HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Autologic Holdings plc and others (Respondents) *v.* Her Majesty's Commissioners of Inland Revenue (Appellants)
BNP Paribas UK Holdings Limited and others (Respondents) *v.* Her Majesty's Commissioners of Inland Revenue (Appellants)
The Future Network plc and others (Respondents) *v.* Her Majesty's Commissioners of Inland Revenue (Appellants)
Perkins Engines Company Limited and others (Respondents) *v.* Her Majesty's Commissioners of Inland Revenue (Appellants)
HJ Heinz Company Inc and others (Respondents) *v.* Her Majesty's Commissioners of Inland Revenue (Appellants)
British Telecommunications plc and others (Respondents) *v.* Her Majesty's Commissioners of Inland Revenue (Appellants)
(Conjoined Appeals)

[2005] UKHL 54

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. On these appeals the question before the House is procedural: should the principal substantive issues raised by the six claimant groups of companies be heard and decided by the High Court or by the Special Commissioners? Resolution of this question is difficult partly because of the variety of claims being advanced and partly because not all the claimants are in the same position. The huge number of companies involved adds a further practical complication.

The background

2. Simplified as far as possible, the background is this. On the procedural question now under consideration six groups of companies have been selected as test cases. They represent a large number of claimant companies in proceedings started in the Chancery Division against the Commissioners of Inland Revenue. This litigation is currently being managed under a group litigation order made by the

Chief Chancery Master in May 2003. The claims within this order are known as the 'loss relief group litigation'. The principal substantive issues raised by these claims are issues of Community law. These issues of law are also the subject of a large number of appeals pending before the special commissioners. In many instances claimants have both appealed to the special commissioners and started proceedings in the High Court.

3. The origin of this mass of litigation lies in two decisions of the European Court of Justice: *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes)* (Case C-264/96) [1999] 1 WLR 108, and the combined cases of *Metallgesellschaft Ltd v Inland Revenue Commissioners; Hoechst AG v Inland Revenue Commissioners* (Joined Cases C-397 and 410/98) [2001] Ch 620, usually known as the *Hoechst* case. Stated shortly, these decisions made plain that United Kingdom legislation restricting fiscal reliefs or advantages to cases where the relevant companies are resident in the United Kingdom may be inconsistent with the E C Treaty. The *I C I* case concerned consortium relief. The European Court ruled that article 52, now article 43, of the E C Treaty precludes legislation of a member state which makes tax relief subject to the requirement that the subsidiaries of the holding company are established in the member state concerned. The *Hoechst* case concerned advance corporation tax. The European Court ruled it is contrary to article 43 for the tax legislation of a member state to afford companies resident in that state the opportunity to benefit by paying dividends without paying advance corporation tax where their parent company is also resident in that state but to deny that opportunity where their parent company has its seat in another member state.

4. Multi-national groups of companies were quick to seize on the possibility of applying the reasoning underlying these two decisions to other tax provisions. Hundreds of claims have now been made against the Commissioners of Inland Revenue amounting to many billions of pounds. One of the fiscal provisions thought to be vulnerable concerns group relief from corporation tax. Corporation tax is charged on the profits of companies. Group relief is a relief from corporation tax available when one company in a group surrenders its losses to another company in the same group, thereby enabling the latter to claim the benefit of those losses as a set off against its profits. Thus, in essence, group relief is a transfer of tax relief from one company to another. It was introduced into United Kingdom tax law in 1973. Chapter IV of Part X of the Income and Corporation Taxes Act 1988 (ICTA) now regulates this relief. Until 2000 one of the prescribed conditions was that both the company surrendering its losses and the claimant company

must be resident in the United Kingdom: section 413(5). The equivalent condition from 2000 is that both the surrendering company and the claimant company must be either resident in the United Kingdom or a non-resident company carrying on a trade in the United Kingdom through a branch or agency: section 402(3A) and (3B). The tax legislation also includes provision for the surrender of losses between companies having a consortium relationship. For present purposes it is sufficient to confine attention to group relief claims. For the purpose of these appeals there is no material distinction between group relief claims and consortium relief claims.

5. In 2002 Marks and Spencer Plc appealed against the refusal of group relief, on the ground that these statutory limitations on the territorial scope of group relief were incompatible with, and overridden by, Community law. The Special Commissioners dismissed the taxpayer's appeal: *Marks and Spencer Plc v Halsey (Inspector of Taxes)* [2003] STC (SCD) 70. On appeal to the High Court Park J referred questions to the European Court of Justice. Advocate General Maduro delivered his opinion on 7 April 2005. The decision of the European Court of Justice is awaited.

6. As was to be expected, other international groups of companies showed interest in following Marks and Spencer's lead. A mass of proceedings followed in the High Court. The loss relief group litigation order was made in order to manage these claims. The House was told that currently there are 95 claimants subject to this order, involving 70 corporate groups and more than 1,000 individual companies. These claims raise some difficult questions of Community law. For present purposes it suffices to note that the primary contention of substantive law is that the provisions in ICTA restricting group relief to companies resident or carrying on an economic activity in the United Kingdom are incompatible with article 43 of the EC Treaty (freedom of establishment) and article 56 (abolition of restrictions on movements of capital and payments).

7. The procedural dispute now before the House arises out of a contention by the Inland Revenue that the principal claims for relief covered by the loss relief group litigation order are not properly justiciable in the High Court. Claims for group relief should be made to an inspector of taxes. If he wrongly refuses a claim the taxpayer should appeal to the General or Special Commissioners. These appeal commissioners, as I shall describe them, will give effect to directly applicable provisions of Community law, just as much as the High

Court. Over 300 groups of companies have followed this route in challenging the group relief provisions. They include 65 of the High Court claimants. That, say the Inland Revenue, is the correct way to proceed. Six test claimants were selected as the vehicle for resolving this jurisdictional dispute.

8. The first major complicating factor on this appeal can now be noted. Four different types of loss are said to have been suffered by reason of the alleged breaches of Community law. The test claimants assert they have suffered loss under at least two, and in some instances, all four headings:

(1) A claim for group relief. This comprises loss of profits of the UK profit-making company which should have been relieved by the losses of a non-UK resident company.

(2) A claim in respect of utilised reliefs. Profit-making companies used other reliefs (eg capital allowances or surplus ACT) they would not have used had basic group relief been available.

(3) A claim for recovery of surrendered reliefs. Other UK members of the group surrendered their own reliefs to the UK profit-making company.

(4) A claim for payments. Companies which would have surrendered losses, possibly for payment, had the group relief rules not been confined to UK resident companies seek compensation for the loss of those payments.

9. Park J struck out claims in category (1): [2004] STC 594. These are matters for the appeal commissioners. The Inland Revenue accept that the so-called 'satellite' claims in categories (2) to (4) are outside the jurisdiction of the appeal commissioners. In a characteristically lucid judgment Park J said it does not greatly matter whether the High Court lacks jurisdiction to decide the category (1) claims or has a discretion to accept or decline jurisdiction since, if the latter is the position, he would decline to exercise whatever jurisdiction he had: page 596, para 4. He said the most important factor is that 'whether it would be more convenient to commence the entire case in the High Court or not, that is not the system our law provides for the resolution of tax disputes between taxpayers and the Revenue': page 607, para 35. Further, he considered it was not 'a major inconvenience' to have two sets of

proceedings when they would proceed sequentially and not simultaneously, with the High Court proceedings claiming consequential relief going ahead only if the taxpayers were successful in the proceedings before the special commissioners: page 607, para 36.

10. The Court of Appeal, comprising Peter Gibson and Longmore LJJ, allowed the taxpayers' appeals: [2005] 1 WLR 52. Peter Gibson LJ said the judge's attitude was one which would perhaps appeal to most lawyers experienced in tax matters if Community law considerations could be left out of account: page 57, para 12. The court held that Community law obliges the High Court to entertain the claims: page 63, para 28. On these appeals the Inland Revenue seek to restore the order of Park J.

The statutory code

11. In resolving this question of jurisdiction the starting point is to note two basic principles. The first concerns the exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system. The present disputes concern claims for group relief. The way a taxpayer claims group relief depends on whether the claim relates to an accounting period before or after 1 July 1999. Before that date the corporation tax (pay and file) system was in force. This has now been replaced by the corporation tax (self-assessment) system. For present purposes this difference is immaterial. What matters is that, whichever system is applicable, an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation. Statute so provides: see, in respect of the pay and file system, section 30A of the Taxes Management Act 1970 and, in respect of the self-assessment system, paragraphs 47(2) and 97 of Schedule 18 to the Finance Act 1998. Further, the statutory code makes its own provision for appeals. Under both the 'pay and file' system and the self-assessment system a taxpayer has a right of appeal to the appeal commissioners against assessments of tax, including amendments made by the revenue to a taxpayer's tax return. The appeal commissioners' findings of fact are final. In appropriate cases a further appeal lies to the High Court by way of case stated on a point of law. Where the appeal commissioners reduce the amount of an assessment, any overpaid tax must be repaid to the taxpayer, with a repayment supplement by way of interest as provided in section 825 of the ICTA.

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 appeal 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 Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390, *In re Vandervell's Trusts* [1971] AC 912 and, more widely, *Barraclough v Brown* [1897] AC 615.

14. In *Vandervell's* case [1971] AC 912, 939-940, Lord Wilberforce sought to clarify the limits of this 'exclusivity' principle. This principle, he said, is not to be taken to exclude the jurisdiction of the courts to decide a question of fact or law which is a basis for an income tax assessment where the taxpayer and the revenue so agree, provided the assessment to which the question relates has not become final and provided also the question, 'in form suitable for decision by the court', is not 'so close to the question of the assessment itself' that the court should decline to entertain it. But Lord Wilberforce was at pains to add that either the taxpayer or the revenue have the right to insist the statutory procedure should be followed.

15. Lord Wilberforce's formulation indicates that, apart from cases of straightforward abuse, there is an area where the court has a discretion.

