experts carried out. The Adviser would have endeavoured to extract the relevant principles from the decided cases and apply those principles in order to decide whether the basis of the payment was legally questionable. There is nothing objectionable about that approach.

70. The Revenue also contended, as they did below, that the consensus referred to by Mr Gammie was only in the UK and that it was relevant to have regard to thinking elsewhere in the EU. Quite apart from the fact that the members of the Ruding Committee were not all from the UK, and the editors of Farmer & Lyal are distinguished EU lawyers, the Judge answered that point definitively at [86]. He found that even if the well-advised multi-national based in the UK would have sought advice from EU lawyers as well as UK tax specialists (albeit, I interpolate, that they could have approached Mr Gammie, who was qualified to give advice both on tax and on relevant EU law) the overall advice it received would inevitably have to take into consideration the specific detail of the UK tax regime in order to determine the question of comparability, and that would engage the professional consensus. He was entitled to make those fact-findings, which cannot be disturbed on appeal.

71. In any event, the Judge did address all of the cases relied upon by the Revenue in his judgment. He referred to *Avoir Fiscal*, *Daily Mail* and *Commerzbank* at [63] and *Bachmann* at [71], and he reached a view that was properly open to him as to what

could be usefully extracted from them. He had well in mind the evidence of the Revenue's expert Professor Barnard, which sought to draw certain conclusions from those and other authorities, which he expressly rejected at [67] and [68] and [89] to [93], preferring the evidence of Mr Gammie. He found nothing in the authorities relied on by the Revenue which would have supported the argument that the payments of tax by these claimants were made under a mistake of law. It was not good enough to say that the authorities demonstrated that direct taxation might in some circumstances have an impact on Treaty freedoms. That, in itself, would not be enough to establish the incompatibility of the Relevant UK Law with EU law.

72. The fundamental problem with the analysis of the cases upon which the Revenue relied was that there was nothing in any of those cases which suggested that in the context with which we are concerned, the situation of a non-UK EU resident subsidiary paying a dividend to a UK parent was comparable with or might be compared to that of a UK subsidiary paying a similar dividend (as the Judge pointed out at [90]). In the DV cases the foreign dividend income had been subject to overseas tax, not to UK tax. In the ACT cases the income in the UK had been subject to ACT but the non-resident income had not been.

73. The court was referred to passages in Mr Gammie's cross-examination in which Mr Gammie not only took the clear view that the situations were not comparable but stated that he was not just reflecting his personal view but reflecting his understanding from all his contacts (both in practice and other contacts) as to what the general view would have been at the time. Mr Gammie's evidence was that if someone hypothetically asked the Appropriate Adviser: "have I paid tax in circumstances where I shouldn't have paid tax?" the answer would be "no, because I don't think the situation is comparable." In other words, an argument that the Relevant UK Law was incompatible with EU law was not regarded at the time by the body of qualified professionals who would have been approached to give advice to a UK based multi-national group as a valid basis for making a claim or embarking on the preliminaries to litigation.

74. Moreover, Mr Gammie's evidence did not focus on the UK to the exclusion of other jurisdictions. The body of materials appended to his report covers an extensive and impressive range of European jurisprudence. Whilst he accepted that legal thinking in terms of the potential impact of EU law on matters of direct taxation was more advanced in Europe than it was in the UK, Mr Gammie said in his report that he had "not detected in my papers or in the literature at the time any specific suggestion that the ECJ might eventually decide this is a breach of the Treaty".

75. Having weighed up the competing expert evidence, considered the documentary evidence, and considered the case law relied on, the Judge was entitled to conclude as he did. He was entitled to find that neither of the ways in which the test was formulated by the Supreme Court was satisfied, at a time when the professional consensus was that a claim of that nature was not viable, for the clear and cogent reasons given by Mr Gammie.

76. The conclusion I have reached above is not just enough to warrant dismissing this appeal on Grounds 1 and 2 but also provides a complete answer to Grounds 3 and 4.

