Neutral Citation Number: [2016] EWHC 169 (Ch)

Case No: HC-2003-000002
(Formerly: HC03C00446)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 02/02/2016

Before:

MR JUSTICE HENDERSON

- -

Between :

(1) SIX CONTINENTS LIMITED **(2) SIX CONTINENTS OVERSEAS HOLDINGS LIMITED**	**Claimants**
- and -	
(1) THE COMMISSIONERS OF INLAND REVENUE **(2) THE COMMISSIONERS OF HER MAJESTY'S REVENUE AND CUSTOMS**	**Defendants**

Mr Jonathan Bremner (instructed by **Joseph Hage Aaronson LLP**) for the **Claimants**
Mr Rupert Baldry QC and Ms Barbara Belgrano (instructed by **the General Counsel and Solicitor for HMRC**) for the **Defendants**

Hearing date: 18 January 2016

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JUDGMENT ON THE AMENDMENT APPLICATION

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.

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MR JUSTICE HENDERSON

Mr Justice Henderson:

Introduction

1. On 18 January 2016 I heard an opposed application by the claimants ("Six Continents") for permission to amend their particulars of claim in order to mount a challenge to the lawfulness under EU and Human Rights law of new primary legislation enacted by section 38 of the Finance (No. 2) Act 2015 and now contained in Part 8C (sections 357YA to 357YW) of the Corporation Tax Act 2010 ("Part 8C" and "CTA 2010"). Part 8C imposes a ring-fenced charge to corporation tax, at the rate of 45%, on certain payments of restitution interest made by the Commissioners for Her Majesty's Revenue and Customs ("HMRC" or "the Revenue") to claimants in legal proceedings, who will include Six Continents if their claims in the present action succeed at trial and become final (in the sense that the determination of those claims by the court could no longer be varied on appeal).

2. The new legislation (to which I will refer as "the Restitution Interest Tax Provisions") was first given effect by a resolution of the House of Commons on 26 October 2015, pursuant to the Provisional Collection of Taxes Act 1968. The Finance (No. 2) Act 2015 received the Royal Assent on 18 November 2015.

3. The Restitution Interest Tax Provisions were introduced by the Government, without prior public notice or consultation, on 23 October 2015, by way of late (post-Committee Stage) amendment to the Finance Bill 2015-16. Most of the provisions of Part 8C take effect from that date. The legislation also imposes a duty on HMRC to deduct tax, at the full rate of 45%, on payments of potential restitution interest which have not yet become final: section 357YO. This obligation, which in effect imposes a withholding tax, applies to payments of interest made on or after 26 October 2015: see section 38(10) of the Finance (No. 2) Act 2015.

4. For the factual and legal background to the present claim, reference should be made to the judgment which I handed down on 14 October 2015 on an application by Six Continents for summary judgment, or alternatively for an interim payment, which I had heard on 15 July 2015: see [2015] EWHC 2884 (Ch) at [1] to [19]. The upshot of this application was that I dismissed the application for summary judgment, but held that the claim for an interim payment succeeded save in relation to such parts of the 1997 Dividends as were sourced from share premium account. By my order of the same date, I directed HMRC to make the interim payment within 14 days and to pay 80% of the claimants' costs. The interim payment (in the sum of £16,014,718.29) was duly made on 19 October 2015, four days before the announcement and introduction of the Restitution Interest Tax Provisions.

5. The interim payment represented principal amounts of allegedly unlawful tax, together with interest on those principal sums calculated on a compound basis. Because the payment was made a week before 26 October 2015, the withholding tax obligation in section 357YO did not apply to it, and the payment was therefore received gross. I was told that it represents approximately 84% of the total amount for which Six Continents expect to obtain judgment if their claim succeeds in full at the trial of the action, which has now been set down for the first week of May 2016 with a time estimate of four days.

The Restitution Interest Tax Provisions: an Overview

6. For present purposes, it is unnecessary to set out the Restitution Interest Tax Provisions in detail and a summary of some of the main features of the legislation will suffice.