In *Glaxo Group Ltd v Inland Revenue Commissioners* [1995] STC 1075, 1083-1084, Robert Walker J put the matter this way:

> 'It is not easy to discern any clear dividing-line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment: but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction.'

I respectfully agree with this approach, subject to noting that, at least as a general principle, the taxpayer and the revenue are each entitled to insist that the statutory procedure for dealing with disputed assessments should be followed.

Community law

16. The second basic principle concerns the interpretation and application of a provision of United Kingdom legislation which is inconsistent with a directly applicable provision of Community law. Where such an inconsistency exists the statutory provision is to be read and take effect as though the statute had enacted that the offending provision was to be without prejudice to the directly enforceable Community rights of persons having the benefit of such rights. That is the effect of section 2 of the European Communities Act 1972, as explained by your Lordships' House in *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85, 140, and *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes) (No 2)* [1999] 1 WLR 2035, 2041.

17. Thus, when deciding an appeal from a refusal by an inspector to allow group relief the appeal commissioners are obliged to give effect to all directly enforceable Community rights notwithstanding the terms of sections 402(3A) and (3B) and 413(5) of ICTA. In this regard the commissioners' position is analogous to that of the Pretore di Susa in *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case

106/77) [1978] ECR 629. Accordingly, if an inconsistency with directly enforceable Community law exists, formal statutory requirements must where necessary be disapplied or moulded to the extent needed to enable those requirements to be applied in a manner consistent with Community law. Paragraph 70 of Schedule 18 to the Finance Act 1998 is an instance of such a requirement. Paragraph 70 provides that a claim for group relief requires the consent of the surrendering company, which must be given by notice in writing to its own inspector of taxes when or before the claim is made. This provision cannot be applied literally in the case, say, of a German subsidiary which makes no tax returns in this country. So if the residence restriction is found to be inconsistent with Community law this provision will need adapting so as to give effect to the overriding Community rights. In this regard the appeal commissioners have the same powers and duties as the High Court.

Claimant companies which can still obtain group relief

18. Against that background I turn to the other complicating feature of these appeals: the different positions of the claimants. The six test claimants exemplify different claims histories. They were chosen for that purpose. In referring to these six cases I shall adhere to the position as it existed when the proceedings were before Park J in March 2004 even though in some instances the actual claims positions of the claimants, agreed between the parties for the purpose of these appeals, have changed since then.

19. As I see it, these claimants fall into two broad classes. One class comprises cases where, if the claimant company's contentions on Community law are well-founded, it is still open to the company to obtain in full the group relief to which, on that footing, the company is entitled. The other class comprises cases where this course is not open to the claimant company. The difference between these two classes corresponds to the distinction between (a) giving effect to the group relief provisions as read and applied in accordance with Community law and (b) awarding damages for breach of a Community law right.

20. In my view in the former of these two classes the category (1) claims in the High Court are misconceived. Where a claimant company can obtain through the statutory procedures the very tax relief of whose non-availability it is complaining, I see no justification for the company by-passing the statutory route and, instead, going to the High Court and claiming damages or a restitutionary remedy based on the proposition

that the company has been wrongly refused the tax relief to which it is entitled under Community law.

21. Take a case where an inspector disallowed a claim for group relief and an appeal to the Special Commissioners is pending. If that appeal proceeds the Special Commissioners will give effect to all relevant directly applicable provisions of Community law. The Special Commissioners can refer any necessary questions to the European Court just as readily as the High Court. They can resolve any questions of fact which may arise on issues such as the amount of the losses claimed. They can enquire into the group structure to see if it meets the statutory requirements. Indeed, detailed questions of this character are more suited for determination by the Special Commissioners than the High Court, especially where large numbers of companies are involved. In short, in this example the claimant is still able to obtain the tax relief it seeks despite its claim having been refused by an inspector.

22. The Autologic group exemplifies this factual situation. The material facts are that one of the companies in the group submitted corporation tax returns for the years ending 31 December 1999 and 31 December 2000 making group relief claims in respect of losses surrendered by two French subsidiaries. Having conducted inquiries into these returns, the inspector refused the claims and amended the returns accordingly. The claimant company appealed to the Special Commissioners against the revenue amendments. Corporation tax was paid on the basis of the amended assessments. These appeals are still pending. An enquiry into the tax return for the year ended 31 December 2001 is still in progress. In the High Court Autologic claims that, in refusing to grant group relief in respect of the losses of the French subsidiaries, the revenue unlawfully failed to give effect to the E C Treaty. They claim as damages, and by way of restitution, the amounts of corporation tax overpaid. These are the category (1) claims.

23. In my view these claims in the High Court are prima facie a misuse of the court's process. These claims cover the same ground in all respects as the appeals pending before the appeal commissioners. The remedy sought is co-extensive with adjudicating upon existing, open assessments. The essence of the High Court claims is that these assessments were wrong, that the court should so hold, and that the court should itself calculate the amounts which ought to have been assessed and order repayment of the overpaid excess. There could hardly be a more obvious example of seeking to sidestep the statutory procedure.

24. The taxpayers say that recourse to the appeal commissioners is a poor alternative to the High Court proceedings. If their appeals succeed their position regarding interest and costs before the special commissioners will compare unfavourably with their position in the High Court. The appeal commissioners do not have power to award interest as such. The statutory repayment supplement is restricted to simple interest at a specified rate, usually about 1% below base rate, starting 12 months after the date the corporation tax was paid. The special commissioners' power to award costs is confined to cases where a party has acted wholly unreasonably in connection with the hearing: Special Commissioners (Jurisdiction and Procedure) Regulations 1994 S I 1994/1811, regulation 21. These limitations on the special commissioners' powers, it is said, offend the Community law principle which requires that relief for breach of Community rights must be effective.

25. I am not attracted by this submission. Appeals to the special commissioners when novel points of law arise are part of the ordinary statutory procedure. Usually the points of law concern United Kingdom tax legislation. But a dispute on the interpretation and application of Community law, and the need to refer questions to Luxembourg, do not make a case fundamentally different. Once the interpretation and application of Community law have been clarified by the European Court, the principal difficulty surrounding these appeals will be gone. Confining claimants to the statutory route, with the interest and costs consequences just mentioned, can hardly be regarded as rendering this route to reimbursement 'excessively onerous', to adopt the phrase of Advocate-General Colomer in *D v Rijksbelanstingdienst* (Case C-376/03, 26 October 2004).

26. The Autologic group exemplifies cases where the statutory claims procedures have reached an advanced stage. In other cases the claims for group relief are less advanced. In some cases the claimant company is in time to make a group relief claim to the revenue but has not yet done so. The H J Heinz group is an instance of this. In other cases claims for group relief have been made and are still being considered by the revenue, as with the British Telecommunications group. In further cases claims have been made and refused and the claimants are in time to appeal to the appeal commissioners but have not yet done so. The Future Network group is an example of this.

27. In my view in each of these types of case the category (1) claims in the High Court are prima facie misconceived, for the reason set out

above. The claimants are able to obtain the group relief to which they are entitled by following the statutorily-prescribed route. That is the route they should follow.

28. The taxpayers contend that to oblige all claimants to follow this route, especially those who have not yet made group relief claims to the revenue, would be inconsistent with the approach indicated by the European Court of Justice in the *Hoechst* case. As matters stand the revenue are bound to refuse claims for group relief where the surrendering company is not resident in this country. The European Court, it is said, has ruled that claimants should not be required to take futile steps of this nature when seeking to enforce their rights under Community law. In the *Hoechst* case [2001] Ch 620, 667, para 107, the European Court said:

> '... it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit for the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime.'

The Court of Appeal regarded this ruling as determinative of these test cases.

29. I am unable to agree. The taxpayers' reliance on this ruling in the present cases is misplaced. The taxpayers are seeking to apply the European Court ruling out of context. In the *Hoechst* case this ruling was directed at rejecting a governmental defence based on the taxpayers' alleged lack of reasonable diligence in pursuing its claims. The *Hoechst* ruling was not directed at a situation where, as here, the claimants' claims have yet to be decided by the national court and there

exists a statutorily prescribed route by which the claimants are able to obtain the tax relief they say is their entitlement under Community law. Which court or tribunal has jurisdiction to hear disputes involving rights derived from Community law is a matter for determination by each member state: see, for instance, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbauesellschaft Berlin mbH* (Case C-54/96) [1997] ECR I-4961, 4996, para 40.

30. Of course, to be compliant with Community law the remedial route prescribed by the legal system of a member state must be such that the rules 'are not less favourable than those governing similar domestic actions (principle of equivalence)' and, additionally, the rules must not render 'practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)': see the *Hoechst* case, para 85. The statutory route prescribed for group relief claims was not designed for claims in respect of non-resident companies. So, as United Kingdom law presently stands, at the initial step a taxpayers' group relief claim will inevitably be refused by the revenue. Further, as already noted, some statutory requirements will need adaptation to accommodate claims in respect of non-resident companies. But neither of these features should present any major problem. Neither of them renders the statutory route 'practically impossible or excessively difficult'. Adaptation of the formal requirements will be needed whichever route is followed, and the appropriate adaptation is a matter on which the Special Commissioners' practical expertise will be invaluable.

31. Mr Aaronson QC advanced further arguments on the inconvenience of requiring claimant companies to follow the statutory route. He submitted that in cases where no claim for group relief has yet been made a claimant should not have to incur 'up front' expenses unnecessarily. A claim for group relief must quantify the amount of relief claimed. The revenue require that companies' accounts be drawn in accordance with United Kingdom accounting principles and adjusted for UK tax rules. If the claimants proceed in the High Court the expense of complying with these requirements can be postponed until the European Court has ruled on the Community law problems.

32. The force of this argument is difficult to evaluate. That some expense will be involved is clear. That this will be substantial is not self-evident. Since the revenue are insisting on taxpayers following the statutory route even though this was not designed for non-resident companies, it behoves the revenue to exercise their dispensing powers

with appropriate regard to the circumstances. I consider that, looking at matters in the round, the House should proceed on the footing that, at least in general, the 'up front' expenses involved will not be a significant factor in the context of individual company claims.

