Neutral Citation Number: [2019] EWHC 2014 (Ch)

Case No: HC-2003-000003
Case No: HC-2009-000068
Case No: HC05C01418

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 31/07/2019

Before:

MRS JUSTICE FALK

- -

Between:

NON-TEST CLAIMANTS IN THE FRANKED INVESTMENT INCOME GROUP LITIGATION	**Claimants**
- and –	
(1) COMMISSIONERS OF INLAND REVENUE **(2) COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS**	**Defendants**

- -
- -

Daniel Margolin QC (instructed by **Joseph Hage Aaronson LLP**) for the **Claimants**
David Ewart QC and **Barbara Belgrano** (instructed by **HMRC Solicitor's Office**) for the **Defendants**

Hearing dates: 8 and 9 July 2019

- -

Approved Judgment

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

....
MRS JUSTICE FALK

MRS JUSTICE FALK:

Introduction

1. This decision addresses two issues that arise in the claims of certain non-test claimants in the long-running Franked Investment Income ("FII") Group Litigation under the group litigation order known as the FII GLO. The issues raised did not arise in the test claims in either that litigation or the related group litigation known as the CFC & Dividend GLO, and emerged during the course of the parties' efforts to compute and reach agreement on the values of various non-test claimants' claims.

2. Mr Justice Fancourt made an order on 22 June 2018 setting down seven preliminary issues for hearing. For various reasons only two of these remain for determination, namely Issue 2 and Issue 5, and only in relation to one non-test claimant group in respect of each of those issues, the EMI group (now part of the Universal Music group) in respect of Issue 2, and the Chemetall group in respect of Issue 5.

3. Issue 2 is described as follows:

> "Where a dividend from non-resident sourced profits carries a low rate of tax paid on underlying profits relative to the applicable foreign nominal rate ("FNR") and if evidence has not been retained that explains the reason for it, should credit be awarded at the FNR?"

As regards EMI, this issue originally arose in respect of 16 dividends declared within the EMI group, but only four of those dividends now remain in dispute, HMRC having conceded in respect of 11 dividends and EMI in respect of one dividend. The issue has also fallen away in respect of another non-test claimant for which it was relevant, following a withdrawal of HMRC's challenge in relation to that claimant.

4. By way of brief background to Issue 2, one result of the test litigation to date is that the then existing provisions of national law, which subjected non-UK source dividends to corporation tax subject to a credit for foreign tax paid whilst exempting UK source dividends, infringed EU law, but this could be remedied by granting a credit at the FNR where that exceeded the actual relief granted. The theory behind this is that the exemption for domestic dividends resembled the grant of a tax credit calculated by reference to the nominal rate (*Test Claimants in the FII Group Litigation v HMRC* (Case C-35/11) [2013] Ch 431 at [60]). Put another way, the UK was entitled to charge corporation tax only insofar as the UK rate exceeded the FNR.[1]

5. In essence, Issue 2 is an evidential challenge. It is accepted that the burden of proof is on EMI to demonstrate, on a balance of probabilities, that the source of the disputed dividends was profit of a kind that should in principle be treated as carrying a credit at the FNR. HMRC say that EMI have not demonstrated that on the evidence available.

6. Issue 5 is specific to the Chemetall group, and is the question whether its claim is limited to dividends paid from 1992 onwards, because of the way in which the claim

[1] It was further established by *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2016] EWCA Civ 1180, [2017] STC 696 at paragraphs [45] to [87] that credit must be granted at the higher of the FNR and the actual tax paid, up to the UK nominal rate. Permission to appeal on this point has been refused by the Supreme Court.

is pleaded. Chemetall argue that it is not so limited and, if they are wrong on that, seek permission to amend their Re-Amended Particulars of Claim to clarify the position.

Issue 2

7. The underlying reason for the evidential difficulties in relation to EMI's claim is that the relevant documentary records were destroyed in a fire in 2006 at the storage facility that housed EMI's archives. Much of the limited information that is available was provided to EMI from HMRC's records in 2009, supplemented by some further information provided in November 2018.

8. The four dividends now in dispute are as follows:

	Dividend paying Company	**Country**	**Year**	**Amount (NLG)**	**ULT credit %**	**FNR %**
A	Thorn EMI Properties BV	Netherlands	1994	185,499,190	0	35
B	Thorn Electric Dk	Denmark	1991	27,766,130	1.54	39 / 42
C	Thorn Licht Germany	Germany	1991	6,728,293	0	45.8
D	Thorn Germany	Germany	1991	6,545,905	0	45.8

Evidence

9. Evidence of fact in respect of Issue 2 was provided by Mr Andrew Slobodzian, the Director of International Tax at the Universal Music Group, which encompasses the EMI group claimants (collectively "EMI"). Mr Slobodzian originally joined Thorn Electrical Industries in 1979 from the Inland Revenue. Thorn acquired EMI in 1980 to become Thorn EMI, and subsequently EMI Group following the demerger of Thorn

in 1996. Mr Slobodzian was part of the tax team at EMI throughout the relevant period, and he was promoted to a role which included responsibility for the UK tax compliance function. Mr Slobodzian produced a total of five witness statements, not all of which are relevant to the issues remaining in dispute. I accept that Mr Slobodzian's evidence was given to the best of his recollection, and that where he has had to correct his evidence (as he did in his fifth witness statement), that was done in the light of additional information which demonstrated that his recollection as to the date of certain events was incorrect. However, the extent to which Mr Slobodzian was able to assist the court in respect of the matters in dispute was somewhat limited, because it seems he had no direct involvement with the structuring and tax affairs of the Dutch, Danish and German sub-groups that are relevant to Issue 2.

10. Expert evidence was provided by three experts instructed on behalf of EMI, Mr Edward Rijnhout in respect of Dutch tax, Mr Arne Ottosen in respect of Danish tax and Dr Klaus Sieker in respect of German tax. All three provided written reports and supplementary reports (in the case of Mr Ottosen, two supplementary reports). The supplementary reports produced by Mr Rijnhout and Dr Sieker addressed additional documentary evidence that was not available when they prepared their original reports. Mr Rijnhout and Dr Sieker also gave oral evidence by video link. Mr Ottosen was not available to give oral evidence. His first supplementary report addressed written questions raised by HMRC. His second supplementary report was produced following the hearing, in light of the fact that it had become clear that the period he had originally been asked to report on, 1990 and 1991, was incorrect. The third report covered the period from 1986 to 1989, and confirmed that there were no material differences in the rules as between the two periods, apart from the tax rates being higher in the earlier period.

11. I had no reason to doubt the expertise of any of the experts, and save as explained below I accept their evidence.

Preliminary points

12. There are two preliminary points worth making at this stage.

13. The first is that EMI accept that no credit can be granted for tax at the FNR where a dividend is a return of capital. This point is relevant to each of dividends B, C and D.

14. The second relates to evidence and the burden of proof. HMRC have not adduced their own evidence. Rather, they have put EMI to proof to demonstrate that the relevant dividends were sourced from profits which should attract a credit at the FNR. Both parties accepted before me that the question of the source of profits is one of fact which I should determine using the normal rules of evidence as applicable in this court (rather than by reference to any EU derived principle as to evidential burden), and that EMI are required to make out their case on the facts on the balance of probabilities.

