20 November 2020

PRESS SUMMARY

Test Claimants in the Franked Investment Income Group Litigation and others (Respondents) v Commissioners for Her Majesty's Revenue and Customs (Appellant) (1)
Test Claimants in the Franked Investment Income Group Litigation and others (Respondents) v Commissioners for Her Majesty's Revenue and Customs (Appellant) (2)
[2020] UKSC 47
On appeals from [2010] EWCA Civ 103 and [2016] EWCA Civ 1180

JUSTICES: Lord Reed (President), Lord Hodge (Deputy President), Lord Carnwath, Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Hamblen

BACKGROUND TO THE APPEALS

This appeal arises in the course of long-running proceedings known as the Franked Investment Income ("**FII**") Group Litigation. The FII Group Litigation brings together many claims concerning the way in which advance corporation tax and corporation tax used to be charged on dividends received by UK-resident companies from non-resident subsidiaries. The Respondents to this appeal are claimants within the FII Group Litigation whose cases have been selected to proceed as test claims on certain common issues ("**the Test Claimants**"). These issues are being determined in phases, with the courts' decisions affecting not just the other claims within the FII Group Litigation, but potentially also a number of other sets of proceedings brought by corporate taxpayers against the Commissioners for Her Majesty's Revenue and Customs ("**HMRC**").

The Test Claimants' case is that the differences between their tax treatment and that of wholly UK-resident groups of companies breached the EU Treaty provisions which guarantee freedom of establishment and free movement of capital. They seek repayment by HMRC of the tax wrongly paid, together with interest, dating back to the UK's entry to the EU in 1973.

Restitutionary claims for the recovery of money must normally be brought within six years from the date on which the money was paid. As an exception to that general rule, section 32(1)(c) of the Limitation Act 1980 provides that, in respect of an "action for relief from the consequences of a mistake", the limitation period only begins to run when the claimant "has discovered the … mistake … or could with reasonable diligence have discovered it."

Before the Court of Appeal, the Test Claimants argued that, where a claimant is seeking to recover money paid under a mistake of law, the effect of section 32(1)(c) is to postpone the commencement of the limitation period until such time as the true state of the law is established by a judicial decision from which there lies no right of appeal. In their cases, the Test Claimants said that this was when, in 2006, the Court of Justice of the European Union decided that relevant aspects of the UK tax regime were incompatible with EU law. HMRC argued that time instead began to run in 2001, when the Court of Justice decided that other aspects of the UK tax regime breached EU law. The Court of Appeal found in favour of the Test Claimants on this issue.

On appeal to the Supreme Court, HMRC argued that section 32(1)(c) of the Limitation Act 1980 applies only to mistakes of fact and not to mistakes of law, or alternatively that the Test Claimants could reasonably have discovered their mistake more than six years before they issued their claims in 2003. On either approach, a proportion of the claims would be time-barred.

JUDGMENT

The Supreme Court unanimously allows the appeal, but for differing reasons. The majority (Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lord Hamblen) hold that section 32(1)(c) of the Limitation Act 1980 applies to claims for the restitution of money paid under a mistake of law, with time beginning to run when the claimant discovers or could with reasonable diligence have discovered their mistake in the sense of recognising that they have a worthwhile claim. It leaves the application of that test to the facts of this case for the High Court, after the parties have had an opportunity to amend their pleadings. The minority (Lord Carnwath, Lord Briggs and Lord Sales) would have held that section 32(1)(c) has no application to mistakes of law.

Lord Reed and Lord Hodge give the main judgment, with which Lord Lloyd-Jones and Lord Hamblen agree. Lord Briggs and Lord Sales give a partially dissenting judgment, with which Lord Carnwath agrees.

REASONS FOR THE JUDGMENT

Should HMRC be allowed to argue that section 32(1)(c) does not apply to mistakes of law?

The Court rejects the Test Claimants' various objections to HMRC arguing at this stage of the proceedings that section 32(1)(c) of the Limitation Act 1980 does not apply to mistakes of law.

"Cause of action estoppel" is a legal doctrine which stops a party from raising points which might have been but were not raised and decided in earlier proceedings **[61]-[62]**. As it operates only to prevent the raising of points which were essential to the existence or non-existence of a cause of action, and the effect of limitation instead is to render an otherwise valid claim unenforceable, this doctrine does not prevent HMRC from making their current challenge **[63]**.

"Issue estoppel" is a related legal doctrine which stops a party from raising points which were not raised in earlier proceedings or were raised unsuccessfully **[64]-[68]**. As the question of when the limitation period commenced was not argued or determined in the first phase of the FII Group Litigation, and as it would not have been possible for HMRC to make their current limitation challenge before the lower courts, this doctrine does not prevent HMRC from making that challenge now **[69]**.