33. One other general point calls for brief mention. Unlike the High Court the appeal commissioners have no power to co-ordinate proceedings by making a group litigation order or the equivalent. I doubt whether in practice this should prove a significant handicap in marshalling the mass of appeals involved in this litigation. I see no reason to doubt that the parties will co-operate in making sensible practical arrangements.

34. Thus far I have been dealing with the category (1) claims. I turn now to the claims in categories (2) to (4) in this class of case. The appeal commissioners have no jurisdiction to decide these 'satellite' claims. The taxpayers, understandably, rely heavily on the practical undesirability of severing the category (1) claims from the satellite claims. At first sight there is force in this point. Indeed, the existence of these satellite claims is perhaps the strongest point in favour of the claimant companies on these appeals.

35. However, the claims in categories (2) to (4) are not without their own difficulties. They are all based on the assumption that the claimant companies have been unable to obtain the group relief to which they are entitled under Community law. But in the class of case now under consideration this is not so. Group relief claims in this class of case are still capable of being allowed in full. The difficulties do not stop there. For instance if, as the category (4) claims suggest, the practice is that surrendering companies are paid the value of the reliefs they surrender, the United Kingdom companies which surrendered their reliefs presumably were paid accordingly. This would undermine the category (3) claims. In the case of the category (4) claims, the loss-making non-resident subsidiaries may not have been paid for surrendering their reliefs but they still have those reliefs which may still be capable of being turned to account within the group.

36. The House is not in a position to reach any conclusions on these matters. But the House is entitled to take note of the potential difficulties confronting these claims. I consider significant weight should not be attached to the existence of these claims when deciding the appropriate course for resolving the category (1) claims in this class

of case. In my view the existence of the satellite claims is not sufficiently weighty to displace the prima facie conclusion that the category (1) claims in the High Court in this class of case should be regarded as an inappropriate use of the court's process. So far as this class of case is concerned Park J was entitled, and right, to decline to permit the category (1) claims to proceed in the High Court as sought by the claimant companies.

37. Underlying this conclusion is a point of general policy concerning cases where an applicant claims he has been wrongly deprived of benefits to which he is entitled under directly applicable provisions of Community law. Where Parliament has assigned to a specialist tribunal responsibility for adjudicating on disputes over the payment of such benefits, and an application to that tribunal is not time-barred, in the ordinary course the primary remedy for non-receipt of such benefits is to have recourse to that tribunal. That tribunal will give effect to the applicant's rights under directly enforceable provisions of Community law as well as his rights under domestic law. The tribunal will afford him the benefits to which he is properly entitled. In such cases, where that course is still available to an applicant, claims in the High Court founded on an alleged breach of Community law will not normally be appropriate.

38. No doubt in such cases there may have been a violation of Community law. Community law requires that national law must ensure rights conferred on individuals by Community law are fully effective in each member state. This obligation can hardly be said to be fulfilled when and so long as national authorities, such as government departments, rely on the terms of the national legislation as the reason for declining to afford an individual benefits to which he is entitled under directly applicable provisions of Community law. The right of individuals to rely on directly applicable provisions of the EC Treaty before national courts is not sufficient in itself to ensure full and complete implementation of the Treaty: *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46 and 48/93) [1996] QB 404, 495, para 20. But a claim for damages for breach of Community law is not, in general, the appropriate remedy when currently it is still open to an applicant to obtain the benefits to which he is entitled by making an application to the specialist tribunal: provided always that the statutory route accords with the Community law principles of equivalence and effectiveness.

Claimant companies which cannot now obtain group relief

39. Thus far I have been considering cases where the subject matter of the category (1) claims in the High Court is group relief claims which can still be allowed by the appeal commissioners if the claimants' Community law contention is correct. I now turn to the other class of cases, where this is not so. The most obvious example is where it is now too late, in respect of the relevant accounting periods, for a claimant to make a group relief claim to the revenue or to appeal to the appeal commissioners. The claimant is outside the prescribed time limits. The Paribas group is an instance of this, where the claim advanced in the High Court relates to group relief for an accounting period ending 31 December 1998. No group relief claim in respect of the losses in question has been made.

40. Time bars of this character are commonplace. I see no reason to suppose the statutory time bars applicable to group relief claims are in themselves inconsistent with Community law: cf. *Steenhorst-Neerings v Bestuur van de Bedrijfvereiniging* (Case C-338/91) [1993] ECR I – 5475 and *Johnson v Chief Adjudication Officer* (Case C-410/92) [1995] ICR 375. This means that, in respect of this class of cases, it is now too late for the taxpayers to obtain group relief by following the statutory route. A similar view has, rightly, been expressed by the Court of Appeal in respect of an employment tribunal's jurisdiction to entertain claims for unfair dismissal involving directly applicable Community rights outside the statutory time limits: see *Biggs v Somerset County Council* [1996] ICR 364.

41. In such cases the taxpayers' remedy necessarily lies elsewhere. In such cases the taxpayer's remedy is of a different character. The taxpayer's remedy lies in pursuing proceedings claiming restitutionary and other relief in respect of the United Kingdom's failure to give proper effect to Community law. The appeal commissioners have no jurisdiction to hear such claims. Such claims are outside the commissioners' statutory jurisdiction, and the commissioners have no inherent jurisdiction. Claims in this class should therefore proceed in the High Court. Difficult questions, both of domestic law and Community law, may arise about the time limits applicable to High Court claims of this character. Some of these questions were explored recently by the Court of Appeal in *Commissioners of Inland Revenue v Deutsche Morgan Grenfell Group plc* [2005] EWCA Civ 78. Those are not matters arising on these appeals.

42. I add one caveat. The revenue and the appeal commissioners have power to extend time limits for late amendments and late appeals. Before proceeding with their High Court claims claimant companies in this class of cases should therefore take the simple step of inviting the revenue or the appeal commissioners to extend the time limits appropriately. If this invitation is accepted, the claimants should proceed along the statutory route. If the invitation is declined, or if the revenue and the appeal commissioners have no power to grant the necessary extensions, the way will be clear for the High Court proceedings to continue.

43. I recognise there may be instances where a claimant company has claims in both the classes I have described. In respect of some accounting periods a company may have made a group relief claim or still be in a position to make such a claim, in respect of more distant accounting periods it may now be too late for the company to put forward such a claim. The need for one company to pursue proceedings before the appeal commissioners and separately and additionally in the High Court is unfortunate. But this possibility is inherent in the distinction between the two classes of case: the distinction between obtaining the tax relief to which the claimant is entitled and obtaining damages for unlawful failure to make such relief available. Unless the circumstances are exceptional, having claims in both classes is not a sufficient reason for a company declining to make a group relief claim in respect of accounting periods where this can still be done.

Conclusion

44. I would therefore allow these appeals. The parties' arguments have been much more fully developed before the House than was possible in the limited time available in the Court of Appeal. I would set aside the orders of the Court of Appeal. The cases falling within the first class described above ('claimant companies which can still obtain group relief') should be stayed. They should be stayed until further order rather than struck out the more readily to accommodate any unforeseen turn of events. And the stay should not preclude the court referring questions to the European Court if practical convenience so dictates. The cases in the second class ('claimant companies which cannot now obtain group relief') should proceed in the High Court. These six test cases should be remitted to the Chancery Division to give effect to the judgment of the House.

45. Mr Aaronson formulated a question he submitted should be referred to the European Court in the event of the House being minded to allow these procedural appeals. In my view, on this procedural issue there is no question which calls for a reference. The applicable principles of Community law are clear. The differences between your Lordships arise from the application of these principles in the particular circumstances of these cases.

46. The loss relief group litigation order includes cases where it is said that the statutory group relief provisions regarding residence offend the non-discrimination articles in double taxation conventions entered into between the United Kingdom and other states. In most of these cases this discrimination claim is coupled with claims for breach of Community law. In a handful of cases the discrimination claim is the sole issue. None of these cases was the subject of separate argument. It is common ground that on the jurisdictional point now in issue the outcome, so far as domestic law is concerned, should be the same as in the other cases comprised in this group litigation order. Having regard to the conclusion I have reached it is not necessary to deal separately with these double taxation cases.

LORD STEYN

My Lords,

47. I have had the advantage of reading the opinion of my noble and learned friend, Lord Nicholls of Birkenhead. I agree with it. I would also make the order which Lord Nicholls proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

48. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Walker of Gestingthorpe, in which he has so carefully and fully set out the background to this appeal. I agree with

his analysis, and for the reasons that he gives I would dismiss the appeal.

49. This is a dispute about jurisdiction. The respondents are seeking relief in the High Court in respect of corporation tax which they say was wrongly paid because of the unlawful restriction of group relief to UK resident companies. This is said to have been unlawful in the case of some of the respondents because it was contrary to article 43 EC, which prohibits restrictions on the freedom of establishment, and article 56 EC, which prohibits restrictions on the movements of capital and on payments between member states of the EU. In other cases it is said to have been unlawful because of prohibitions on discrimination contained in double taxation agreements between the United Kingdom and other countries outside the EU. As Lord Walker has explained, their claims fall into four distinct categories. The jurisdictional dispute relates only to claims for relief which fall within the first category, where a UK company is said to have sustained loss of profits which should have been relieved by the losses of a non-UK resident company. It is conceded that claims falling within the other three categories are outside the jurisdiction of the special commissioners.

50. Claims which fall within the first category are presented in the statements of claim as claims for restitution at common law on the ground of unjust enrichment. The argument is that the public purse has been unjustly enriched at the expense of these taxpayer companies. This was because they paid more corporation tax than they should have done, as the legislation that was in force for group relief in the United Kingdom did not accord treatment to subsidiaries in other states which was equivalent to that given to subsidiaries resident or carrying on trade in the United Kingdom through a branch or agency. They are not, on this presentation of the claim, seeking repayment of corporation tax. They are seeking payment of an amount of money that will reimburse them, by way or restitution or damages, for the amount of corporation tax that they wrongly paid to the revenue.