77. Ground 3, the head-on rationality challenge, was always ambitious, and on application of the principles adumbrated in *Volpi v Volpi* it is simply unarguable. There was a

rational basis for the Judge's findings about the existence of the consensus, namely, the evidence of Mr Gammie. I do not accept Mr Ewart's submissions to the effect that the Judge misunderstood or mischaracterised Mr Gammie's evidence. The fact that the professional consensus, to which Mr Gammie himself subscribed, was not recorded in contemporaneous documentation did not mean that it did not exist. The weight to be ascribed to Mr Gammie's evidence, and which of Mr Gammie's views he accepted, were matters for the Judge. The Revenue's submissions were tantamount to a contention that he should have preferred the evidence of Professor Barnard; but that ship has sailed.

78. There was also a rational basis for the Judge's fact-finding that the professional consensus was undermined by *Verkooijen*, namely, that (regardless of whether any commentators said so at the time) the reasoning of the CJEU struck at the heart of the three limbs of the consensus the Judge had described at [71] for the reasons he set out at [133]. In simple terms, the CJEU had dismissed (or brushed aside) all the legal obstacles to making such a claim which previously the Appropriate Adviser would have regarded as fatal – perhaps most significantly, comparability. It had also put very stringent limits on the extent to which the principle of cohesiveness applied in *Bachmann* would afford a justification for any impediment to the Treaty freedoms caused by the differences in treatment. That would have been enough, on the Judge's findings, to embolden a well-advised multi-national sufficiently to embark upon the preliminaries. It (and its advisers) would now be aware that the claim was unlikely to fall at the first hurdle. Thus it did not matter that Mr Gammie did not claim that the decision in *Verkooijen* dismantled the consensus, nor that the situation with which *Verkooijen* was concerned was factually very different. I will consider those differences in more detail when I address FCE's cross-appeal.

79. The Judge was entitled to conclude that the CJEU judgment in *Verkoojen* meant that there was no longer a basis for regarding the three pillars of the consensus described by Mr Gammie as insurmountable obstacles to a claim. His finding that this was the date of discoverability was also consistent with the evidence about the time when the possibility of making a challenge to the lawfulness of these tax payments began to be considered by well-advised multi-nationals based in the UK.

80. In a passage in FII SC 2 dealing with Henderson J's judgment in FII HC 1, the Supreme Court referred at [33] to evidence from a tax manager at BAT, Mr Cohn, that "the first time we considered that the denial of [FII] treatment of foreign dividends might be a breach of EC law was when we discussed internally the *Verkooijen* judgment shortly after it was published on 6 June 2000." As Mr Bremner KC accepted when it was put to him by my Lord, Lord Justice Nugee, in the course of oral argument, that was a reference to an ACT Challenge, although he pointed out that the head of taxation at BAT, Mr Hardman, focused more on a DV Challenge in his evidence. Lord Reed and Lord Hodge went on to describe the evidence of the BAT witnesses, which Henderson J accepted in FII HC 1, as consistent with other evidence. All that evidence supports the Judge's conclusion as to the date of discoverability, at the very least so far as a DV Challenge is concerned.

81. However, the reasoning which the CJEU deployed in *Verkooijen* also emerges clearly from the Advocate General's second Opinion in that case. Whilst the CJEU does not always accept the views of the Advocate General, it often does. It is important to bear in mind that the Supreme Court in FII SC 2 has made it clear that the date of

discoverability is not the date on which a claimant knows he will win, or even that he is likely to win the argument, it is the date on which, if he takes the right advice, he would become aware that the payment is legally questionable, in the sense that there is a viable argument that the Relevant UK Law contravened EU law, (and would have sufficient confidence to embark upon the preliminaries to litigation).

82. If the Appropriate Adviser had read that Opinion in conjunction with the Advocate General's first Opinion, they must have appreciated that there was a viable argument that, at least so far as differential taxation of dividend income was concerned, the positions of a foreign subsidiary and a domestic subsidiary could be regarded as comparable and that the principle of cohesiveness would provide no justification for the difference in treatment. It was viable because the Advocate General, far from dismissing it out of hand, had espoused it. It was foreseeable that the CJEU might agree with him, and on that basis a challenge to the discriminatory tax treatment of dividend income from an EU subsidiary would have been worth pursuing. That is why I consider that on the application of the Judge's own reasoning, the date of discoverability was December 1999 rather than June 2000.