Dividend A

15. The most material evidence about dividend A is derived from the accounts of the dividend paying company, Thorn EMI Properties BV ("Properties BV"), for the year to 31 March 1994, together with extracts that are available from the accounts of its

immediate parent (and the recipient of the dividend) Thorn EMI Holdings BV ("Holdings BV").

16. As discussed further below, the dispute in relation to dividend A has resolved itself into a single question of fact, namely whether the profits out of which the dividend was paid were substantially derived from a transaction undertaken within a Dutch fiscal unity. In broad terms, a fiscal unity is a mechanism under which Dutch companies in common ownership may elect to be treated as a single entity for corporate tax purposes, such that the individual subsidiaries cease to exist from a corporate tax perspective (being treated as merged into the parent company), and transactions between companies in the fiscal unity are ignored. Among other things, this allows an effective offset of profits and losses within the group. There is no dispute between the parties that, if the relevant transaction was within a fiscal unity, then the profits derived are not the kind of profits in respect of which a credit at the FNR can be treated as arising.

17. The accounts of Properties BV for the year to 31 March 1994 explain that it was formerly called Thorn EMI Netherlands BV and operated as a finance and holding company. The Directors' report states: "Following a restructuring within the Dutch group, the Company disposed of all of its subsidiaries at November 8, 1993 and is effectively dormant as of that date". The notes to the accounts effectively repeat this, stating that "the Company disposed of all of its subsidiaries on November 8, 1993 to another group company and effectively became dormant as of that date". The Taxation note states that the Company forms a fiscal unity with its parent Holdings BV, and that its parent follows the practice of charging or crediting its subsidiaries within the fiscal unity for current taxation.

18. The notes dealing with investments in subsidiaries state as follows:

> "In June 1993, Thorn EMI plc decided to dispose of its Lighting product group. Following this decision, the Company contributed additional capital to its Dutch Lighting subsidiary of NLG 3.5 million.
>
> In November 1993, the Company acquired one share of Alkmaarse Grammofoonplatenindustrie BV with an assigned value of NLG 250,000,000 in consideration for the transfer of ownership to that company of several operating companies with a carrying value of NLG 91,083,730. The Company subsequently transferred such share to Thorn EMI Holdings BV in connection with a dividend distribution, for which the value was agreed upon by the Company and its immediate parent to be NLG 185,499,191, under the following conditions:
>
> - the debt of Thorn EMI Properties BV to Thorn EMI Holdings BV, amounting to NLG 52,500,809 at that date, was considered settled;
> - Thorn EMI Holdings BV will be indebted to Thorn EMI Properties BV for an amount of NLG 12,000,000."

19. It is also apparent from these accounts that another company took on Properties BV's former name, and took over responsibility for certain intragroup payables owed by Properties BV.

20. The extract available from the accounts of Holdings BV for the year to 31 March 1994 includes the following statement in the notes dealing with investments in subsidiaries:

> "During the year the Company acquired all the outstanding shares of the Alkmaarse Grammofoonplatenindustrie BV for an assigned value of NLG 250,000,000. An additional share of this company was acquired in connection with a dividend distribution, the value of which was agreed upon by the Company and its subsidiary at NLG 185,499,191, under the following conditions… [there is then a similar description to the one in the accounts of Properties BV].
>
> The company was ultimately liquidated into the Company. As a result of the liquidation the Company received an additional share in Thorn EMI International BV and Thorn EMI Netherlands BV as liquidation settlements, with assigned values of NLG 237,123,000 and NLG 12,877,000, respectively."

21. The Taxation note in these accounts of Holdings BV records that it forms a fiscal unity with the "majority of its Dutch subsidiaries", and refers to the policy of accounting for taxes arising in respect of the fiscal unity and charging or crediting companies within the fiscal unity in respect of current taxation. There is a similar reference in the accounts of Holdings BV for the year to 31 March 1995.

22. My conclusions from the evidence are that the following transactions occurred during the financial year ended 31 March 1994, in the order set out below:

    1) The then outstanding shares Alkmaarse Grammofoonplatenindustrie BV ("AG BV") were acquired by Holdings BV. This occurred before Properties BV entered into a transaction with AG BV on 8 November 1993 (see the reference to "all the outstanding shares" in the first sentence of the extract from Holdings BV's accounts referred to at [20] above, in contrast to the second sentence). It is not clear whether AG BV was a member of the EMI group before that transaction occurred, but it was clearly a wholly-owned subsidiary of Holdings BV immediately after this step.

       The shares acquired had an assigned value of NLG 250 million. Based on the final paragraph of the extract from the Holdings BV accounts referred to above, it is more likely than not that the assets of AG BV that underpinned this value comprised the share or shares in Thorn EMI International BV and Thorn EMI Netherlands BV that were ultimately received on the liquidation of AG BV. Mr Margolin suggested that these shares comprised the consideration Holdings BV provided for the acquisition of the AG BV shares at step 1). That is a possible explanation, but it is not clear or, I think, material.

    2) On 8 November 1993 Properties BV transferred its subsidiaries to AG BV in consideration of the issue of one share, also with an assigned value of NLG 250 million. The companies transferred had a carrying value of just over NLG 91 million, so a substantial book profit arose. I consider it more likely than not that the subsidiaries transferred included the subsidiary or subsidiaries that conducted the lighting business, because if they had already been sold by Properties BV I would expect that to have been referred to in the accounts. The fact that Properties BV became dormant after step 3) below also indicates that

all its subsidiaries were transferred in this step. I note that the book profit is shown in the accounts as a rounded figure of NLG 155,354,000, roughly equal to the difference between NLG 250 million and the aggregate of the carrying value referred to and the NLG 3.5 million of capital contributed to the lighting subsidiary in June 1993.

I do not accept Mr Ewart's suggestion that this step preceded the acquisition by Holdings BV of the outstanding shares in AG BV (step 1) above). That is not consistent with the reference in Holdings BV's accounts to the transfer in step 3) below as being the acquisition of an "additional" share by Holdings BV.

3) Properties BV transferred its one share in AG BV to Holdings BV. This took the form of a dividend in specie with a value of NLG 185,499,191, largely exhausting its retained earnings (including the book profit just earned on the transfer of its subsidiaries). The balance of the NLG 250 million was made up of the satisfaction of a debt of NLG 52,500,809 owed to Holdings BV, and the creation of a new payable owed by Holdings BV to Properties BV of NLG 12,000,000.

   As a result, Properties BV became effectively dormant. It no longer had subsidiaries, and its main asset was a debt owed by its parent.

4) AG BV must then have disposed of the operating companies it acquired from Properties BV (because the assets stated to be transferred on its liquidation are limited to those referred to below).

5) AG BV was liquidated, as a result of which Holdings BV received a share or shares in Thorn EMI International BV and Thorn EMI Netherlands BV.