51. There is no doubt that the High Court has jurisdiction to entertain restitutionary claims presented to it under the common law principle of unjust enrichment. The revenue say nevertheless that the High Court does not have jurisdiction to hear these claims and that in any event, if it does have jurisdiction, it should decline to exercise it. They contend that these are in essence claims about the amount of group relief and that they should be brought under the statutory procedure for the determination of disputes about tax. They say that the claims should be

made by the appropriate company to the appropriate inspector of taxes and, if they are disallowed, the decisions should then be appealed to the special commissioners.

52. In my opinion there would be no room for argument if the claims that the respondents were seeking to make fell fairly and squarely within the statutory code which Parliament has laid down for group relief in paras 66 to 77 of Schedule 18 to the Finance Act 1998. The current legislation lacks the clear and unequivocal declaration that was contained in section 5(6) of the Taxes Management Act 1964 and re-enacted in section 29(6) of the Taxes Management Act 1970, that after the notice of assessment has been served the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts. The only place where these words are now to be found is in para 47(2) of Schedule 18. There is no equivalent provision in the group of paragraphs dealing with group relief in that Schedule. Mr Aaronson QC for the respondents submitted that, as the overriding declaration was no longer present, dicta by Lord Wilberforce and Lord Diplock in *In re Vandervell's Trusts* [1971] AC 912, 939 and 944, that the power to alter an assessment once it has been made is conferred to the exclusion of any court of law on the special commissioners are no longer strictly applicable. In my opinion however the plain inference that the statutory code gives rise to is that it is the statutory procedure only that may be used where issues are raised as to the correctness of an assessment.

53. Had these claims involved the amendment or alteration of assessments, therefore, I would have thought that there was no answer to the revenue's argument that they ought to have been made under the statutory procedure and that the High Court has no jurisdiction to deal with them.

54. The crucial point which emerged from Mr Aaronson's argument however and was at no point, as it seemed to me, effectively answered by Dr Plender QC for the revenue is that these claims are made at common law and not with a view to obtaining any statutory remedy. They do not require any amendment or alteration of the assessments that were made under the relevant paragraphs of Schedule 18 to FA 1998. The whole point of these claims is that the relevant paragraphs did not provide for the group relief that, under Community law and the double taxation agreements, ought to have been available. The statutory procedure for the obtaining of group relief, which would have been subject to appeal to the special commissioners had it applied, was not

available in the case of any of the claims falling within the first category.

55. It would perhaps be possible – this has yet to be tested – for the statutory code to be construed in a way that conformed with the United Kingdom's obligations under the EC Treaty and the Double Taxation Agreements: *Pickstone v Freemans plc* [1989] AC 66; *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546; *Imperial Chemical Industries plc v Colmer (No 2)* [1999] 1 WLR 2035. But Community law provides that the appellants are entitled to an effective remedy, and they are not to be forced to go down that route if to do so would be impossible or excessively difficult: *Metallgesellschaft Ltd v Inland Revenue Commissioners; Hoechst AG v Inland Revenue Commissioners* (Joined Cases C-398/98 and 410/98) [2001] Ch 620, para 106. The fact that the strict rules which the code lays down were not designed for this exercise suggests strongly that the appellants are entitled to seek relief instead by way of the common law remedy.

56. That is the context in which the appellants seek an effective remedy at common law to obtain reimbursement of or compensation for the loss which they say they have sustained and from which the state has unjustly benefited. The amount of the appellants' loss due to the state's unjust enrichment cannot, of course, be established without re-examining the assessments. There will have to be set against the tax paid the amount of the group relief in respect of losses sustained by the non-resident subsidiaries that would have been available had the legislation made provision for it. This is an exercise in quantification that will have to be done. But it does not follow that the issuing of fresh assessments will be necessary.

57. It is in this context that the following observations in Lord Wilberforce's speech in *Vandervell* at p 939 become relevant:

> "There may be questions, in form suitable for decision by the court, which are in fact so close to the question of the assessment itself that the court ought not to entertain them but leave them to the statutory procedure. And nothing that I have said must be taken to imply that either the Crown, or the taxpayer, may not be entitled to insist that a particular question, as between them, be so decided. But I find nothing in the income tax legislation to justify the comprehensive proposition for which the appellants

> contend, namely, that the High Court is absolutely excluded from a vast range of issues of a kind normally justiciable by it, just because those questions arose between the taxpayer and Crown and form a basis, even a necessary basis, for an income tax assessment."

58. In my opinion there is no doubt that the common law unjust enrichment claim which the appellants seek to make is of a kind normally justiciable by the High Court. The re-issuing of an assessment is not a necessary part of it, because the court's order will do all that is needed to provide the appellants with their remedy once the amount of the loss has been quantified. On these short and simple grounds I would, in agreement with the Court of Appeal, reject the revenue's argument that the High Court has no jurisdiction to deal with it.

59. My noble and learned friend, Lord Nicholls of Birkenhead, sees the appellants' claims as falling into two broad classes: one where it is still open to the UK company to obtain in full the group relief to which it claims to be entitled, the other where it is not because the claim is outside the prescribed time limits. For the reasons which I have given, I am unable to agree with him that the appellants must follow the statutory route with regard to claims falling within the first class. But I agree with his conclusion that the appellants' remedy with regard to claims falling within the other class lies in pursuing proceedings for relief in the High Court. My grounds for taking this view differ from his. But I would be content to make the same order that he proposes with regard to them on the alternative basis that, for the reasons that he has given, these claims are outside the statutory jurisdiction of the special commissioners.

60. I cannot part with case without noting that the hearing of this appeal took place on the eve of the 200th anniversary of the creation of the special commissioners by William Pitt the Younger on 5 June 1805. The history of this most distinguished body has been traced by Dr J F Avery Jones in two articles which he has contributed to a special issue of the British Tax Review marking the bi-centenary: [2005] BTR 40 and 80. The very high standing which the special commissioners have earned for themselves and their ability to deal with cases of the greatest complexity is not in issue here. The answer to the issue of jurisdiction does not depend on an assessment of the relative skills of the special commissioners on the one hand or of the judges of the High Court on the other. So I mean no disrespect to the special

commissioners when I say that in my opinion all these claims belong to the High Court and not to them.

LORD MILLETT

My Lords,

61. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Nicholls of Birkenhead, with which I am in complete and respectful agreement. I had prepared a short speech of my own which reached the same conclusion; but in the light of the masterly analysis of Lord Nicholls I consider that no useful purpose would be served by delivering it.

62. It is sufficient to say that three propositions are well established. First, it is for the legal system of each member state to identify the court or tribunal which has jurisdiction to determine disputes involving individual rights derived from Community law, provided that full effect is given to such rights; secondly, in the United Kingdom the computation of a taxpayer's taxable profits for the purpose of determining his liability to tax is within the exclusive jurisdiction of the commissioners; and thirdly, owing to the primacy and direct effect of Community law, the commissioners, in exercising their jurisdiction, are not only entitled but bound to give effect to Community law, disregarding any provisions of domestic law which are inconsistent with it or which make it impossible or excessively difficult to apply. Accordingly, where it is still possible for a claim to group relief to be made, waiving or extending time limits and other conditions or requirements where necessary, the taxpayer must have recourse to the statutory machinery and not to the courts. Only where this is no longer possible, (for example where the commissioners or the revenue refuse to extend a time limit when it is within their power to do so or where the relevant assessment has become final and conclusive so that the commissioners have no jurisdiction to reopen it), may the taxpayer bring proceedings of the kind contemplated in the High Court.

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.

LORD WALKER OF GESTINGTHORPE

My Lords,

Introduction

64. This appeal could be described as being concerned with a purely procedural question: whether numerous sets of proceedings which have been commenced by numerous companies in the Chancery Division of the High Court, and which have been made subject to a Group Litigation Order ("GLO") should continue on their course in the High Court; or whether some of the claims made in the proceedings (that is, those in respect of overpaid corporation tax) should be struck out on the ground that they can be heard and decided only by the Special Commissioners. Even if it right to describe this as a purely procedural question, it is one which raises important issues of principle; the sums at stake are very large indeed; and the lower courts have taken sharply different views on the question.

65. All the companies concerned in the litigation are members of groups of companies, and all the groups have the common feature (although presented in various structural permutations) that at least one company in the group is resident in the United Kingdom, and at least one is resident in another member state of the European Union ("EU"). The United Kingdom tax code makes available to groups of companies various types of group relief, as a sort of practical mitigation of the strict theory of the separate juristic personality of each company in the group. One of the most important of these reliefs is group loss relief. But that relief is, on the face of the legislation, restricted to companies resident in the United Kingdom (or non-resident but trading in the United Kingdom through a branch or agency).

66. For many years this restriction was accepted at its face value by groups of companies which were predominantly resident in the United Kingdom, but had one or more subsidiaries trading in EU countries. But about ten years ago corporate tax advisers started to consider whether the restrictions infringed a basic principle of EU law, embodied in article 43 of the Treaty, which prohibits restrictions on freedom of establishment. The ground was broken (although the taxpayer company was ultimately unsuccessful) in *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes)* (Case C-264/96), a case concerned with consortium relief. This House's reference of the matter to the Court of Justice of the European Communities ("the ECJ") is reported at [1996] STC 352; the judgment of the ECJ at [1999] 1 WLR 108; and this House's disposal of the matter at [1999] 1 WLR 2035.