83. Ground 4 can be dealt with even more shortly. One starts with the assumption that an appellate court must make that the judge in the lower court has taken the whole of the evidence into consideration, absent compelling evidence to the contrary. Here, there is no need to rely on that assumption because the Judge said at [31] that he had had full regard to all the evidence and submissions of the parties but that he was not going to deal in any great detail with evidence and submissions that appeared to him to be unduly influenced by hindsight. There is no reason to disbelieve him.

84. In the Revenue's written submissions, this criticism was developed into a complaint that the Judge did not consider the state of the case law in 1996, in particular *Avoir Fiscal, Daily Mail, Commerzbank* and *Bachmann*. That is incorrect; the Judge did consider those cases, but he preferred Mr Gammie's evidence about what lawyers thought about them, to that of Professor Barnard. He rejected, as unduly influenced by hindsight, her argument that it would have been apparent to an Appropriate Adviser at the time that those cases would support a claim that these payments were legally questionable. He based his view, as he was entitled to, on Mr Gammie's evidence as to what the professionals who would have been approached to give such advice to a UK based multi-national were *actually* thinking at the time. There is no substance in the complaint that the Judge failed to have regard to all the evidence.

85. For those reasons each of the challenges to the Judge's judgment fails, and I would therefore dismiss the appeal.

FCE'S CROSS-APPEAL

86. The cross-appeal, like the appeal, involves a challenge to a finding of fact based on an evaluative judgment. Therefore it faces the same difficulties, with one additional hurdle, namely, that FCE bear the burden of establishing that they would not have been advised that an ACT Challenge was worthwhile/they would not have had the confidence to embark on the preliminaries to litigation, had they sought advice from an Appropriate Adviser on 6 June 2000. The Judge recognised that it was for FCE to prove that, despite *Verkooijen*, and its accepted implications for a DV Challenge, an Appropriate Adviser would still have advised that an ACT Challenge would not be

worthwhile (in the sense explained by the Supreme Court). He decided they could not discharge that burden. Indeed he found as a fact that a well-advised multi-national would have had sufficient confidence to embark upon the preliminaries in respect of both a DV Challenge and an ACT Challenge in the wake of the judgment in *Verkooijen*.

87. FCE's case was that an Appropriate Adviser would not have appreciated that an ACT Challenge was worthwhile until, at the earliest, the CJEU's judgment in *Hoechst* (and thus a claimant seeking advice from such an Adviser could not have discovered the mistake before then). The argument is based on the premise that the ACT Challenge is so fundamentally different to the DV Challenge that the publication of the CJEU's judgment in *Verkooijen* would not have led to an Appropriate Adviser advising a prospective claimant that an ACT Challenge was worthwhile.

88. One of the fundamental problems for FCE is that even if they could establish that the Judge erred in failing to appreciate that there was a significant difference between the two types of challenge, which meant that *Verkooijen* would not have alerted an Appropriate Adviser to the viability of an ACT Challenge, the FCE claims (all of which are ACT Challenges) would be time-barred if the date of discoverability was the date on which the Advocate General's Opinion in *Hoechst* was published (12 September 2000). In order to avoid that consequence, FCE would have to establish that the mistake of law was not discoverable by the exercise of due diligence even then.

89. *Hoechst* was concerned with the tax treatment of UK subsidiaries of non-resident parents. As the Judge set out at [96]-[98], the issue in *Hoechst* was whether a UK subsidiary of an EU resident parent company could make a group income election in respect of ACT when it paid dividends to that parent, as it could if it made the payment of dividends to a UK parent company. If permitted, this would enable the subsidiaries of non-resident parents to enjoy the same cashflow advantage as the subsidiaries of UK parents. As Mr Gammie explained in his report, and the Judge accepted, *Hoechst* raised no issue of double taxation relief. The argument did not require the UK to forego charging ACT, nor to confer any tax credit on the non-resident recipient of the dividend. The challenge in *Hoechst* was based squarely on the contention that the difference in treatment was contrary to the freedom of establishment.