23. These transactions were clearly undertaken for some purpose. I consider it more likely than not that the liquidation of AG BV was planned before the transfer of the operating companies to it by Properties BV. Its name suggests that it was not intended to be the company whose shares would be sold as the means of selling the lighting business. I also consider it to be clear that the subsidiaries transferred to AG BV comprised or at least included one or more subsidiaries that undertook the lighting product business, and that the sale of that business had already been decided upon. The accounts refer to contributing additional capital to a Dutch lighting subsidiary in June 1993, before the transfer of operating companies in November, as a result of which (combined with the dividend) Properties BV became dormant. I consider it to be more likely than not that the transactions were undertaken in the context of the planned sale of the lighting business, and that AG BV undertook the sale before being liquidated. Mr Slobodzian's evidence was that the lighting business sale took place in "about 1993", in the form of a sale of the subsidiaries that operated the business, and I infer that it occurred shortly after the transfer of the subsidiaries to AG BV.

24. Properties BV was clearly in a fiscal unity with Holdings BV, and according to its accounts Holdings BV was in a fiscal unity with the "majority" of its subsidiaries. The key question is whether AG BV was in that same fiscal unity at the date of the transfer of Properties BV's subsidiaries to it. If it was, then EMI accept that their claim in respect of dividend A fails. If it was not then, subject to HMRC's reservation on any appeal (see [32] below), EMI succeed in respect of that dividend.

25. Mr Rijnhout's evidence was that it is and was at the time general market practice for a Dutch parent and its wholly owned subsidiaries to form a fiscal unity. However, in his opinion the absence of a fiscal unity between Properties BV/Holdings BV and AG BV provides a logical explanation for the transfer. There would be no point in making a transfer of the operating subsidiaries within a fiscal unity, because that would be a tax nothing. There was no need to put a fiscal unity in place because the transfer of the operating subsidiaries by Properties BV would in any event have been exempt under the participation exemption. Creating a fiscal unity would just create complexity. There was joint and several liability between companies in a fiscal unity, and arrangements needed to be put in place to account for tax liabilities and tax credits between them. Tax returns are more complex because of the need to eliminate transactions within the fiscal unity. When companies are excluded from a fiscal unity then certain claw backs can arise in respect of earlier transactions. When companies are sold, they also leave the fiscal unity. He usually advised his clients to remove entities from a fiscal unity prior to their sale, to reduce the level of complexity.

26. In contrast, structuring the transaction so that AG BV was outside the fiscal unity would not only achieve the benefit of the participation exemption for Properties BV, but would potentially allow the benefit of a tax-deductible loss to be obtained on the liquidation of AG BV (a liquidation which would in any event have resulted in it leaving any fiscal unity). No such loss would be capable of being obtained if AG BV was within a fiscal unity.

27. Mr Rijnhout also suggested that the wording in Holdings BV's accounts indicated that AG BV was not within the EMI group before its shares were acquired by Holdings BV during the financial year. At the relevant time the eligibility requirements for a fiscal unity included ownership of 99% of the share capital. This could be a reason why AG BV had not qualified to join a fiscal unity before that time. Making it part of the fiscal unity for a short period prior to its liquidation would be highly complex, effectively requiring a single financial year to be split into a number of separate periods for tax return purposes.

28. Mr Ewart submitted that this was too speculative. No explanation is provided for the transfer to AG BV. There was clearly some kind of corporate restructuring, but that could well have been motivated by non-tax considerations. There is also no established link between the restructuring and the lighting business sale. Mr Rijnhout's evidence was that it was not possible for AG BV to be kept outside a fiscal unity with its parent, but for its own subsidiaries to be members of that fiscal unity. Properties BV had transferred all its operating subsidiaries to AG BV, and it was unlikely that the group was willing to exclude them all from the fiscal unity.

29. I have concluded that it is more likely than not that AG BV was outside the fiscal unity, and therefore that Properties BV relied on the participation exemption to exempt the transfer of its subsidiaries. Based on the available evidence, I consider that the transfer was linked to the disposal of the lighting business, and that the aim was to obtain some form of loss on the liquidation of AG BV, once that business had been sold. Excluding the companies transferred from the fiscal unity was a sensible step in any event for companies just about to be sold for the reasons given by Mr Rijnhout, and for any other companies affected I infer that it was a necessary consequence of securing the intended benefit, and a consequence which was regarded as manageable and which could in any event be addressed once AG BV was liquidated.

30. I do not rely on Mr Rijnhout's suggestion about the 99% ownership requirement potentially not being met in relation to AG BV before the first step of the restructuring. That is possible but there is too little evidence to support it. Based on the company's name, AG BV might equally have been a dormant entity held somewhere in the group, or a company that already held a share or shares in Thorn EMI International BV and Thorn EMI Netherlands BV before the restructuring. In any event AG BV was clearly wholly owned by Holdings BV immediately prior to the transfer by Properties BV at step 2).

31. I do not accept Mr Ewart's alternative suggestion that the transactions were not tax motivated. Given their nature, that strikes me as inherently unlikely. Features worthy of note in this respect include the apparently identical valuations of the AG BV shares first acquired by Holdings BV (reflecting the ownership of stakes in Thorn EMI International BV and Thorn EMI Netherlands BV) and the share acquired by Properties BV on the transfer of its subsidiaries, and also the speedy liquidation as a result of which Holdings BV received shares in Thorn EMI International BV and Thorn EMI Netherlands BV. Most importantly, the potential liquidation loss described by Mr Rijnhout provides a rational, and likely, explanation for the transactions. I do not agree with Mr Ewart that the description of the transactions is not consistent with Holdings BV being able to obtain a loss. Mr Rijnhout considered that obtaining a loss was a rational explanation and I accept that. As in the UK, there may have been a variety of reasons why a loss may have been available even if Holdings BV had only just acquired AG BV, and in book terms at what might have been full value.

32. I should record that HMRC accepted that they would lose on this issue before me if I concluded (as I have) that the transfer was made outside a fiscal unity. However, they reserve for any appeal the question whether profits that are exempted from tax under the Dutch participation exemption are properly profits that should be treated as attracting a tax credit at the FNR. This was an issue that was decided by Mr Justice Henderson, as he then was, in the taxpayer's favour in *Six Continents Ltd v HMRC* [2016] EWHC 2426 (Ch); [2017] STC 1228, where he concluded that profits and gains falling within the participation exemption were "subject to tax" in the Netherlands. EMI's position on this is that the point was not only determined by Henderson J but was also determined as a GLO issue in these proceedings, which is binding on the parties under CPR 19.12, in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2016] EWCA Civ 1180, [2017] STC 696 at [116]-[120]. I should record in this connection that Mr Rijnhout's evidence on the nature of the exemption was along the same lines as the expert evidence preferred by Henderson J in *Six Continents*, namely that profits covered by the participation exemption are in principle within the scope of profits for tax purposes, but benefit from an exemption taking them outside the charge, rather than not forming part of the profit at all.

Dividend B

33. There is very limited evidence available about this dividend. The principal evidence relied on is a table of dividends paid via Holdings BV to Thorn EMI International Holdings Limited ("TEIHL"), the relevant UK "water's edge" company and a direct subsidiary of the then group parent company, from various Dutch entities in the group in the year to 31 March 1991, headed "Thorn EMI International Holdings Ltd year

ended 31 March 1991; Summary of dividends to Thorn EMI Holdings BV" (the "Dividend Table"). This was originally produced by EMI but was provided back to it by HMRC in 2009 when EMI was trying to collate evidence. The same document also lists dividends C and D.