67. More closely in point, and still unresolved, is *Marks & Spencer Plc v Halsey (Inspector of Taxes)* [2003] STC (SCD) 70, in which group loss relief claims for years ending 31 March 1998, 1999, 2000 and 2001 were made in respect of that company's French, Belgian and German subsidiaries. The claims came before the special commissioners at the end of 2002, and were rejected (see [2003] STC (SCD) 70). The special commissioners held that the United Kingdom rule restricting group relief by reference to residents did not constitute either a discriminatory or a non-discriminatory restriction on freedom of establishment, and they regarded the matter as acte clair. On appeal Park J made a reference to the ECJ. Advocate-General Maduro delivered his opinion on 7 April 2005, and it has since been subjected to a great deal of detailed and anxious scrutiny. Since your Lordships are not concerned with the substance of the matter, and since the ECJ has yet to give judgment, it is sufficient to say that the opinion of the Advocate-General gives some comfort to each side, and clear victory to neither.

68. That is the background to the present flood of High Court litigation concerned with the lawfulness, under EU law, of various territorial restrictions on different types of group relief. The GLO to which this appeal relates is by no means the only GLO which has been made in order to stem and channel the flood. But the claims raised in the proceedings subject to this GLO are the first in which the revenue has raised any significant procedural objection. Park J (who has the heavy responsibility of managing almost all these GLOs) acceded to the revenue's objection. But the Court of Appeal took a different view. The revenue now appeals to your Lordships' House.

69. That is a brief sketch of what this appeal is about. It is now necessary to go into the different strands of the problem more systematically and in more detail.

Domestic tax law: group relief

70. Group relief of various types has been a feature of United Kingdom corporation tax law since 1973. The most important provisions are in Part X Chapter IV of the Income and Corporation Taxes Act 1988 ("ICTA 1988"). Section 402 (as amended by the Finance Act 2000 and as explained by the interpretation provisions in section 413) lays down the framework of the reliefs:

> "402(2) Group relief shall be available in a case where the surrendering company and the claimant company are both members of the same group.
>
> 413(3) For the purposes of this Chapter—
>
> > (a) two companies shall be deemed to be members of a group of companies if one is the 75% subsidiary of the other or both are 75% subsidiaries of a third company;. . .
>
> 413(5) References in this Chapter to a company apply only to bodies corporate resident in the United Kingdom; and in determining for the purposes of this Chapter whether one company is a 75% subsidiary of another, the other company shall be treated as not being the owner— …
>
> > (c) of any share capital which it owns directly or indirectly in a body corporate not resident in the United Kingdom.
>
> 402(3A) [taking effect for accounting periods ending after 31 March 2000] Group relief is not available unless the following condition is satisfied in the case of both the surrendering company and the claimant company.
>
> (3B) The condition is that the company is resident in the United Kingdom or is a non-resident company carrying on a trade in the United Kingdom through a branch or agency."

71. Park J (who has exceptional knowledge and experience in this field) summarised the effect of these provisions as follows ([2004] STC 594, 598, para 8):

> "The points which matter for the purposes of this judgment are the requirements in section 413 (5) that the companies must be resident in the United Kingdom, and, from 2000 onwards, the similar residence requirements of s 402 (3B). They mean that, if they take effect according to their terms, group relief is only available if the surrendering and claimant companies are resident in the United Kingdom and are both members of a group which has a United Kingdom parent (which can, however, itself be a subsidiary of a non-United Kingdom parent). An exceptional case, introduced in 2000, is that group relief is available to or from the United Kingdom branch of a non-resident company."

72. The judge then gave three examples of the restrictive effect of the residence requirement: a United Kingdom parent company with one United Kingdom subsidiary (both profitable) and one loss-making French subsidiary; a loss-making French parent company with a profitable United Kingdom subsidiary; and a non-resident parent company with two United Kingdom subsidiaries, one profitable and one loss-making. He added that these were very simple examples (para 9):

> "In the practical reality of many large multi-national groups more complicated structures are likely to arise, particularly so if one introduces the possibility of consortium companies. The Revenue and the professional advisers of the participants in the GLO have identified many variants on the basic patterns, and most of them are exemplified in one way or another by the six groups which have been identified as potential test cases for this GLO."

73. The different categories of group structure have been designated (in the GLO relevant to this appeal) as classes 1, 1A, 1B, 1C, 2, 3, 3A, 4, 4A and 5. The House was told that more categories may be identified as more companies come in under the GLO. But to avoid confusion it should be noted that the six lead groups have been selected, not by reference to the different categories of group structure, but by reference to their participation or non-participation (and for the participants, by their state of progress) in what might be called conventional tax proceedings (that is, proceedings starting with an appeal heard by the special commissioners). That is the next strand of the matter which I must address.

Domestic tax law: jurisdiction and procedure

74. In *Barraclough v Brown* [1897] AC 615 this House stated and applied a general principle which has important consequences in many different fields of law, including tax law. Section 47 of the Aire and Calder Navigation Act 1889 gave statutory undertakers who had incurred expenditure in removing a sunken vessel a right "to recover such expenses from the owner of such vessel in a court of summary jurisdiction." This House affirmed the decisions of the lower courts that the expenses were not recoverable in an action the High Court. Lord Watson said at p 622:

> "By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters."

75. Lord Watson added, in relation to the suggestion that the High Court could at least have made a declaration of liability (also at p 622):

> "It is possible that your Lordships might accede to such a suggestion, if it were necessary, in order to do justice. But apart from the circumstance that such a declaration would not be in accordance with law, the substance of it is one of those matters exclusively committed to the jurisdiction of the summary court."

The rest of the House either agreed, or expressed similar views.

76. This principle has often been applied when taxpayers who are in dispute (or anticipate being in dispute) with the revenue seek to ventilate the matter by initiating proceedings in the High Court, rather than by pursuing the conventional path of an appeal (against an assessment or the refusal of a claim) to the general or special commissioners. For example in *Argosam Finance Company Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390, a share-dealing company issued an originating summons in the Chancery Division seeking a declaration as to the

correct method of computing its income for the purposes of loss relief. The revenue challenged the proceedings as an abuse of process. The Court of Appeal, affirming Plowman J, struck out the proceedings as an abuse of process. Lord Denning MR said at p 423,

> "If the summons had been limited to question (a)—that is, to determine whether the company was entitled to relief under section 341 [of the Income Tax Act 1952]—I would agree that the courts would have no jurisdiction to determine it. The question is one which is entrusted by the legislature to the exclusive province of the commissioners, and the courts cannot entertain it. It falls within the decision of the House of Lords in *Barraclough v Brown*."

The position was made no better by the inclusion in the originating summons of question (b), which was a hypothetical "will-o-the-wisp" (see Harman LJ at pp424-425) except so far as it followed on from the objectionable question (a).

77. *Barraclough v Brown* was also cited and referred to in this House in *In re Vandervell's Trusts* [1971] AC 912. That was the second occasion on which this House had to consider different aspects of the complicated, expensive and regrettable litigation set in train by Mr Vandervell's flawed attempt to make a tax-efficient gift to the Royal College of Surgeons. I need not go into the facts beyond noting that it was (as Lord Wilberforce accepted at pp 936-937) an exceptional case, in which the real issue was (as Lord Reed observed at p 928) not jurisdiction but res judicata. Although the decision was unanimous, the House showed some divergence in reasoning. But subject to those caveats I find it helpful to see what Lord Wilberforce said about *Barraclough v Brown.* At p 939 he quoted from the speech of Lord Herschell:

> "I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

Lord Wilberforce commented on this:

> "The limits of this decision are obvious from these words. In order to compare (in fact to contrast) the situation under the Income Tax Acts, it is necessary to see precisely what it is that under that legislation has been made the subject of the statutory procedure. This is the validity and quantum of the assessment to tax which has been made upon the subject. It is this which, when made, is the subject of appeal to the Special Commissioners under section 52 (5) of the Income Tax Act 1952 and section 12 (5) of the Income Tax Management Act 1964; it is the assessment which cannot be altered except in accordance with the Income Tax Acts (Income Tax Management Act 1964, section 12) and which ultimately becomes final and conclusive. All this is undoubted and, if necessary, the authority of *Barraclough v Brown* could be invoked to show that the High Court cannot interfere with assessments.

Lord Wilberforce went on to express doubt whether the principle was wider than that.

78. At this point it is appropriate to say something about the status and functions of the general commissioners and the special commissioners (the familiar abbreviations of their full titles, the commissioners for the General Purposes of the Income Tax and the Commissioners for the Special Purposes of the Income Tax Acts). They are venerable institutions whose history has been well documented (see for instance H H Monroe's 1981 Hamlyn Lectures, "Intolerable Inquisition? Reflections on the Law of Tax" and two recent articles by Dr John Avery Jones [2005] BTR 40 and 80). The general commissioners have been described as the lay magistracy of the tax world (and as with lay magistrates their future is uncertain). They sit in regional divisions throughout the United Kingdom. The special commissioners, by contrast, are the equivalent of an elite cadre of legally qualified and highly experienced stipendiary magistrates, dealing with particularly demanding tax matters. The status and functions of the general commissioners and the special commissioners are now provided for in Part I of the Taxes Management Act 1970 ("TMA 1970"). Section 4 (5) provides,

> "By virtue of their appointment the Special Commissioners shall have authority to execute such

> powers, and to perform such duties, as are assigned to them by any enactment."

Their powers are therefore wholly statutory. A list of their principal functions can be found in Simon's Direct Tax Service, Volume 2, para A 2.516. The special commissioners are not a court of record, or indeed a court of any sort, but a statutory tribunal subject to the oversight of the Council on Tribunals.

79. The Special Commissioners (Jurisdiction and Procedure) Regulations 1994 (SI 1994/1811) (made under powers conferred by TMA 1970), provide for procedure before the special commissioners. Their express case-management powers are limited. They have power (regulation 7) to order proceedings raising a common issue to be heard either together or consecutively, but their only express power to designate lead cases (regulation 7A) applies only to certain social security matters. They have only a very limited power (regulation 25) to make orders for costs. In arguing that the High Court is the appropriate forum for their claims the respondents rely on the special commissioners' very limited powers of case-management, their very limited powers to make orders as to costs, and the absence of any power for them to award interest (repayment supplement, which the respondents regard as inadequate compensation, being a matter of statutory machinery and not something ordered by the special commissioners).