7. The new charge to corporation tax is imposed by section 357YA. It applies to "restitution interest arising to a company". By virtue of section 357YB, profits arising to a company which consist of restitution interest are chargeable to tax as income under Part 8C, regardless of whether the profits are of an income or capital nature.

8. "Restitution interest" is defined in section 357YC as meaning profits in relation to which Conditions A, B and C in subsections (2) to (4) are satisfied. Condition A requires that the interest is paid or payable by HMRC in respect of a claim by the company for restitution with regard to either:

> "(a) the payment of an amount to the Commissioners under a mistake of law relating to a taxation matter, or
>
> (b) the unlawful collection by the Commissioners of an amount in respect of taxation."

Condition B requires that the court has made a "final determination" that HMRC are liable to pay the interest, or that HMRC has entered into a final settlement of the relevant claim under which the company is entitled to be paid or retain the interest. A "final" determination is defined by section 357YC(8) as one which cannot be varied on appeal. Condition C requires that the interest determined to be due, or agreed upon, "is not limited to simple interest at a statutory rate".

9. Section 357YC(6) provides that it does not matter whether the interest is paid or payable (a) pursuant to a judgment or order of a court, (b) as an interim payment in court proceedings, (c) under an agreement to settle a claim, or (d) in any other circumstances. By virtue of subsection (7), "interest" includes amounts determined by reference to the time value of money.

10. Sections 357YE and 357YF provide that generally accepted accounting practice applies to determine the amounts to be brought into account, and the period in which they are to be brought into account as restitution interest in determining the company's profit and loss for the period.

11. Section 357YK provides that corporation tax is charged on restitution interest at the "restitution payments rate" of 45%. The new charge to tax is then "ring-fenced" by section 357YL, which excludes the application of any reliefs or set-offs against tax charged at the restitution payments rate. Amounts of restitution interest charged under Part 8C are also excluded from the company's "total profits" for the purpose of computing the basic charge to corporation tax under CTA 2010. This is reflected in section 357YV(1), which provides that:

> "So far as restitution interest is charged to corporation tax under this Part it is not chargeable to corporation tax under any other provision."

12. I have already referred to the obligation to deduct withholding tax from payments of restitution interest in section 357YO. For this purpose, the definition of "restitution interest" is, in effect, applied without the requirement for a final determination: see subsection (1). On making such a payment, HMRC must under subsection (2):

> "(a) deduct from it a sum representing corporation tax on the amount at the restitution payments rate, and
>
> (b) give the company a written notice stating the amount of the gross payment and the amount deducted from it."

The amounts withheld under section 357YO(2) are then to be treated for all purposes as paid by the company on account of its liability, or potential liability, to corporation tax charged on the interest payment as "restitution interest": section 357YP(1).

13. Section 357YQ makes provision for the assessment by HMRC of amounts chargeable to corporation tax under Part 8C. The company must pay the amount assessed as payable for the relevant accounting period within 30 days of being given notice of the assessment. An appeal against the assessment may be made in the usual way to the Tax Chamber of the First-tier Tribunal ("the FTT"), pursuant to paragraph 48 of Schedule 18 to the Finance Act 1998.

14. An appeal may also be brought against the deduction of tax by HMRC under section 357YO: see section 357YS, which provides that notice of appeal must be given in writing within 30 days of HMRC giving notice under section 357YO(2) stating the amount of the deduction.

15. As will be apparent from this brief summary, the Restitution Interest Tax Provisions have a number of unusual features. The charge to tax applies only to "restitution interest" recovered by taxpayer companies in claims against the Revenue founded on a mistake of law or the unlawful collection of tax, such as (to take two obvious examples) the claims to recover unlawfully levied corporation tax and ACT in the FII group litigation, and the claims to recover compound interest on unlawfully levied VAT in the Littlewoods litigation. The charge to tax is insulated from the normal corporation tax regime by the ring-fencing provisions, and the rate of tax is more than double the current standard rate of 20%. Moreover, the charge to tax will not arise until the relevant proceedings have been finally determined or settled, which may be many years in the future, but the accounting period to which the charge relates will be determined in accordance with generally accepted accounting practice, and may therefore be much earlier than the period in which the assessment is made. Meanwhile, the effect of the withholding tax provisions is that companies are provisionally required to bear the full economic burden of the tax whenever a payment of potential restitution interest is made to them by HMRC.