34. The Dividend Table indicates that the profits from which dividend B was sourced arose in the financial year 1989. The dividend was paid by "Thorn Electric Dk" to Thorn EMI International BV, in the amount of DKK 94 million. The Dividend Table shows that this dividend was then reflected in a larger dividend paid by Thorn EMI International BV, via its parent Holdings BV, to TEIHL in the year to 31 March 1991. (The figure shown in the table at [8] above is the NLG equivalent of DKK 94 million.) The larger dividend paid by Thorn EMI International BV included dividend C. The Dividend Table was obviously produced in connection with establishing the extent of underlying tax credit available to TEIHL in respect of the dividend or dividends it received. The withholding tax shown in respect of Dividend B is nil. The rate of underlying tax was 1.54%, as shown in the table above.

35. Mr Slobodzian initially thought that the source of dividend B was a disposal of part of the lighting business, the remaining part of which was sold in 1993 as mentioned above. However, it transpired that the relevant part of the business was only sold in November 1990, so this does not fit with the source of the profits dating from 1989. His evidence does not provide any alternative explanation for the source of the profit or absence of tax.

36. A further document provided recently by HMRC (but which was also originally produced by EMI) does give some further detail in respect of dividend B. This is a document entitled "Map of dividends to Thorn EMI International BV" (the "Dividend Map"). Like the Dividend Table it relates to TEIHL's financial year to 31 March 1991. It shows a DKK 94 million dividend paid by "Thorn EMI Electric Denmark A/S", derived from dividends received by that company from a number of different companies with source years between 1986 and 1989, of which only one dividend is shown as carrying any underlying tax credit. The names of the subsidiaries listed generally suggest that they were operating subsidiaries, including in relation to video and music publishing.

37. The expert evidence from Mr Ottosen makes assumptions that Thorn Electric Dk was incorporated in Denmark and was not tax resident elsewhere. On those assumptions he does not provide any specific reason why profits of the Danish entity might not have been within the charge to tax, although his report does describe certain exemptions in general terms. Mr Ottosen's evidence also refers to the potential reduction of the tax base by expenses and/or by losses. HMRC point out that Mr Slobodzian had indicated that the Danish group, unlike other parts of the group in Scandinavia, was profitable, although I note that that comment (in his third witness statement) related to a different question and later years, when the lighting business would already have been sold.

38. Mr Ottosen's conclusion is that it is reasonable to conclude that the effective tax rate was reduced by reliefs and allowances applicable under Danish law.

39. There are no accounts or other information available in respect of Thorn Electric Dk or any of its subsidiaries. In those circumstances the expert evidence is inevitably

general in nature. As already mentioned, Mr Ottosen's reports do confirm that certain exemptions were available, including in respect of shares, goodwill and real property held for more than three years and not held for trading purposes. In addition, his evidence indicates that the mechanism to achieve exemption was inclusion in taxable income followed by exclusion under the relevant exemption. He also indicates that there may be no direct link between distributable profits and taxable profits. He refers for example to offsetting losses of one company against profits of another under a group consolidation regime, and generous rates for depreciation allowances.

40. Mr Ottosen was unable to explain why the Dividend Table shows the dividend from Thorn Electric Dk as attracting a nil withholding tax liability. In his opinion all dividends would have been subject to withholding tax, and he suggests that the lack of a withholding tax credit may have been due to the way in which allowable credits were computed for UK purposes. However, Mr Slobodzian's evidence in cross-examination was that he had no reason to believe that the withholding tax figures in the Dividend Table were wrong. Importantly, however, Mr Ottosen also points out that the lack of a withholding tax credit does not establish whether the source of dividend B was a distribution of profit or a return of capital, because there was no distinction between them for Danish withholding tax purposes.

41. It is not straightforward to reach a decision about dividend B. There is very limited evidence enabling me to conclude positively that the dividend was sourced from profits subject to tax in Denmark. There is no clear evidence that Thorn Electric Dk was an entity that was subject to Danish taxation, either generally or in respect of the profits in question. The expert simply assumes that it is. Although Mr Slobodzian refers to "Thorn Electrik Dk" in his third witness statement as a Danish company, no further detail is provided. There is nothing to explain the absence of withholding tax, which the expert evidence indicates would have applied even if there was a return of capital, and no evidence of any particular exemption that might have applied to explain the very low underlying tax rate.

42. Overall, however, I am persuaded of EMI's case on dividend B by a combination of the Dividend Table and the Dividend Map. As discussed below in relation to dividends C and D, the Dividend Table does not state where dividends are paid from capital. However, the Dividend Map does. Other parts of the Dividend Map note specific dividends as being paid from capital reserves, but no such note appears in relation to dividend B. It is possible to infer from this that dividend B was not a return of capital.

43. Putting this together with the expert evidence, this is therefore a situation where nothing has been identified which would exclude the profits out of which dividend B was paid from the scope of tax. The dividends appear to have been sourced from the profits of operating subsidiaries over a number of periods, and the expert evidence is that the most likely explanation was that tax was reduced by reliefs and allowances. Although I was concerned that there was no clear evidence that Thorn Electric Dk was an entity that was subject to Danish taxation, its status as such was not challenged by HMRC. Furthermore, in my view the Dividend Map indicates reasonably clearly that it was a Danish entity, paying dividends in Danish kroner.

44. I have also been concerned about the absence of withholding tax. However, although I have taken account of Mr Slobodzian's evidence that he had no reason to believe that

the withholding tax figures in the Dividend Table were wrong, I also need to take account of the expert evidence which provides no explanation for the absence of withholding tax, and in particular no explanation that is consistent with the profits not being subject to tax. An important contrast with dividends C and D (discussed below) is that its absence is not explained by dividend B being a return of capital.

Dividends C and D

45. It was not disputed that, on the evidence, Thorn Licht Germany and Thorn Germany (referred to in the table at [8] above as the payers of dividends C and D) were the same entity. I shall refer to it as "Thorn Licht". According to the Dividend Table referred to at [33] above, dividends C and D were paid to two different Dutch shareholders within the group, Thorn EMI International BV in respect of dividend C and Holdings BV in respect of dividend D. The Dividend Table gives 1990 as the source year for both dividends, though both were received by TEIHL in the UK during the year to 31 March 1991. The gross amounts of the dividends as declared by Thorn Licht in Deutschmarks, and shown in the Dividend Table, were DM 5,961,531 and DM 5,799,919 respectively (the NLG figures are shown in the table at [8] above). The withholding tax shown in the Dividend Table is DM 20,067 for dividend C and DM 24,773 for dividend D, a rate of well under 1% (and not at the same percentage rate as between the two dividends). The underlying tax rate shown is nil in each case.

46. Although initially not clear, it is now also not in dispute that at the relevant time in 1991 Thorn Licht had one German shareholder, Thorn EMI GmbH, and four Dutch shareholders. Those shareholders were Thorn EMI International BV (which was also the parent company of Thorn EMI GmbH), Skala Home Electronics BV ("Skala"), EMI Hi-Fi BV ("Hi-Fi") and Holdings BV. Skala and Hi-Fi were in turn subsidiaries of Thorn EMI Netherlands BV ("Netherlands BV")[2], and that company, together with Thorn EMI International BV, were direct subsidiaries of Holdings BV. As already mentioned, Holdings BV was owned by TEIHL. I understand that the reason Thorn Licht had a number of different Dutch shareholders was withholding tax related, and that that reason disappeared in 1991, after which the structure was unwound.