80. In arguments about the exclusive jurisdiction of the special commissioners under the principle in *Barraclough v Brown* much emphasis is often placed on the almost ritual significance, in the history of tax law, of the assessment made by a revenue official, originally called a surveyor, and later an Inspector of Taxes. This is reflected, for instance, in the passage from the speech of Lord Wilberforce in *Vandervell* [1971] AC 912, 939 which I have already quoted. Similarly, Lord Diplock said at p 940,

> "Section 5(6) of the Income Tax Management Act 1964 provides that after notice of assessment has been served 'the assessment shall not be altered except in accordance with the express provisions of the Income Tax Acts.' The only way in which an assessment can be altered under the provisions of the Income Tax Acts is by the special

> commissioners on an appeal to them by the party assessed."

81. It is not easy to see how far this hallowed principle still has the same force in the current tax system, which differs in very many respects from the system in force before 1965 (the period with which *Vandervell* was concerned). 1965 was a watershed year as under the Finance Act 1965, companies became subject to an entirely new tax, corporation tax, instead of being subject to income tax in much the same way as individuals. Since 1965 corporation tax has become much more complicated and has diverged further and further away from income tax, both in its substantive provisions and in the provisions for assessment and collection. Moreover, the assessment of both income tax and corporation tax has been put on a new basis, that is self-assessment, which is provided for (in relation to corporation tax) principally in Parts I to IV of Schedule 18 to the Finance Act 1998 ("FA 1998"). It replaced the "pay and file" system which had operated from 1993. Schedule 18 operates for accounting periods ending on or after 30 June 1999 and has effect as if contained in TMA 1970 (FA 1998 section 117 (2)). Part VIII of Schedule 18 contains new procedural provisions about group loss relief, and Part XI contains supplemental provisions.

82. Part II of Schedule 18 provides for companies to make company tax returns for an accounting period which must include (para 7(1)):

> "an assessment (a 'self-assessment') of the amount of tax which is payable by the company for that period—
>
> (a) on the basis of the information contained in the return, and
>
> (b) taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period."

Para 8 prescribes how the tax payable is to be calculated. Most claims (including claims for group relief) can be made only by inclusion in a company tax return (para 10). Part III imposes statutory duties to keep and preserve records. Part IV (enquiry into company tax return) is the closest equivalent to the old system of assessment by an inspector of taxes. The revenue may by notice to a company amend its self-assessment in order to make good a perceived deficiency in the amount

of tax shown as due under a self-assessment (para 30). The company has a right of appeal (para 30 (3) to (5)). Such an appeal lies to the general or special commissioners (para 93 and 94 in Part XI).

83. The provisions of Part VIII of Schedule 18 (claims for group relief) are detailed and, in some respects, inflexible. A claim for group relief must quantify the amount of relief claimed (para 68). If the amount claimed proves to be excessive the claim is wholly ineffective (para 69 (2)). The first prescribed step in the computation of the relief assumes that the surrendering company makes a company tax return showing its income computed in accordance with United Kingdom tax law (para 69 (3)). Overseas companies which do not trade in the United Kingdom would not prepare their accounts in this way, but your Lordships were shown copies of recent correspondence indicating that the revenue have been insisting on these requirements. The respondents say that for a non-resident surrendering company to comply with these procedural requirements would create difficulties which are not imaginary, hypothetical or trivial.

84. It is a curiosity that the only corporation tax provision closely corresponding to section 5 (6) of the Income Tax Management Act 1964 (to which Lord Diplock attached importance) appears to be para 47 (2) in Part V of Schedule 18. Part V contains default provisions which apply if a company does not comply with the statutory self-assessment procedure. But other provisions in Parts I to IV and XI of Schedule 18, briefly summarised above, seem to produce much the same practical effect. I can discern no parliamentary intention to alter the general principle embodied in tax law before self-assessment, that any dispute with the revenue about an individual's liability to income tax or a company's liability to corporation tax is to be determined in the first instance by the general commissioners or the special commissioners.

85. There is another very significant change which has occurred since 1965: that is the extraordinary growth of judicial review. Tax lawyers were not in the forefront of this expansion but they have been catching up during the last two decades. Judicial review is available not only for procedural errors or unfairness on the part of the general or special commissioners but also to challenge the validity of secondary tax legislation, as in the case of *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70. But judicial review in the High Court is not an appropriate remedy in cases where Parliament has provided a special appeal procedure for determining substantive questions as to tax liability.

GLO's

86. GLO's were introduced with effect from 2000 in implementation of one of Lord Woolf's proposals for procedural reform. They are provided for in Part III, rules 19.10 to 19.15 of the Civil Procedure Rules 1998, as supplemented by the practice direction on group litigation. The key features and normal effect of any GLO are that it identifies the common issues which are a pre-condition for participation in a GLO; it provides for the establishment and maintenance of a register of GLO claims; it gives the managing court wide powers of case management, including the selection of test claims and the appointment of a lead solicitor for the claimants or the defendants, as appropriate; it provides for judgments on test claims to be binding on the other parties on the group register; and it makes special provision for costs orders.

87. The GLO relevant to this appeal exhibits all these features. It was made on 23 May 2003 by the Chief Chancery Master. It has been amended several times. There are now a large and growing number of corporate groups on the group register (the Revenue's printed case puts the total at 89 groups and the respondents' printed case puts the total number of companies involved at over 1,000).

88. Five of the six selected test claims were commenced (as Part 8 proceedings) on 23 or 24 December 2002. The revenue moved swiftly and issued striking-out applications on 30 January 2003. The timing and procedure in the BNP Paribas claim (and in other claims which have not been selected as test cases) was different but the details are unimportant. What is noteworthy is that the GLO was made under the shadow of strike-out applications which had already been made. The revenue cannot be accused of having been dilatory in launching its jurisdictional challenge to claims covered by the GLO. There was a reference to the challenge in para 24 of the GLO:

> "This Order disapplies the terms of Civil Procedure Rules 1998, Part II, so that the defendants need not file or serve a Part 23 application with witness evidence in support where they indicate in an acknowledgment of service that they dispute the jurisdiction of the High Court to try the claim or where they contend that the High Court should decline jurisdiction to try the claim and the question of jurisdiction shall be dealt with as one of the issues in the litigation."

Community law: articles 43 and 56 and direct effect

89. Article 43 of the Treaty (formerly article 52) is in the following terms:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

This article has direct effect (*Reyners v Belgium* (Case 2/74) [1974] ECR 631) and it is therefore to be enforced by courts in the United Kingdom as an "enforceable Community right" within the meaning of section 2 (1) of the European Communities Act 1972.

90. Article 56 of the Treaty (formerly article 73 (b)) is in the following terms:

> "(1) Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between member states and between member states and third countries shall be prohibited.
>
> (2) Within the framework of the provisions set out in this Chapter, all restrictions on payments between member states and between member states and third countries shall be prohibited."

Thus the reach of article 56 extends beyond transfers between states which are members of the EU. It can also apply to a transfer between the United Kingdom and (say) the United States (though it is, in both applications, subject to a number of qualifications which it is unnecessary to explore here). Article 56 also has direct effect (*Criminal proceedings against Sanz de Lera and Others* [1995] (Joined Cases C-163/94, 165/94 and 250/94) [1995] ECR I-4821, 4841-3, paras 40 to 48, a case concerned with exporting bank notes from Spain to Switzerland).

Community law: the principle of effectiveness

91. In their written and oral submissions the respondents have relied on three general principles of EU law: the principle of effectiveness, the principle of equivalence and the principle of certainty. It is on the principle of effectiveness that the argument has centred. This principle is derived from article 5 (formerly 10) of the Treaty, which imposes on national courts the duty of ensuring the legal protection which individuals derive from EU law. There is a measure of agreement about the general principle, but sharp disagreement as to its practical implications and its application in this case.

92. The general principle has been stated many times by the ECJ. One of the most recent statements is in *Kobler v Republik Osterreich* [2004] QB 848, 903, paras 46 and 47:

> "According to settled case law, in the absence of Community legislation, it is for the internal legal order of each member state to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law: see *Rewe-Zentralfinanz eG v Landwirtschaftskammer fur das Saarland* (Case 33/76) [1976] ECR 1989, 1997-1998, para 5; *Comet BV v Produktschaap voor Siergewassen* (Case 45/76) [1976] ECR 2043, 2053, para 13; *Hans Just I/S v Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] ECR 501, 522-523, para 25; *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722, 772, para 42, and *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (Case C-312/93) [1995] ECR I- 4599, 4620-4621, para 12.

> Subject to the reservation that it is for the member states to ensure in each case that those rights are effectively protected, it is not for the Court of Justice to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system: judgments in *SEIM-Sociedade de Exportacao e Importacao de Materiais, Lda v Subdirector-Geral das Alfandegas* (Case C-446/93) [1996] ECR I-73, 110, para 32 and *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* (Case C-54/96) [1997] ECRI-4961, 4996, para 40."

In the same case Advocate-General Leger referred (in passages strongly relied on by Mr Aaronson, QC for the respondents) to the utmost importance of "the direct, immediate and effective protection of the rights which individuals derive from Community law" (p 994, para 52; see also pp 990 and 996, paras 39 and 57-8).

93. The ECJ has, no doubt for good reasons, been reluctant to interfere more than necessary in domestic rules as to the jurisdiction and procedure of national courts, and the remedies which they can grant. In an early case, *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* (Case 158/80) [1981] ECR 1805, para 44, the ECJ stated that,

> "it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law."