16. In the Explanatory Note to what was then clause 8 of the Finance Bill 2015-16, the rationale of the proposed legislation was explained as follows:

> "29. Under the law as it currently stands, payments of restitution paid by HMRC to companies, which relate to interest, are subject to Corporation Tax at the standard rate. However the interest payments targeted by this clause will be

> subject to a higher rate, to reflect the particular circumstances of these awards. These include the number of years over which the overpayments were made, the fact that any such awards would be calculated on a compound basis and the historic corporation tax rates that applied during the years to which these claims relate."

17. On the Second Reading of the Finance Bill in the House of Commons on 26 October 2015, the Financial Secretary to the Treasury, Mr David Gauke, said:

> "New clause 8 addresses an unfairness whereby in certain claims for repayment of tax and restitution through interest payments, taxpayers might receive a significant additional benefit at the expense of the public purse. The vast majority of interest payments that are paid by [*HMRC*] are made under the relevant Taxes Act. These will continue to be subject to the normal rate of corporation tax. However, the interest payments targeted by this clause arise from claims made under common law, which stretch over a large number of years – in some cases, going back to 1973 – and represent a unique set of circumstances.
>
> As it stands under current law, any payments will be taxed at the low corporation tax rate that applies at the time the payments are due to be made. Since the interest payments targeted by the clause have accrued over years when the rate of corporation tax was much higher than companies currently enjoy, those making the claims received a significant financial benefit. In addition, such payments may have to be calculated on a compound basis, further improving the advantage gained at the expense of the public purse."

18. It is important to note, before moving on, that it is common ground that, but for the enactment of the Restitution Interest Tax Provisions, the interest element of restitution awards made to companies in respect of claims against HMRC would in principle be subject to corporation tax. It is no part of Six Continents' case that the interest component of the restitution which they seek should be immune from corporation tax in their hands.

The disputed amendments

19. The amendments which Six Continents wish to make, and which HMRC oppose, are set out in paragraphs 13G.1 to 13G.7 of the draft sixth amended particulars of claim. After giving a brief description of the enactment and effect of the Restitution Interest Tax Provisions, the proposed amendments continue as follows:

> "13G.4 The Restitution Interest Tax Provisions will be unlawful by reason of their incompatibility with EU law and with the requirements of the European Convention on Human Rights. In particular, the Restitution Interest Tax Provisions will:

(1) violate the United Kingdom's obligations under EU law to provide the Claimants with an adequate and effective remedy in respect of taxes unlawfully levied contrary to the principle of effectiveness and Article 47(1) of the Charter of Fundamental Rights of the European Union;

(2) contravene the established EU law and European Convention on Human Rights ("ECHR") law principles of legal certainty, non-retroactivity, and the protection of legitimate expectations;

(3) constitute, by seeking to reverse the effect of final judicial rulings as to the appropriate and necessary remedy, an unjustified interference by the State in judicial proceedings contrary to general principles of EU law and ECHR law (including the rule of law and the requirement of separation of powers, and contrary to Article 6 EC[H]R and Article 47(2) CFREU);

(4) contravene Article 1 of Protocol 1 to the ECHR and Article 17 CFREU.

13G.5 In the premises, the Restitution Interest Tax Provisions are unlawful and must be disapplied.

13G.6 Further, and in the alternative, any restitution and/or compensation awarded to the Claimants must be increased so as to take account of the tax which will be charged under the Restitution Interest Tax Provisions.

13G.7 Further, and in the alternative, the breaches of EU law effected by the Restitution Interest Tax Provisions upon which the Claimants rely involve manifest and grave infringements by the UK of the limits of its powers. The Claimants aver that the breaches on which they rely were sufficiently serious to warrant State liability to pay compensation in respect of resulting losses.

[*Particulars are then given*]"

20. In addition, the prayer for relief seeks, as a new paragraph 15H:

> "A declaration that the Restitution Interest Tax Provisions are contrary to EU law and/or ECHR law, the relief prayed above to reflect any such illegality."