47. In addition to showing dividend C as having been declared to Thorn EMI International BV and dividend D as having been declared to Holdings BV, the Dividend Table includes two dividends declared to Netherlands BV which were previously in dispute and which it is accepted also comprise dividends derived from Thorn Licht, via Skala and Hi-Fi. The source year for these dividends is shown as 1990, in common with dividends C and D. These dividends are shown in the amounts of NLG 6,523,881 and NLG 7,205,096 respectively. EMI has conceded its claim in respect of these two dividends because they also appear in another document recently supplied by HMRC with a footnoted comment stating "Balance of Dividend paid from Capital Reserves 1990". This document does not make clear whether the reference to capital reserves was to capital reserves of Thorn Licht or of the relevant Dutch shareholder. Mr Margolin submits that EMI's concession was without prejudice to the position in relation to the dividends remaining in dispute, and that the footnote was also consistent with only a part of the dividend deriving from capital.

[2] This is probably the same company that became Properties BV, but that is immaterial for these purposes.

48. Mr Slobodzian's initial evidence, in his third witness statement, was that dividends C and D, and the dividend paid via Skala (and presumably Hi-Fi, although this is not explicitly mentioned) would have represented capital gain on the disposal of part of the group's lighting business in late 1990. He thought that they would not have been returns of capital because they were not described as such. He could not explain why there was no underlying tax on what he said was an asset rather than a share sale, but suggested that this may have been attributable to brought forward losses or reliefs, particularly as the German companies concerned were in a form of tax consolidation known as an Organschaft. His fifth witness statement corrected part of this, accepting in the light of additional documents disclosed by HMRC that the Skala dividend was a return of capital, and that the German Organschaft could not explain the low rate because it was only put in place in 1991. (That occurred after the multiple Dutch shareholding structure was removed.)

49. Dr Sieker's supplementary report refers to correspondence between EMI and the Inland Revenue in 1996 in respect of the underlying tax position relating to, among other things, a dividend paid by Thorn Licht to its German shareholder Thorn EMI GmbH in respect of the year to 31 March 1990, in other words in respect of the same year as dividends C and D (and those paid to Skala and Hi-Fi). The amount of the dividend paid was DM 27.5 million. In turn Thorn EMI GmbH paid on a dividend of DM 17.7 million, which appears in the Dividend Table as a dividend paid to Thorn EMI International BV (with an equivalent figure after currency translation of just under NLG 20 million). Dr Sieker's opinion, which HMRC do not dispute, was that this correspondence showed that at the relevant time Thorn Licht was subject to regular German corporation tax and trade tax, and was therefore not in an Organschaft (because if it was then tax would have been assessed on its parent instead). Furthermore, Dr Sieker's view was that the correspondence showed that Thorn Licht had earned taxable profit in the year to 31 March 1990. Of the total dividend of DM 27.5 million paid to Thorn EMI GmbH, DM 26,987,754 is shown net profit. In his oral evidence, Dr Sieker indicated that it was somewhat unclear whether the DM 26.9 million figure represented the actual accounting profit. He noted that a tax refund would have become available on the distribution, attributable to the fact that the rate of tax on distributed profits was lower than that on retained profits. At the time the corporation tax rate was 50% on retained profits and 36% on distributed profits (excluding trade tax in each case). The refund available when a dividend was paid would have increased the accounting profit available for distribution. That suggested to Dr Sieker that the actual profits may have been greater than the amount of the dividend, such that no part of the DM 27.5 million would have been a return of capital.

50. Dr Sieker's supplementary report states that, as a German corporation, dividends paid by Thorn Licht were subject to withholding tax at a rate of 25%, although dividends paid to Dutch resident shareholders qualified for a reduced rate of 15% under the Netherlands/Germany tax treaty. However, withholding tax would not apply to distributions of capital, including capital reserves. Any distribution would be treated as a dividend until all of the profits had been exhausted, and then any balance would be treated as capital. Furthermore, all shareholders had to be treated equally, so it was not possible to arrange matters so that one shareholder received profit and another received capital.

51. Dr Sieker notes that the Dividend Table shows only a very small amount of withholding tax in respect of dividends C and D, and suggests that if that document is correct then dividends C and D must have been paid from capital reserves, as also suggested in relation to the dividends paid via Skala and Hi-Fi in the document referred to at [47] above. However, in his view that would not be supported by German tax rules. The 1996 correspondence showed that Thorn Licht had earned a taxable profit in the year to 31 March 1990 and that only a small part of the dividend paid to its German shareholder (if any) did not represent profit. Since all shareholders had to be treated equally it was not conceivable that the dividends paid to the four Dutch shareholders did not suffer German withholding tax and were regarded as paid in full from capital reserves.

52. Dr Sieker was asked in cross-examination whether it was possible to have different classes of share and treat shareholders differently for that reason. His evidence was that it is unusual. He did mention that it is possible to have ordinary and non-voting shares, the latter typically carrying preferential dividends, but my understanding of his evidence is that there is very limited flexibility as compared to UK company law.

53. Dr Sieker also gave evidence in cross-examination that, even where taxable profits are offset by losses, the 36% rate of corporation tax on distributed profits had to be paid if profit was distributed.

54. Dr Sieker suggested that the Dividend Table and other schedules he had seen were prepared for UK tax purposes and do not provide the full picture from a German perspective. He gave an example of a dividend from another German company, Glover & Main GmbH, which is presented on the Dividend Table as being paid direct to Thorn EMI International BV and subject to 15% withholding tax, when in fact it appears that the company was owned by Thorn Licht. He also referred to a letter from the Inland Revenue dated 14 October 1996 which suggests that refunds of German corporation tax may have been netted against withholding tax, so resulting in withholding tax being understated. However, as already noted in relation to dividend B, Mr Slobodzian's evidence in cross-examination was that he had no reason to believe that the withholding tax figures in the Dividend Table were wrong. His evidence was that dividends C and D were not paid from capital because, where dividends were sourced from capital, that was noted.

55. The documentary evidence included a document equivalent to the Dividend Table in respect of the year to 31 March 1990. This appears to show equal amounts of net dividend paid by Thorn Licht to each of Thorn EMI International BV and Holdings BV, and three further dividends also each of the same net amount to Netherlands BV, all with the source year 1989. That suggests that for that period the shareholdings might have been different to what they became the following year. Oddly, the first two of these dividends and one of the three dividends shown as received by Netherlands BV are shown as carrying withholding tax of the same amount (at a rate of approximately 6% of the gross dividend), but the other two dividends are shown as carrying a nil rate of withholding tax, so that the gross dividend declared is higher for three of them. The underlying tax rate appears to be equivalent for all five dividends, at 29.81%, although there is a handwritten query on one of the figures.