90. Importantly, in the light of *Avoir Fiscal* and subsequent cases, it was not argued by the UK that there was an objective difference between subsidiaries of UK and EU parents which could justify a difference in treatment between them. However, arguments were mounted on both non-comparability of the two situations (because a foreign parent would not be liable to ACT) and the need to preserve cohesion in the UK tax system. It was argued that, although making a group income election relieved the UK resident subsidiary of the obligation to pay ACT when it paid the dividends to its UK parent, that payment was merely deferred, because a resident parent would pay the ACT when it made distributions subject to that tax. A non-resident parent would not pay ACT at all. If resident subsidiaries and non-resident parent companies were able to make a group election, then no ACT would be paid in the UK. A UK resident subsidiary of a resident parent company was therefore not in a comparable situation to a UK resident subsidiary of a non-resident parent.

91. Secondly, it was argued that in order to prevent double taxation in economic terms, resident shareholders are exempt from paying corporation tax on dividends they receive

from resident subsidiaries, since that exemption is offset by the ACT charge on the payment of dividends by subsidiaries to their parents.

92. The Advocate General rejected both those arguments. At [25] he held that the differences in the respective fiscal situations of the parent companies did not provide a justification for denying the subsidiary of a non-UK parent the same tax advantage as the subsidiary of a UK parent. He then considered the cohesion argument and distinguished *Bachmann*, relying among other matters on the reasoning in *Verkooijen* and the absence of the requisite direct link. He concluded at [35] that the objectively different corporation tax positions of resident and non-resident parents cannot justify the imposition of an effectively higher corporation tax burden only on the subsidiaries of the latter.

93. The CJEU, in its judgment, agreed with the Advocate General's analysis and his conclusions. It expressly rejected the non-comparability argument at [52] to [60], adopting and approving the Advocate General's reasoning at [25] of his opinion. It then considered the cohesion argument and rejected it at [66] to [73], distinguishing *Bachmann* at [69] on the basis that there is no direct link between, on the one hand, the refusal to exempt subsidiaries in the UK of non-resident parent companies from payment of ACT under a group income election and, on the other, the fact that non-resident parent companies are not liable to corporation tax in the UK. It held at [70] that parent companies, whether resident or non-resident, are exempt from paying corporation tax in respect of dividends received from their UK subsidiaries and it is irrelevant for the purposes of granting a tax advantage (such as exemption from ACT under the group income election regime) that the reasons for that are different, namely, in the case of a non-UK parent because it has no liability to pay corporation tax, and in the case of a UK parent because the profits have already been taxed at source and there would otherwise be double taxation.

94. Mr Bremner submitted that there would be an insufficient level of confidence to embark on the preliminaries to litigation based on the Advocate General's opinion, but there would be sufficient once there was a decision handed down by the CJEU. I am unable to accept that submission. In my judgment, if an Appropriate Adviser, when asked if there was enough of a legal basis to make a viable ACT Challenge, would have worked out from the CJEU judgment in *Hoechst* that there was, and would have given advice to the multi-national which would imbue them with that level of confidence, then that Adviser would have done the same on reading the Advocate General's opinion which adopts the same reasoning. The mistake was discoverable when the Appropriate Adviser would realise that the CJEU might well accept the argument that the situations were comparable and the difference could not be justified on grounds of cogency. That is fatal to FCE's case even if they were to succeed in undermining the Judge's finding that the date of discoverability for an ACT Challenge was the date of the CJEU judgment in *Verkooijen.*

95. So far as that finding is concerned, I can see no legitimate basis for this court to disturb the Judge's conclusion that the reasoning in *Verkooijen* was enough to dismantle the professional consensus, and was therefore enough to indicate to an Appropriate Adviser that there was now a real possibility that the CJEU might reject all the reasons why, in the past, it was believed that there were insurmountable obstacles to a claim based on an argument that matters of direct taxation which involved double tax relief and differential tax treatment between companies with non-UK and UK parents were

contrary to one or more of the fundamental Treaty freedoms. The precise detail of the legal argument does not matter.