The Revenue's objections

21. The Revenue object to the proposed amendments on three main grounds. First, they submit that the application is premature. Secondly, they submit that the FTT has exclusive jurisdiction to deal with the proposed challenges to Part 8C. Thirdly, they

say that issues relating to Part 8C are already being dealt with by both the FTT and the Administrative Court, and it would be inappropriate for the same challenge to be raised in the Chancery Division in the context of the present proceedings.

(1) Prematurity

22. Counsel for HMRC, Rupert Baldry QC and Barbara Belgrano, submit that the tax treatment of any sum to be awarded by the Court in the present action is a distinct and consequential issue, for which a separate means of challenge is provided. At present, there is no "restitution interest" under Part 8C, and thus no present liability to the Part 8C charge. Nor has any amount been withheld in respect of the Part 8C charge by HMRC, because the interim payment was made before the new legislation came into force and is unaffected by it. If and when a tax charge crystallises under Part 8C, the claimants will have a statutory right of appeal to the FTT. Meanwhile, there is nothing on which the High Court can properly adjudicate in the context of the present action.

23. As to the alternative claim in paragraph 13G.6 of the draft, namely that the amount to be awarded by the court should be grossed up to take account of tax chargeable under Part 8C, HMRC submit that this is both premature and wrong in principle. The appropriate way to challenge the lawfulness of Part 8C is under the statutory appeals procedure. If the tax charge is held to be unlawful, the claimants would then have a statutory right to claim any amounts withheld. If, on the other hand, the tax charge is lawful, the award of a grossed-up amount would have over-compensated them.

(2) The FTT has exclusive jurisdiction

24. HMRC submit that the High Court has no jurisdiction in relation to the claimants' challenges, or (if it does) that it should decline to exercise it. Statutory rights of appeal to the FTT are provided, both against an assessment under Part 8C and against any withholding of tax under section 357YO: see paragraphs [13] and [14] above. Accordingly, the FTT has exclusive jurisdiction in relation to any such appeals, in accordance with the principles stated by the majority of the House of Lords in Autologic Holdings Plc v Inland Revenue Commissioners [2005] UKHL 54, [2006] 1 AC 118 ("Autologic").

25. As Lord Nicholls (with whom Lord Steyn and Lord Millett agreed) said in Autologic, after outlining the statutory code applicable to corporation tax appeals:

> "12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be

> struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeals procedure provided by Parliament. He should follow the statutory route.
>
> 13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation. This approach accords with the views expressed in authorities such as *Argosam Finance Co Limited v Oxby* [1965] Ch 390, *In re Vandervell's Trusts* [1971] AC 912 and, more widely, *Barraclough v Brown* [1897] AC 615."

26. Lord Nicholls went on to explain that the position was no different where the taxpayer wished to challenge a provision of United Kingdom legislation as being inconsistent with a directly applicable provision of EU law: see [16] to [17]. Lord Nicholls concluded, at the end of [17]:

> "In this regard the appeal commissioners have the same powers and duties as the High Court."

27. These principles apply with even greater force, say the Revenue, where no charge to tax under the impugned UK legislation has yet arisen, and where the claim is that a future tax charge which may arise as a consequence of a judgment in the claimants' favour should be disapplied or read down. Furthermore, the FTT would in any event be the appropriate tribunal to make the detailed findings of fact necessary to decide the case, if and when an appeal is properly brought before it. Six Continents seek to disapply Part 8C to the particular facts of their case. Whether any given claimant has an EU law right that requires national legislation to be disapplied depends on its own particular circumstances: see, for example, The Trustees of the BT Pension Scheme v HMRC [2015] EWCA Civ 713 at [37] per Patten LJ, giving the judgment of the Court. The FTT would be ideally placed to hear oral evidence, find facts and decide points of accounting law and practice. The FTT could also deal with any issues arising under the Human Rights Act 1998.