Since then it has become apparent that national courts may have to alter their procedure and remedies, and even their jurisdiction, in order to meet the demands of the principle of effectiveness. The process has been described by *Takis Tridimas, The General Principles of EC Law* (1999), pp 278-279:

> "More recent cases, however, show that the case law has made significant inroads in the area of remedies so much so that the statement that the Treaty was not intended to provide new remedies is no longer valid. Gradually, the case law has transformed the principle of primacy from a

> general principle of constitutional law to a specific obligation on national courts to provide full and effective protection of Community rights. The seminal judgment in *Simmenthal* marked the first step in that direction. The question arose whether a national court could disregard a national law which had been held by the court to be incompatible with Community law or whether it should follow the procedure provided for by the Italian Constitution and refer that law to the Italian Constitutional Court which under the Constitution was the only competent body to rule on the validity of national law. . . Procedural protection was further extended in *Factortame*. The culmination of this trend in the case law has been the establishment of member state liability in damages."

94. The areas in which national courts may have to adapt their rules include limitation periods and other time limits, monetary limits to awards of compensation, interest and costs, and rules of evidence. Time limits have been a controversial area in which some difficult distinctions have been drawn: contrast *Emmott v Minister for Social Welfare* (Case C-208/90) [1993] ICR 8 and *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging* [1993] ECR I-5475. National restrictions on monetary compensation may have to be disregarded even by a tribunal which has limited statutory powers: see the judgment of the ECJ in *Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2)* [1994] QB 126 (the final order by this House is reported at [1994] AC 530). In *Amministrazione delle Finanze dello Stato SpA v San Giorgio* (Case No 199/82) [1983] ECR 3595, a rule of Italian law creating a presumption as to the defence of passing-on was held unlawful on the ground that, though not discriminatory, it made it practically impossible for the claimant to obtain restitution.

95. The correct general approach to these issues has been described by the ECJ in *Peterbroeck van Campenhout & Cie v Belgium* (Case C-312/93) [1994] ECR I-4599, 4621, para 14:

> "For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis

> the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."

That guidance is expressed in such general terms as to give only meagre assistance. There is further guidance on the principles in the opinion of Advocate-General Jacobs in that case (pp 4610-2, paras 40 and 43). The Advocate-General observed:

> "The case-law of the court in this area establishes a balance between, on the one hand, the need to respect that autonomy [of national courts] and, on the other hand, the need to ensure the effective protection of Community rights in the national courts. That is true both of the case-law on the subject of time-limits which I have set out above and of the decisions in *Simmenthal* and *Factortame* which are mentioned in the order for reference and are relied on by Peterbroeck, and which illustrate the court's concern for the effective protection of Community rights."

He considered *Simmenthal* and *Factortame,* and continued, at p 4611, para 43:

> "The decisions in *Simmenthal* and *Factortame* were necessary to ensure that the court seised was not precluded from giving effect to the Community rights claimed in the respective national proceedings. The decisions demonstrate the way in which Community law can have an impact—indeed a remarkable impact—on national procedures. But it will be noted that in both cases the effect of Community law was to exclude a national rule which would have made the judicial protection of Community rights by the court seised wholly impossible."

96. These issues were also raised in *Hoechst (Metallgesellschaft Ltd and Others and Hoechst AG and Hoechst (UK) Ltd v Inland Revenue Commissioners and HM Attorney General* [2001] Ch 620 but since the significance of that case is controversial, and has been the subject of extended argument in this appeal, it is better to defer discussion of *Hoechst* until a later stage.

Double taxation treaties

97. Some but not all of the test cases selected under the GLO include claims founded on an alleged breach of the general non-discrimination article (based on the OECD model) which is included in many double taxation treaties. This appears as article 24 of the United Kingdom—United States of America Double Taxation Convention of 1975 (relevant to the Perkins and Heinz cases) and as article 25 of the United Kingdom-France Double Taxation Convention of 1968 (relevant to the BNP Paribas case).

98. The standard form of the article is as follows:

> "Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected."

Its effect in connection with another type of group relief has recently been considered by Park J in *NEC Semi-Conductors Ltd v Inland Revenue Commissioners* [2004] STC 489. Your Lordships were told that an appeal from that decision is to be heard by the Court of Appeal [next July/this month]. The main area of controversy in as to the appropriate comparator for the purpose of the comparison called for by the non-discrimination article.

99. Double taxation treaties do not have direct effect. They need to be imported into domestic tax law by express enactment. In relation to income tax and corporation tax this is achieved by section 788 (3) of ICTA 1988, which provides as follows:

> "Subject to the provisions of this Part, the arrangements [specified in an Order in Council relating to double taxation] shall, notwithstanding anything in any

enactment, have effect in relation to income tax and corporation tax insofar as they provide—

(a) for relief from income tax, or from corporation tax in respect of income or chargeable gains . . .”

100. The alternative claims based on the non-discrimination article are a peripheral issue in this appeal (indeed they were not mentioned at all in the judgments in the Court of Appeal). That is because, as is stated in para 101 of the respondents’ printed case, in every case the claim in respect of a breach of the non-discrimination article is coupled with a parallel claim under the provisions of article 56. However, during the Revenue’s oral submissions your Lordships were told that of 306 appeals about group loss relief now pending before the special commissioners, there are six in which the non-discrimination article is the sole issue. Dr Plender (for the revenue) realistically acknowledged the convenience of having the double taxation treaty claims heard at the same time, and in the same forum, as the claims based on articles 43 and 56. Mr Aaronson appeared to accept that when the issue of substance finally comes to be decided none of his clients is likely to win on the double taxation treaty point if it loses on the EU points.

The companies’ claims

101. The claims of the claimants in the six test cases are set out in similar form in their respective Part 8 claim forms. The claims are not however identical. I have already mentioned that some but not all include claims based on non-discrimination articles in double taxation treaties. Another and much more important difference is in the type of loss which is said to have been occasioned by the alleged breaches of articles 43 and 56 (and other articles which are put into the pleading for good measure).

102. There are four different types of loss said to have been sustained as a result of the alleged breaches. Park J quoted ([2004] STC 594, 600, para 14) the description in the skeleton argument for the companies (the claimants before him). It is convenient to repeat this, especially as much of the oral argument before your Lordships referred to claims in categories (i), (ii), (iii) and (iv):

"The claims by each of the test claimant groups are for at least two, and in some cases for all four, of the following:

(i) For the profits of the UK profit-making company to be relieved by the losses of a non-UK resident company. It may be helpful to refer to this as 'basic group relief.'

(ii) Because of the clear legislative requirement for all the relevant companies to be resident in the UK basic group relief was regarded in every case as not available. In many cases the profit-making companies used other reliefs (eg capital allowances or surplus ACT) which they would not have used had basic group relief been available. In these cases the profit-making companies claim restitution of the other reliefs, or, in the alternative, compensation for their use. It will be convenient to refer to this as 'the reclaim of utilised reliefs.'

(iii) In many cases other UK members of the group surrendered their own reliefs to the UK profit-making company; and those companies are reclaiming the reliefs. It will be convenient to refer to this as 'the recovery of surrendered reliefs.'

(iv) In all of the cases the companies which would have surrendered losses, if the group relief rules were not confined to UK resident companies, may have been paid for allowing their losses to be set-off against the profit-making companies' profits, and they seek compensation for the loss of these payments. It will be convenient to refer to this as 'the claim for payments.'"

103. The way these claims have been pleaded can be illustrated by the pleading in the Autologic case. Paragraph 8A of the statement in the claim form is a long and very elaborately subdivided paragraph particularising the claims for restitution and damages. Para 8A.1.4 claims damages under three heads as follows:

(1) Para 8A.1.4.1 "Amounts of corporation tax overpaid by [a UK subsidiary] 'the paying company'"—a category (i) or "basic group relief" claim;

(2) Para 8A.1.4.2 "The value of reliefs surrendered to the paying company by [other UK group companies] and which would not have been used or surrendered and which may otherwise have been available for use elsewhere in the company group or for other accounting periods had the paying company been able to claim loss relief from [loss-making French subsidiaries] and thereby offset its chargeable profits"—a category (ii) or "reclaim of utilised reliefs" claim; and

(3) Para 8A.1.4.3 "The sums [the loss-making French subsidiaries] would have received from the paying company had they been able to surrender their losses and other eligible amounts to the paying company which they were precluded from doing in the manner set out in this claim"—a category (iv) or "claim for payments" claim.

Paragraphs 8A.2.1 and 8A.2.2 then follow the same sort of pattern in respect of the restitutionary claims, omitting the category (iv) claim but including express claims for the time value of money.

104. It is over the category (i) claims that battle has been joined. The revenue regard the category (i) claims as being of central importance, and as being a plain breach of the principle that group loss relief claims are to be determined (in the first instance) by the special commissioners, to whose exclusive jurisdiction Parliament has assigned them. The revenue regard categories (ii), (iii) and (iv) as "satellite" claims which cannot be considered until after the essential issue of category (i) claims has been decided. It was the category (i) claims that Park J struck out (see for instance para 1.3 of his order drawn up on 31 March 2004, in the Autologic case, striking out paras 8A.1.4.1 and 8A.2.2.1).

The judgments below

105. In his judgment Park J, having covered all the matters to which I have already referred, with the important exception of the EU principle of effectiveness, turned to the issue of tax appellate jurisdiction. He referred to the changes during the 1990s in the administration of corporation tax, but observed (p601, para 18):

> "It has always remained the case that a corporate taxpayer which wishes to dispute some point of tax law with the Revenue has a statutory right of appeal to the Commissioners."

He mentioned the line of tax cases which had considered and applied the principle in *Barraclough v Brown*, the most recent being *R v Inland Revenue Commissioners Ex p Bishopp* [1999] STC 531. He then crisply summarised his own view (p 603, para 25):

> "I am not going to go through the judgments in the cases which were cited to me. They are all consistent in the result: the courts did not decide questions of principle which went to liability. Such questions (as opposed to questions of machinery) were properly the subject of appeals to the General or Special Commissioners. I would accept that the precise reasoning which led the courts to that result has varied between some of the judgments. Some observations are to the effect that there is a simple rule of law that the court has no jurisdiction at all in such matters, an approach which appears to me to be consistent with the second strand in the speech of Lord Watson in *Barraclough v Brown* [[1897] AC 615,622]. Other observations are to the effect that there might in theory be a jurisdiction to decide questions of tax principle in cases begun in the High Court, but that, given the existence of the statutory jurisdiction of the Commissioners, it would be wrong for the High Court to exercise any such original jurisdiction as it might possess."