56. Taking account of all the available evidence, I do not consider that EMI have demonstrated that dividends C and D were derived from profits subject to tax (for

which credit should be available at the FNR), as opposed to capital reserves. The most important factors are the absence of any underlying tax and the absence of withholding tax (other than insignificant amounts). Dr Sieker's evidence was that tax would arise at the rate of 36% even if the profits out of which a dividend was paid were sheltered by losses. In contrast, there would be no such tax on a return of capital. Although Dr Sieker refers to tax refunds that are available when profits are distributed by reference to the lower rate of tax on distributed profits, it is hard to see how that could result in a nil tax liability.

57. Although Dr Sieker gives a possible explanation for withholding tax not being shown, as with dividend B that is contradicted by Mr Slobodzian's evidence. But more importantly, in contrast to dividend B, there is an explanation for an absence of withholding tax, since under the German system it did not apply to a return of capital.

58. I accept that the 1996 correspondence shows that Thorn Licht was paying a dividend to its German shareholder largely or wholly out of profits apparently subject to tax, and that Dr Sieker's evidence was that it is not possible to discriminate between shareholders so that some receive dividends and others returns of capital. However, he did concede that it was possible to have different classes of share in some circumstances, and there is no evidence about Thorn Licht's share capital structure. There is also no clear evidence about the relative shareholdings held by each, or indeed (although it seems not to be in dispute) any clear evidence as to whether all five shareholders were shareholders at the same time. The document referred to at [55] above in relation to the year to 31 March 1990 suggests to me that shareholdings may have been altered. The 1996 correspondence gives me the impression that the entire profits were distributed to Thorn EMI GmbH. I infer that some way was found, or perhaps considered to exist, contrary to Dr Sieker's view, which resulted in taxed profits being paid to Thorn EMI GmbH but untaxed amounts to the Dutch shareholders.

59. It is also of some relevance that the minimal amounts of withholding tax shown in respect of dividends C and D are not at the same percentage rate. That might suggest different classes of share or distributions paid at different times to different shareholders. Furthermore, whilst the footnoted reference to capital reserves in relation to Skala and Hi-Fi (see [47] above) might be explained either by reference to a return of capital within the Dutch structure, or to only part of the distribution being from capital reserves, the existence of that reference in respect of the Skala and Hi-Fi dividends is unhelpful to EMI's case given the paucity of evidence about the disputed dividends. In particular, it significantly reduces any weight I can attach to Mr Slobodzian's evidence that dividends C and D could not be repayments of capital because any repayments were noted as such. The Skala and Hi-Fi dividends appear on the Dividend Table without any such note. The footnoted reference appears only in an additional document recently disclosed by HMRC, for which no equivalent is available in respect of dividends C and D.

Issue 5

60. At the relevant time the Chemetall group comprised a company called Brent International plc (since renamed Chemetall plc) and subsidiaries worldwide, which operated in a variety of sectors. I shall refer to the Chemetall group claimants collectively as "Chemetall".

61. Issue 5 raises a pleading point. HMRC contend that Chemetall's claim can only extend to monies paid under a mistake of law or pursuant to unlawful demands in respect of non-UK source dividends received in accounting periods ending in 1992 onwards, and advance corporation tax ("ACT") paid in those periods. Chemetall disagree, and in the alternative have applied for permission to amend their Re-Amended Particulars of Claim and, if necessary, for permission pursuant to section 35 of the Limitation Act 1980 and CPR 17.4, on the grounds that to the extent that the amendment adds a new claim, it arises out of the same or substantially the same facts as those already pleaded.

62. Amendments to particulars of claim in this GLO are governed by paragraph 7 of an order of Mr Justice Park dated 12 December 2003. That sets out a procedure whereby particulars of claim to which the GLO applies may be amended. It states that any claims added by the amendments are deemed to have been commenced on the date that the amended claim form is sealed, unless the court subsequently finds that the amendments did not have the effect of adding new claims within s 35 Limitation Act 1980, or the new claims arise out of the same or substantially the same facts as a claim in respect of which a remedy has already been sought, in which case the claim is deemed to have commenced on the date of the original claim.

The pleadings

63. Paragraph 8 of Chemetall's Re-Amended Particulars of Claim, in respect of a claim originally issued on 3 June 2005 (claim reference HC05C01418, to which I will refer as the "2005 claim"), states as follows:

> "In the accounting periods ending 30th September 1973 and subsequently, the following occurred:
>
> 8.1 Companies in the Chemetall Group resident in the UK received dividends from their subsidiaries resident in other countries. These included, but were not limited to, dividends received by the Ultimate Parent and Intermediate Parents from the Subsidiaries[3];
>
> 8.2 Where the dividends were received by any of the Intermediate Parents, those funds were then paid on, either wholly or in part, by way of dividends from the relevant Intermediate Parent through any other intermediate holding companies to the Ultimate Parent;
>
> 8.3 The Subsidiaries were at all material times, subject to tax in the relevant jurisdiction in which they were resident and earned profits in those jurisdictions;
>
> 8.4 The Ultimate Parent paid dividends to its shareholders which dividends incorporated funds deriving from the dividends received from the Subsidiaries either directly or via the Intermediate Parents in the manner referred to in paragraph 8.2; and

[3] "Subsidiaries" is defined in paragraph 1.3 as companies resident outside the UK of which Chemetall plc was the "direct or indirect parent" or "owned the shares". Subsidiaries were said to include, but not be limited to, wholly or majority owned companies in various Member States.

> 8.5 The shareholders of the Ultimate Parent comprised a wide range of individual and institutional investors in the UK and abroad. Accordingly the Ultimate Parent could not enter a group income election with its shareholders and was therefore liable to pay and did pay ACT upon these dividends. The dividends paid by the Ultimate Parent were paid, in part or whole, out of profits earned by or distributed from the Subsidiaries."

64. There follow "Particulars", in the case of paragraphs (a) to (d) below by reference to the contents of attached Schedules, as follows:

> "(a)… (non exhaustive) details of the gross dividends received by the Ultimate Parent and the Intermediate Parents from the relevant Subsidiaries in the accounting periods ending in 1992 to 1999.
>
> (b) … for the accounting periods ending in 1992 to 1999, (non exhaustive) details of dividends paid or distributions made by the Ultimate Parent to its shareholders together with ACT paid upon those distributions.
>
> (c) … (non exhaustive) details of capital allowances disclaimed by the Ultimate Parent in order to increase the capacity to set off surplus ACT.
>
> (d) … (non exhaustive) details of Schedule D Case V corporation tax paid on foreign dividend receipts.
>
> (e) Any further details of dividends payments received from the Subsidiaries and ACT payments made by the Claimants both for those accounting periods and subsequent accounting periods will follow."

The schedules provide details of certain dividends and related ACT paid between 1992 and 1999.

65. The following paragraph, paragraph 9, states as follows:

> "9. Had the Subsidiaries, as well as their parents, been UK residents rather than residents of the other States referred to above, then the dividends referred to in paragraph 8.1 would have attracted tax credits under s231 ICTA and would have amounted to franked investment income (see paragraph 4 above). In those circumstances neither the Ultimate Parent nor the Intermediate Parents would have been obliged to pay or would have paid a proportionate amount of the ACT referred to in paragraph 8.5 above."