(3) Other pending proceedings

28. There are already at least four separate challenges to the Restitution Interest Tax Provisions in existence. They are as follows:

    (1) Various claimants in the BAT Group have appealed to the FTT against the withholding tax deducted by HMRC, in purported compliance with Part 8C, from the interest component of judgment debts obtained by them in the FII group litigation. This appeal raises two issues: first, whether HMRC has made a valid deduction under section 357YO, in circumstances where they have not given a

written notice stating the amount of the gross payment and the amount deducted from it in accordance with subsection (2)(b); and, secondly, whether the withholding tax is unlawful. BAT sought to have this appeal determined urgently, and to have the first issue dealt with as a preliminary issue (on the basis that, if there had not been a valid deduction, the FTT would lack jurisdiction on the appeal and therefore could not decide the question of lawfulness). The FTT did not consider that the claim was urgent, or that there should be a separate determination of the first issue. The FTT has instead listed a case management hearing for 4 March 2016, at which appropriate directions will be given for the appeal to proceed to a substantive hearing.

(2) Two other claimants in the FII group litigation, Imperial Chemical Industries Limited ("ICI") and FCE Bank Plc ("FCE"), have begun judicial review proceedings challenging the lawfulness of the Restitution Interest Tax Provisions. ICI has obtained an interim payment of more than £64 million (which includes an interest component of more than £22 million), while FCE has obtained summary judgment for more than £67 million (including interest of some £41 million). These payments were received before Part 8C came into force, in the case of ICI as long ago as 2009, but the claimants say the interest component of those payments will become "restitution interest", and be chargeable to tax under Part 8C, when all appellate stages of the FII group litigation have been completed, probably several years hence. A permission hearing has been listed for 3 February 2016, when the Administrative Court will also consider whether to expedite the claim if permission is granted.

(3) Another application for judicial review has been made by The Prudential Assurance Company Limited, which is the test claimant in the CFC & Dividend GLO. Prudential also challenges the lawfulness of the new tax, and seeks to have its claim consolidated with the judicial review proceedings brought by ICI and FCE. Prudential's claim is supported by bodies such as life insurers, unit trusts and open ended investment companies which have historically paid low rates of tax. This claim is still at an early stage, and is awaiting a decision from the Administrative Court on permission and consolidation.

(4) Finally, the BAT test claimants and eight other claimants in the FII GLO have made applications seeking payment of their judgment debts gross of the 45% withholding tax, on the basis that the tax is unlawful. These applications were deferred pending a decision by the Administrative Court on the question whether they should be consolidated with the judicial review claim brought by ICI and FCE. The application for consolidation has been rejected by the Administrative Court, so directions will need to be given for the future conduct of these applications.

The submissions of Six Continents

29. On behalf of Six Continents, Mr Bremner argued that permission to amend should be granted. He says that the substance of the proposed amendments is clearly arguable, and they cannot be rejected as having no realistic prospect of success. Furthermore, it is clear that the forthcoming trial of the action in May 2016 will yield a substantial judgment in the claimants' favour, which will include a large amount of compound interest to which Part 8C will apply. This follows from the agreed list of issues dated

17 December 2015, which states that the only issues the court will be asked to decide at the trial are three issues, relating to specific parts of the Dividends, which turn on questions of Dutch law. As to the remainder of the claim, HMRC accept for the purposes of the trial that the court is required to apply the law on the basis set out in FII (High Court) II, while reserving their position for a higher court. Accordingly, submits Mr Bremner, HMRC accept for the purposes of the forthcoming trial that, save in the three respects identified in the list of issues, the tax charged upon the Dividends under Case V of Schedule D was unlawfully levied, and must be repaid to the claimants with compound interest in order to satisfy their right to restitution under EU law.

30. Next, Mr Bremner submits that the right to reimbursement of unlawfully levied tax under EU law extends to amounts paid to, or retained by, the State which relate directly to that tax, and such amounts include losses representing the time value of overpaid tax. The EU law principle of effectiveness also requires that the taxpayer should receive an adequate indemnity for the loss occasioned through the undue payment of tax: see Littlewoods (ECJ) at paragraph 29 of the judgment of the Court, and Littlewoods (CA) at [107] to [108]. Accordingly, a critical issue which the High Court will have to determine at trial is: what is the "adequate indemnity" to which the claimants are entitled for the loss occasioned by their undue payment of tax?