96. Whilst *Verkooijen* contained no argument concerning an obligation on the part of the Netherlands to give relief for foreign tax, or to abandon its taxing rights in relation to overseas income, that was the practical result of obliging the Netherlands to give the exemption in respect of dividends paid by the Belgian company as well as dividends paid by the Dutch company. It would not have been difficult for an Appropriate Adviser to reach the conclusion that if the CJEU was prepared in that case to find that the tax treatment of foreign dividends in the hands of a resident taxpayer was comparable with the tax treatment of dividends paid by resident companies to that taxpayer, there would be a viable argument (that would at least get past a strike-out application) that the refusal to treat EU dividend income as FII in the hands of a UK company was unjustified as a matter of EU law.

97. Of course, *Verkooijen* concerned the taxation of individuals, not companies. However commentators at the time (such as David Oliver KC) began to query whether it could be read across to taxation of corporations. It is clear that they did not discount that possibility, though Mr Oliver was both cautious and pessimistic in his conclusions.

98. Mr Bremner argued that although *Verkooijen* flagged up that a DV Challenge would get off the ground to a sufficient extent to give confidence to a claimant to embark on the preliminaries to litigation, a great deal more work had to be done before an Appropriate Adviser would reach the same conclusion about an ACT Challenge, even if they suspected it might be arguable. Suspicion would not be good enough to establish the level of confidence indicated by the Supreme Court. *Verkooijen* indicated that EU law may have something to say about a Member State's system for dealing with double taxation relief, but that was just a stepping stone. The UK's ACT system was (on the face of it, at least) even-handed, as there was a single ACT charge which applied both to UK source income and foreign source income. The ACT charge funded the shareholder credit, so there was an internal logic to the system. It was only at a much later stage that it became clear that as a matter of EU law, ACT was treated as a prepayment of corporation tax and could be equated to foreign corporation tax. That only emerged, he submitted, at [88] of the CJEU judgment in *Hoechst*.

99. In support of that argument, Mr Bremner referred to articles that were written by commentators in the 1990s, prior to the decision in *Hoechst,* in which they described ACT as being in concept an income tax, because although it looked like a company tax, so far as the *shareholders* were concerned the company had pre-paid income tax on their behalf. However, despite the fact that ACT provided an economic justification for the shareholder tax credit, from the perspective of the relevant taxpayer complaining of the discriminatory treatment (i.e. the UK subsidiary) ACT operated as an advance payment of corporation tax on those profits at the time when they were distributed. Mr Bremner accepted that this was true, but said that the Advocate General and the CJEU in *Hoechst* looked at that function to the exclusion of the others, which was something no-one had foreseen.

100. All these arguments were aired before the Judge, who regarded them as flawed. I agree with him that the CJEU's treatment of ACT as an advance payment by the relevant taxpayer on account of corporation tax was hardly surprising, given that this is the way in which it is described in s.14 of ICTA, quoted by the Judge at [138]. As he said,

Neuberger J had found that ACT was in the nature of corporation tax in his judgment of 2 October 1998 which settled the terms of the reference to the CJEU in the *Hoechst* case (a point also made by the Advocate General in *Hoechst*). As the Judge also said, the test as explained by the Supreme Court did not require the claimant to foresee in advance all the ways in which the court might ultimately determine the challenge in their favour. They would just need to have sufficient confidence to embark on the preliminaries. He found as a fact that they would have done, once it became clear that the factors previously seen as insuperable obstacles were no longer incapable of being overcome. That finding cannot be disturbed, on the application of classic *Volpi v Volpi* principles.

101. As I have already mentioned, there was evidence that shortly after the judgment in *Verkooijen* was published, BAT started examining internally whether an ACT Challenge could be brought. The Judge was therefore entitled to make the finding at [140] that the inconsistency between the judgment in *Verkooijen* and a substantial proportion of the professional consensus described by Mr Gammie would have given a well-advised multi-national sufficient confidence to embark upon the preliminaries to litigation. Bearing in mind where the burden of proof lay, his conclusion that he saw no other secure basis in the evidence for concluding that the date of discoverability in respect of an ACT Challenge was any later than 6 June 2000 was fully justified.

102. For those reasons, I would also dismiss the cross-appeal.

Lord Justice Nugee:

103. I agree.

Lord Justice Snowden:

104. I also agree.