Further, HMRC's challenge does not amount to an abuse of process, when seen in the context of group litigation which raises novel issues of unparalleled complexity, and which was the subject of case management decisions as to the order in which these issues were to be addressed **[78]-[79]**. It is readily understandable why in the first phase of the litigation HMRC focused on arguments which, if successful, would have made it unnecessary to mount this wider challenge **[80]**.

On the basis of those factors, as well as the substantial value of the claims, the importance of the issue to other claimants both within and outside the FII Group Litigation, and the potential to remedy any prejudice through an order for costs, the Supreme Court allows HMRC to withdraw their concession that section 32(1)(c) applies to mistakes of law, and now to make the contrary case **[94]-[100]**. That case places in question two of the most important decisions on the law of limitation of recent times: *Deutsche Morgan Grenfell Group Plc v Inland Revenue Comrs* [2006] UKHL 49 ("***Deutsche Morgan Grenfell***") and *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 ("***Kleinwort Benson***") **[1]**, **[172]**.

What is the test for the discoverability of a mistake under section 32(1)(c)?

In *Deutsche Morgan Grenfell*, the House of Lords tied the date of discoverability of a mistake of law to the date when "the truth" as to whether the claimant has a well-founded cause of action is established by a decision of a court of final jurisdiction **[167]-[170]**, **[213]**. Section 32(1)(c) cannot be intended to have that effect, as

limitation periods apply regardless of whether the substance of the claim is disputed, and regardless of whether there is in truth a well-founded cause of action **[177]-[179]**, **[199]-[202]**, **[213]**. Such an approach also has the illogical consequence that mistakes are not discoverable by a claimant until after he has issued a claim on the basis of the mistake **[173]-[174]**, and perpetuates the problems associated with distinguishing between matters of fact and matters of law **[195]**, **[213]**, **[250]**.

Given those very unfortunate consequences, for which there is currently no prospect of Parliament enacting a legislative solution, it is appropriate for the Supreme Court to depart from the decision in *Deutsche Morgan Grenfell* in relation to discoverability **[250]**-**[253]**. The correct approach is that time begins to run under section 32(1)(c) when the claimant discovers, or could with reasonable diligence discover, his mistake in the sense of recognising that a worthwhile claim arises **[193]**, **[209]**. That approach brings section 32(1)(c) into line with section 32(1)(a), and with other analogous provisions of the 1980 Act **[180]-[196], [213].**

Does section 32(1)(c) apply to mistakes of law?

Section 32(1)(c) applies to mistakes of law, as the House of Lords decided in *Kleinwort Benson*. Although that decision was not supported by convincing reasoning **[148]-[161]**, and although when section 32(1)(c) was enacted it was not contemplated that it might extend to actions for the restitution of money paid under a mistake of law, the ordinary meaning of the words of that provision include such actions **[220]-[221]**, **[242]-[243]**. Excluding claims based on a mistake of law would frustrate the purpose of section 32(1)(c), which is to relieve claimants from the necessity of complying with a time limit at a time when they cannot reasonably be expected to do so **[220]-[221]**, **[242]-[243]**. Including such claims does not have unacceptable consequences for legal certainty, particularly now that the approach to discoverability in *Deutsche Morgan Grenfell* is departed from **[225]-[229]**, **[242]-[243]**.

How should the test for discoverability of a mistake under section 32(1)(c) be applied to the facts of this case?

The Court of Appeal applied the approach to discoverability wrongly established in *Deutsche Morgan Grenfell*, such that HMRC's appeal must be allowed **[254]**. The Supreme Court cannot, however, determine in the abstract the point in time when the Test Claimants could with reasonable diligence have discovered their mistake. That question is left for the High Court to determine, after the parties have had an opportunity to amend their pleadings **[255]**.

Dissenting judgment

In their partially dissenting judgment, Lord Briggs and Lord Sales conclude that section 32(1)(c) does not apply to payments made on the basis of a mistake of law **[258]**. They consider that the House of Lords was wrong to decide otherwise in *Kleinwort Benson* **[274]-[285]** and that the proper course now is to overrule that decision **[298]**, **[303]**. Any application of section 32(1)(c) to mistakes of law which include judicial rewriting of the law is bound to risk opening up very old claims **[289]** across a wide range of cases **[293]**, going well beyond the narrow equitable principle which was intended to apply **[296]**. This introduces large inroads into the overall purpose of the legislation by undermining legal certainty **[259]**. The approach taken by the majority to the issue of discoverability does not provide an adequate answer to these objections **[278]**, **[297]** and could prove unfair and unworkable in practice **[259]**, **[298]**. On the footing that the majority's interpretation of section 32(1)(c) has prevailed, however, Lord Briggs and Lord Sales agree that it is appropriate to depart from the decision in *Deutsche Morgan Grenfell* in relation to discoverability **[304]**.

References in square brackets are to paragraphs in the judgment