31. Thirdly, where compensation reflects a claimant's loss, the court must take into account the incidence of taxation in order to ensure that the claimant is appropriately compensated. This may involve the compensation awarded to the claimant being reduced, as in the well known case of British Transport Commission v Gourley [1956] AC 185 (HL), or increased, as in Taylor v O'Connor [1971] AC 115 (HL) – see per Lord Reid at 128H-129B.

32. Fourthly, Mr Bremner submits that the Revenue's jurisdictional objection, based on the Autologic principle, is wrong. The present case concerns claims over which the High Court has exclusive jurisdiction, because all of the years in question are "closed" years: see my previous judgment in the present case at [3]. It is only the High Court which can assess the amount of compensation that would provide the claimants with an adequate indemnity. Mr Bremner referred me to a recent decision of the FTT, Coin-A-Drink Ltd v Revenue and Customs Commissioners, TC/2013/03851, unreported, in which the FTT said at [77] that it did not have jurisdiction to determine whether the payment of interest on overpaid VAT there in issue represented an adequate indemnity to the appellant.

33. Mr Bremner also submitted that, if the Restitution Interest Tax Provisions were held to be unlawful, there might well be consequential issues relating to interest which only the High Court could resolve. The reason for this, he says, is that the statutory rate of interest which HMRC would have to pay, on a repayment of the unlawfully levied tax, at the rate set under section 52 of the Finance (No. 2) Act 2015 (currently 2% above bank base rate), would be lower than the rate which has so far been taken in computing the restitution required by EU law (namely a ten year moving average of the annual average yield of ten year gilts, which is currently 3.53%, compounded annually).

34. Finally, in relation to the other pending proceedings where challenges are made to Part 8C, Mr Bremner submits that their existence is irrelevant to the question whether

permission to amend should be granted. Rather, they give rise to case management issues which the court will have to resolve as efficiently as it can, having regard to all the claims which have been properly brought.

Conclusions

35. With the benefit of these submissions, I can now state my conclusions.

36. The Revenue's linked objections on the grounds of prematurity and jurisdiction are in my judgment compelling, and point strongly towards the conclusion that the claimants should not be permitted to challenge the validity of the Restitution Interest Tax Provisions in the High Court, at a stage before any judgment has been given in their favour. If and when they obtain judgment for a sum which includes actual or potential restitution interest – and I accept, on the basis of the agreed list of issues, that this is likely to happen after the forthcoming trial – the question of validity will then arise, but (save perhaps in exceptional circumstances) the only appropriate forum for resolution of that question will be the FTT, in the context of an appeal brought by the claimants against either a withholding of tax under section 357YO or an assessment under section 357YQ. That is the appeal machinery provided by Parliament, and in accordance with Autologic I can see no good reason for departing from it, whether the question is properly to be regarded as one of jurisdiction in the strict sense, or one of abuse of process.

37. There can be no doubt, in my view, that the FTT would have the same ability as the High Court to consider the lawfulness of the Restitution Interest Tax Provisions under EU law. The position was stated with great clarity by Lord Nicholls in Autologic, at [16] to [17]. The inhibition which the FTT expressed in Coin-A-Drink went (as I understand it) to a different point, which is that the FTT has no original jurisdiction at common law to make an award of restitution to a taxpayer in respect of unlawfully levied tax. But that is not the question which would face the FTT in the present case. The claimants will have obtained their award of restitution in the High Court, and the only issue will be the validity of the tax which is charged upon the interest element of that award.

38. It is also completely irrelevant that the High Court admittedly has jurisdiction to entertain the present claims, because they relate to "closed" years. The relevant question is which court or tribunal would have jurisdiction to determine an appeal under Part 8C, following a future assessment or withholding of tax. On the basis of Autologic, the answer to that question is in my judgment clear.