66. Paragraph 12 states:

> "12. The Claimants were liable to corporation tax upon any dividends or other distributions received from the Subsidiaries and any other subsidiaries resident outside the UK pursuant to s 18 Schedule D Case V ICTA. Had those dividend paying companies been UK resident companies, the Claimants would not have been chargeable to corporation tax upon that dividend by reason of section 208 ICTA."

67. The claim to restitution is set out in paragraph 21 in the following terms:

> "21. By reason of the matters pleaded above, the Claimants are entitled to and claim against the Defendant restitution of, and/or compensation for monies paid pursuant to a mistake of law or unlawful demands by the Defendant and pursuant to the ACT Provisions and the Dividend Provisions in respect of the dividends paid to include (but not be limited to), restitution of and/or compensation for: …"

68. There follows a number of claims, including in respect of unlawfully paid tax and loss of use of money. The prayer for relief refers simply to "restitution" at paragraph 2.

69. As already mentioned, this claim was issued in June 2005. In November 2009 Chemetall filed a separate claim under reference HC09C04176 (the "2009 claim"). Chemetall's position is that this claim covers the same ground as the 2005 claim, but also incorporates an additional claim in respect of shadow ACT. HMRC's position is that this later claim is limited to surplus ACT, rather than ACT that had been utilised, and they say that most of Chemetall's ACT was in the latter category.

70. Chemetall maintain that the wording of the pleadings in the 2009 claim is helpful to their case. In that later claim paragraphs 8.1 to 8.5 from the earlier claim are reproduced in substantially the same terms, and with the same introductory wording, as paragraph 11. However, the particulars that follow are in different terms and state as follows:

> "Non exhaustive details of the gross dividends received and ACT payments made can be found, without limitation, in Schedule 1 to these Particulars. Any further details of dividend payments received from the Subsidiaries and ACT payments made by the Claimants both for those accounting periods and subsequent accounting periods will follow."

The parties' submissions

71. Chemetall's case is that paragraphs 8.1 to 8.5 and 9 of the 2005 claim, read with paragraphs 12 and 21 of that claim, contain averments of primary fact which cover all accounting periods ending 30 September 1973 and subsequently, as made clear by the opening words in paragraph 8, and this is not qualified by the wording of the particulars that follow paragraph 8.5. Those particulars do not define the scope of the facts on which the claim is founded: *Pinson v Lloyds and National Provincial Foreign Bank Ltd* [1941] 2 KB 72 ("*Pinson*"). Extensive particulars are not required in a statement of case, and if they are included that does not import an obligation to include all particulars. In this case the particulars provided were specifically stated to be "non exhaustive".

72. Chemetall also say that the wording of the particulars that follow paragraph 11 in the 2009 claim clearly refer back to accounting periods ending 30 September 1973 and subsequently, because accounting periods from 1992 are not specifically mentioned in the pleading (as opposed to the schedule), in contrast with the 2005 claim.

73. Alternatively, Chemetall seek permission to amend the Re-Amended Particulars of Claim in respect of the 2005 claim by deleting the word "subsequent" in paragraph (e) of the particulars that follow paragraph 8.5 and replacing it with the word "other". They say that this would not involve the addition or substitution of a new cause of action, but merely the provision of further particulars. The relevant cause of action is

a claim for restitution, in relation to which dividends received prior to 1992 are relevant evidentially but do not form part of the claim. However, if the proposed amendment was regarded as involving or permitting the addition of a new claim, that arises out of the same or substantially the same facts as those already pleaded. HMRC would not suffer any material prejudice, and no such prejudice was alleged. HMRC have not yet served a defence because the claim has been stayed. The amount at stake is a maximum of £157,000.

74. HMRC oppose the application and say that the proposed amendment would have the effect of adding new claims not arising out of the same or substantially the same facts. Any new claim would be out of time. The question of whether there is a new claim turns on whether there is a new cause of action, being simply a factual situation which gives rise to an entitlement to a remedy (*Lloyds Bank plc v Rogers* [1999] 38 EGLR 83 at 85). The "particulars" set out after paragraph 8.5 relate to and define the scope of the preceding paragraphs in paragraph 8. The material facts included when the foreign dividends were received, when the onward distributions of those amounts were made to Chemetall's shareholders, and when ACT and unlawful corporation tax was paid. All material facts had to be pleaded and the proper function of particulars was not to state material facts omitted from the statement of claim, *Pinson* at page 75.

75. HMRC say that the dividends were only identified in paragraph 8, and despite the label "particulars" after paragraph 8.5, what was pleaded was material facts constituting the cause of action. Paragraphs 8.1 to 8.5 in the 2005 claim set out background facts only and did not include all essential elements, including the corporation tax paid and the fact that payments were made under a mistake. In the 2009 claim, "those accounting periods and subsequent accounting periods" referred to those set out in Schedule 1 because the reference to "subsequent" did not make sense if read with the introductory words to paragraph 11. In any event, the 2009 claim related to ACT that was surplus in 1999, and the claims that Chemetall were seeking to add now did not include such claims.

Discussion

76. The key question is whether the pleadings in the 2005 claim contained the material facts constituting a cause of action in respect of all dividends received from non-resident subsidiaries (and dividends paid onwards) in accounting periods ending in 1973 onwards, despite the absence of any details of pre-1992 dividends. If the existing pleadings do cover all such dividends then Chemetall succeeds on this point. If not, then I do not consider that this is a case where permission to amend could appropriately be given, because it would follow from the conclusion on the first point that there would be a new claim that does not arise from the same or substantially the same facts, because those facts would include details of dividends paid from 1992, rather than dividends paid earlier. Essentially, the question is whether the material facts had to include details of the dividends (and/or the associated tax).

77. Under CPR 16.4, particulars of claim must include a "concise statement of the facts on which the claimant relies". CPR 17.1 requires consent or the permission of the court to amend a statement of case that has been served. Section 35 of the Limitation Act 1980 provides that any new claim (relevantly defined as any claim involving the addition or substitution of a new cause of action) made in the course of an action is deemed to be a separate action commenced on the same date as the original action. It

also provides that the court may not allow such a claim after the limitation period has expired, subject to a limited carveout which is reflected in CPR 17.4. CPR 17.4 permits the court to allow an amendment which adds or substitutes a new claim, but only if it arises out of the same facts or substantially the same facts as a claim for which a remedy has already been sought.

78. In this case Park J's order (see [62] above) is relevant, effectively addressing any requirement for permission under CPR 17.1 and requiring a determination of whether a new claim is being added or substituted.

79. Chemetall relies on the Court of Appeal decision in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] Ch 243 ("*DMG*"). One of the issues considered by the Court of Appeal in that case was whether amendments to schedules to the particulars of claim added new causes of action. In that case there was a claim for restitution in respect of payments of ACT on dividends paid "from time to time" by DMG to its two German shareholders. The ACT payments were specified as including, but not being limited to, payments specified in the schedules. Park J had held that the amendments adding additional dividend payments did not add new claims, but simply gave further details. He distinguished his earlier decision in *Hoechst UK Ltd v Inland Revenue Commissioners* [2003] EWHC 1002 (Ch), where he had interpreted the particulars of claim as seeking relief only in respect of specific ACT payments identified in a schedule, such that when the schedule was amended new claims were added.