39. The position might be different if Six Continents were able to persuade me that it was necessary for the court to consider and rule upon the validity of the Restitution Interest Tax Provisions before deciding on the quantum of restitution they are entitled to recover. Mr Bremner was, however, unable to advance any plausible argument why this might be the case. On the contrary, the quantum of restitution will be fixed by reference to the principles laid down in FII (High Court) II, and will therefore include compound interest at the conventional rate which represents HMRC's actual cost of borrowing. That is the maximum recovery which the claimants could hope to recover, on the basis of the law as it now stands. The suggestion that it might be appropriate to gross up the recovery by the amount of tax under Part 8C which is prospectively payable on the interest element of the restitution is in my judgment

misconceived, and runs the risk of over-compensating the claimants. If the Restitution Interest Tax Provisions are valid, or to the extent that they may be held to be valid, that must be because the challenges to them under EU and/or Human Rights law have failed. In those circumstances, they would be binding on the claimants in the same way as other primary UK tax legislation, and there would be no more reason to increase the restitution or compensation which the claimants recover in order to take future Part 8C tax charges into account, than there would be to take account of the basic charge to corporation tax which admittedly already applies to the interest element of the restitution. If, on the other hand, the Restitution Interest Tax Provisions are invalid, in whole or in part, the claimants will be able to recover any overpaid tax under the statutory appeal machinery, and there would again be no proper basis for grossing up the restitution awarded to them.

40. It is true that there is one aspect of the proposed amendments, namely the claim for compensation in paragraph 13G.7, which the FTT would not have jurisdiction to entertain, and which only the High Court could deal with. But the conclusive answer to that point, in my judgment, is that this part of the claim is on any view premature. I do not see how such a claim could sensibly be brought before the invalidity of Part 8C had been established, and before the claimants had suffered any loss as a result of the imposition of the unlawful tax.

41. Similarly, I think that prematurity provides the conclusive answer to Mr Bremner's point about the possible claim Six Continents might one day have about the rate of interest paid to them on a repayment of unlawfully levied Part 8C tax. Quite apart from that, a comparable submission was rejected on its merits by Lord Nicholls in Autologic at [24] to [25].

42. I need to deal finally with a fall back argument advanced by Mr Bremner. Relying on the observations of Lord Nicholls and Lord Millett in Autologic at [44] and [63] respectively, he submits that, even if the Revenue's jurisdictional objections are accepted, the appropriate course would still be to grant permission for the amendments to be made, but for the court then to stay the issues which they raise until further order. The purpose of proceeding in this way, as Lord Nicholls said at [44], would be "the more readily to accommodate any unforeseen turn of events". Lord Nicholls added that the stay "should not preclude the court referring questions to the European Court if practical convenience so dictates".

43. To similar effect, Lord Millett said at [63]:

> "It is impossible to foresee all eventualities, and I agree with Lord Nicholls that the proceedings in the High Court in respect of claims which should have been brought before the commissioners should be stayed and not struck out. This would have two advantages. It should encourage the revenue to co-operate in waiving or extending time limits and removing procedural and other obstacles to the commissioners' jurisdiction; and it would enable the High Court claims to be revived in the event of unforeseen difficulties arising before the commissioners which cannot be overcome."

44. These observations were made in a context where the relevant claims to group relief related to past events, and had already been made albeit in the wrong forum (the High Court rather than by way of appeal to the General or Special Commissioners, the predecessors of the FTT). In those circumstances, it is understandable that the majority of the House of Lords considered it prudent to keep the High Court proceedings alive in order to cater for unforeseen contingencies. But the position in the present case is very different. No claims have yet crystallised, the statutory machinery will be available to resolve any future appeals brought by the claimants, and if it emerges in due course that there is some good reason for claiming relief in the High Court which is not available before the FTT, there would be nothing to prevent the commencement of fresh proceedings for that purpose. I am satisfied, however, that it would be wrong to permit the proposed amendments to be made at this stage, on a purely precautionary basis, in order to cater for hypothetical problems which may never arise in the context of future charges to tax. The proper function of pleadings is to formulate concrete issues which arise on existing facts, not to provide a springboard for the resolution of hypothetical and unforeseen future issues.

45. For all these reasons, I am satisfied that, as matters now stand, none of the proposed amendments would have a realistic prospect of success. I therefore refuse permission for them to be made.