80. Jonathan Parker LJ concluded at [247] that the statement made that the claims "include, but are not limited to" the payments specified in the schedules meant that on a true interpretation claims in respect of all payments of ACT made by DMG were pleaded, the function of the schedules being to provide particulars of specific payments. The defendants might have been able to complain that a pleading in that form was embarrassing, but had not done so. Rix LJ agreed with this conclusion. Although he agreed with Buxton LJ (who dissented on this point) that each payment the return of which is claimed by way of restitution constitutes a separate cause of action, the point in *DMG* was of a lower order of abstraction relating to the "very special facts" relating to the state of the pleadings in that case. The particulars of claim claimed restitution in respect of "dividends" generally, and the amendments did not plead new causes of action. Rather, they gave further factual details of the cause of action which had already been pleaded. The question was ultimately one of degree, and the reference to "from time to time" meant that there could be no intention to include some payments but not others. If there had been no schedules then the pleading would clearly have referred to all dividend payments, albeit that it may have lacked proper particularisation.

81. Mr Ewart sought to distinguish *DMG* on the basis that that case related to DMG's inability to make a group income election (and so avoid paying ACT) on dividends paid to a foreign parent. The complaint applied to any dividend paid to DMG's foreign parent and all the associated ACT. In Chemetall's case the claim was limited to only certain dividends and could not be construed otherwise.

82. In *Savings and Investment Bank Ltd v Fincken* [2001] EWCA Civ 1639 ("*Fincken*"), Peter Gibson LJ explained that in considering whether there was a new claim or cause of action for the purposes of s 35 Limitation Act 1980, what was needed was a

comparison of the pleading in its state before the proposed amendment and the pleading in its amended state, examining the pleading of the essential facts which need to be proved, and leaving out non-essential facts as mere instances or particulars of the essential facts (paragraph [30]).

83. I have concluded that the better interpretation of the Re-Amended Particulars of Claim relating to the 2005 claim is that they do extend generally to dividends received from non-resident subsidiaries, and dividends paid on that were sourced from those dividends, in accounting periods ending 30 September 1973 and subsequently. I reach this conclusion both by reference to the paragraphs of specific relevance, and by reading those paragraphs in the context of the Re-Amended Particulars of Claim as a whole.

84. Paragraphs 8.1 to 8.5 of the Re-Amended Particulars of Claim are in general terms and are preceded by introductory wording referring explicitly to accounting periods ending 30 September 1973 and subsequently. Those paragraphs also need to be read, in particular, with paragraph 9, in relation to ACT, paragraph 12 in relation to corporation tax, and paragraph 21 which seeks restitution for monies paid pursuant to a mistake of law or unlawful demands. None of these later paragraphs is in my view limited by reference to the entries in the schedules. Instead they refer generally to dividends received from non-resident subsidiaries, and dividends reflecting such dividends which were paid on within and outside the Chemetall group. Together they comprise the essential facts that need to be proved. Details of individual dividends were non-essential, albeit that in the absence of any details a complaint might well have been made about a lack of particularisation.

85. This interpretation is supported by reading the paragraphs referred to above in the context of other paragraphs of the Re-Amended Particulars of Claim. In particular, paragraphs 2 to 7 contain a general description of the ACT and corporation tax regime in respect of dividends and other "qualifying distributions" on or before 5 April 1999. Paragraphs 10 and 11 make general points about the restrictions on setting off ACT in relation to non-resident subsidiaries as compared to resident subsidiaries. Paragraph 14 makes general points about the inability to use foreign source dividends as franked investment income, and the exposure to surplus ACT and corporation tax created by non-resident subsidiaries as compared to resident subsidiaries. Paragraphs 15 to 17 allege that the relevant tax rules were (among other things) contrary to Treaty provisions relating both to freedom of establishment and movement of capital, that Chemetall should have been in the same position in respect of non-UK and UK source dividends, and that the tax regime acted as a disincentive to establish subsidiaries in other Member States or to move capital between the UK and subsidiaries wherever situated. None of these other paragraphs suggest that the claim is limited to dividends between 1992 and 1999, or only to certain of the dividends received from non-resident subsidiaries. There follow specific paragraphs that are expressed as "further or in the alternative" that raise points about the Parent Subsidiary Directive (90/435/EEC), individual double tax treaties and the Human Rights Act, but these clearly do not detract from the primary pleaded case.

86. In reaching this conclusion, I have considered the wording of the particulars that follow paragraph 8.5 carefully. Although not entirely clear, I consider that the references to "non exhaustive" indicate that the details of dividends provided in respect of accounting periods ending in 1992 to 1999 are or may be incomplete, rather

than indicating that the references to dividends in those paragraphs also encompass dividends paid in earlier periods. That is supported by the inclusion of paragraph (e), which in my view refers back to the "non exhaustive" references in paragraphs (a) and (b), with the reference to "those" accounting periods in paragraph (e) most naturally meaning those between 1992 and 1999. This, together with the reference to "subsequent" accounting periods in that paragraph, has caused me some concern. Overall, however, I do not think these points outweigh the clear introductory words in paragraph 8, combined with the wording of paragraphs 9, 12 and 21 and, more generally, the other paragraphs of the Re-Amended Particulars of Claim.

87. Following the approach suggested by Rix LJ in *DMG*, if the "particulars" after paragraph 8.5 were removed, what remains is a pleading of all the essential facts, albeit an unparticularised one. Although HMRC might complain that they were led to believe from those particulars and the schedules that the case they had to answer was limited to dividends paid between 1992 and 1999 (and, potentially, subsequently), the response to that is that the introductory words in paragraph 8 make it clear that the facts pleaded relate to 1973 onwards. As explained by Lord Woolf in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793a-b, pleadings must mark out the parameters of the case advanced, identifying the issues and the extent of the dispute and making clear the general nature of the case. As referred to in *Fincken*, the essential facts that need to be proved must be set out. In my view Chemetall's pleadings achieved this without the particulars included after paragraph 8.5. It was always open to HMRC to seek further particularisation.

88. As already explained, Mr Ewart sought to distinguish *DMG* on the basis that the claim in that case related to all dividends paid to the foreign parent, whereas he said that in this case only some dividends are the subject of Chemetall's claim. I can see that there would be force in this argument if the dividends the subject of Chemetall's claim were not described in such a way that they are objectively ascertainable, because pleadings must mark out the parameters of the case advanced.

89. However, Chemetall's claim is expressed as encompassing an entire, and objectively ascertainable, category of dividends. It covers all dividends received from subsidiaries resident in other countries, together with dividends representing those dividends paid on within and outside the Chemetall group, in accounting periods ending 30 September 1973 and subsequently.

90. In the circumstances it is not necessary for me to express a view on the scope of the 2009 claim, and I do not propose to do so. It is also not necessary to consider the application to amend, although since it is clarificatory in nature and no new claim is being added or substituted, such an amendment may be made under the procedure established by Park J's order.

Conclusion

91. In conclusion:

    a) in relation to Issue 2, dividends A and B should be treated as carrying a credit at the FNR, but dividends C and D should not; and

b) in relation to Issue 5, Chemetall's claim is not limited to dividends in accounting periods ending in 1992 onwards.