106. Park J then referred to *Marks & Spencer Plc v Halsey (Inspector of Taxes)*, summarising the decision of the special commissioners ([2003] STC (SCD) 70) and his own decision to make a reference to the ECJ). He noted that the revenue said that in that case the taxpayer company followed the correct procedure in order to get the critical question of tax principle decided. Mr Aaronson, who appeared for the taxpayer company in *Marks & Spencer*, told your Lordships that it was a much more straightforward case on the facts, and that in any case there might have been second thoughts about the wisdom of going to the special commissioners. He could also point out that the revenue had not objected to the High Court assuming jurisdiction in *Hoechst.* But this important appeal cannot be decided by weighing and striking a balance

between the alleged procedural inconsistencies of the revenue, on the one hand, and taxpayer companies and their advisers, on the other hand.

107. In discussing the competing arguments Park J started from the basic principle as he had formulated it ([2004] STC 594, 603, para 25). That basic principle could not be evaded by a company stealing a march, and starting High Court proceedings before an assessment (or some other formal trigger for an appeal to the Commissioners) was in place. Nor would the principle cease to apply because there was a large number of companies which could band together for a GLO. Nor would it cease to apply because another company in a group claimed to have suffered financial loss in consequence of a refusal of group relief. He concluded (p 606, para 31 (iv)):

> "Finally, I combine the foregoing examples. Suppose that several companies are having the same argument of tax law with the Revenue. They all have associated companies which wish to make consequential claims for damages against the Revenue. In my opinion they cannot cause the High Court to have or to exercise a jurisdiction to determine the disputed question of tax law—a jurisdiction which otherwise it would either not have or not exercise—by uniting to create a GLO in which all of the companies with the tax disputes and all of the associated companies with consequential damages claims combine to bring High Court proceedings against the Revenue. The example in this sub-paragraph is in principle the same as the case before me."

108. Only towards the end of his judgment did Park J refer to the EU principle of effectiveness and the decision of the ECJ in *Hoechst* [2001] Ch 620, paras 98-107 (the paragraphs dealing with the fifth question). He dealt with the point in the following passage (p 608, para 38):

> "Points of the nature which I have described in the foregoing paragraph [the procedural difficulties on which Mr Aaronson relied] are important and potentially difficult, but I cannot see what they have to do with the jurisdictional issue which is the subject matter of this judgment. If a claimant company argues on an appeal to the Special Commissioners that it is entitled to group relief for losses of a group company resident outside the United

> Kingdom, the Inland Revenue's arguments against the company might include submissions that the appeal fails anyway for procedural reasons such as the lack of a notice from the surrendering company to its Inspector or the omission by the companies to make formal claims for group relief within the prescribed time limits. If the Revenue's arguments do include such submissions, the claimants can respond before the Commissioners, just as they could if the case had commenced in the High Court, by arguing that, in reliance in the passages in the *Metallgesellschaft/Hoechst* judgment, Community law overrides the procedural and formal requirements. The Special Commissioners are just as capable of adjudicating on these arguments as is the High Court."

109. In the Court of Appeal (which heard the case in a single day, as an on-notice application for permission to appeal, with the appeal to follow on permission being granted) the outcome was very different. Peter Gibson LJ ([2005] 1 WLR 52, 53, para 1) placed *Hoechst* in the forefront of his judgment. He recorded (p 57, para 13) the appellant companies' main criticisms of the judgment below:

> "(1) By reason of the *Hoechst* case the judge should have found that the High Court not only had jurisdiction but was required to hear the category (i) claims. (2) The judge erred in not deciding whether he had jurisdiction; he should have found on the authorities that he had jurisdiction and should have exercised it. (3) The judge erred in failing to appreciate or give adequate consideration to the practical difficulties in requiring the category (i) claims to be severed from all the other claims and consigned to the commissioners; those difficulties should have led the judge to exercise jurisdiction by hearing all the claims in the High Court."

110. Peter Gibson LJ quoted at some length (pp58 to 60, paras 17 and 18) from the opinion of Advocate-General Fennelly and the judgment of the ECJ in *Hoechst*. He also referred to *Simmenthal*, *Kobler* and *Roquette Freres SA v Direction des Services Fiscaux du Pas-de-Calais* (Case C-88/99) [2000] ECR I-10465. He observed (p 62, para 25) that the importance of the principle of effectiveness in Community law cannot be overstated, and that in the present case there is a very serious difficulty, if not an impossibility, for companies resident outside the

United Kingdom to comply with the formal statutory requirements for group loss relief.

111. Peter Gibson LJ's essential conclusion was as follows (p 63, para 28):

> "With due respect to the judge, I do not think that thereby he gave effect to the full import of the ECJ's decision on question (5) in the *Hoechst* case. Given that the United Kingdom tax law has denied groups of resident and non-resident companies the benefit of group loss relief, it is no answer to the claimants' claims in the High Court, by which they seek to invoke the primary and direct effect of Community law, to require the claimants to apply for a tax benefit denied to them by national law with a view to challenging the inevitable refusal of that application through the statutory procedure for tax appeals. In my judgment, consistently with the *Hoechst* case, the High Court was obliged to entertain the claims and, if made out, give effect to them, and the judge was wrong to strike out part of the claims."

112. Peter Gibson LJ did not find it necessary to say anything about the other grounds of appeal (including the issue of jurisdiction of the High Court apart from the EU context). Longmore LJ gave a short judgment agreeing with Peter Gibson LJ.

The Hoechst case

113. Before your Lordships the revenue contended that the Court of Appeal gravely misunderstood the significance of the *Hoechst* case [2001] Ch 620. It is therefore necessary to examine it in a little detail. It was in fact two linked cases on essentially the same factual situation, a German parent company was a trading subsidiary resident in the United Kingdom. It was concerned with a different form of group relief (which ceased to exist on 6 April 1999), that is a group income election under section 247 of ICTA 1988 enabling an intra-group dividend to be paid without a simultaneous payment of advance corporation tax ("ACT") if (and only if) both companies were resident in the United Kingdom (see section 247 (4), now repealed together with all the other provisions relating to ACT). This resulted in a financial detriment to a group where

the receiving company was resident in another member state of the EU, although the detriment was transitory (and equivalent to a loss of interest) because mainstream corporation tax would (absent another form of group relief) be payable in due course.

114. The relevant companies in each of the two groups commenced proceedings against the revenue in the High Court. They relied on articles 43 and 56 (then articles 52 and 73b) of the Treaty and claimed "damages or compensation for the loss of the use of the money in respect of the periods between the payments of advance corporation tax made and the time when their mainstream corporation tax, against which those payments were set off, was due." The periods concerned were 1974 to 1995 in the case of one group, and 1989 to 1994 in the case of the other (see the Advocate-General's opinion, pp 626-627, paras 9-11). On 2 October 1998 Neuberger J made an order for the reference to the ECJ of five questions.

115. There is no suggestion that the revenue raised any objection to the procedural course which I have just described. Nor did the revenue dispute that national law deprived non-resident companies of any possibility of a group income election (see the Advocate-General's opinion at p 627, para 12). That was the basis on which the United Kingdom government fought the case in the ECJ, arguing that the differential between resident and non-resident companies was justified and was not discriminatory.

116. The first and second questions raised the main issues as to the alleged breaches of EU law. The ECJ, agreeing with the Advocate-General, found the breaches established. The first question was answered as follows (p 661, para 76):

> "The answer to the first question must therefore be that it is contrary to article 52 of the Treaty for the tax legislation of a member state, such as that in issue in the main proceedings, to afford companies resident in that member state the possibility of benefiting from a taxation regime allowing them to pay dividends to their parent company without having to pay advance corporation tax where their parent company is also resident in that member state but to deny them that possibility where their parent company has its seat in another member state."

The second question was answered as follows (p 665, para 96):

> "where a subsidiary resident in one member state has been obliged to pay advance corporation tax in respect of dividends paid to its parent company having its seat in another member state even though, in similar circumstances, the subsidiaries of parent companies resident in the first member state were entitled to opt for a taxation regime that allowed them to avoid that obligation, article 52 of the Treaty requires that resident subsidiaries and their non-resident parent companies should have an effective legal remedy in order to obtain reimbursement or reparation of the financial loss which they have sustained and from which the authorities of the member state concerned have benefited as a result of the advance payment of tax by the subsidiaries. The mere fact that the sole object of such an action is the payment of interest equivalent to the financial loss suffered as a result of the loss of use of the sums paid prematurely does not constitute a ground for dismissing such an action. While, in the absence of Community rules, it is for the domestic legal system of the member state concerned to lay down the detailed procedural rules governing such actions, including ancillary questions such as the payment of interest, those rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law."

In the light of these rulings it was unnecessary to answer the third and fourth questions.

117. The fifth question is restated in the judgment of the ECJ at pp 665-666, para 98, but with the addition at the end of 20 words which give a clue as to the court's eventual answer:

> "By its fifth question, the national court is seeking in substance to ascertain whether it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the

> subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and did not therefore make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime."

118. Subsequent paragraphs of this part of the judgment (paras 98-107) make clear that the ECJ was considering the issue as an alleged defence, in line with the principles stated in *Brasserie du Pecheur* and *Factortame* [1996] QB 404, based on a lack of reasonable diligence on the part of the claimant. Nevertheless these paragraphs also emphasise the futility of requiring a claimant to adopt, at the outset of his claim, a special and possibly burdensome procedure which was doomed to failure from the start: see paras 103 ("it is not disputed that, had the claimants applied for that taxation regime, their application would have been refused by the inspector of taxes"); 104 ("since no such right to reimbursement exists under English law"); 105 ("it is thus criticising the claimants for complying with national legislation and for paying advance corporation tax without applying for the group income election regime or using the available legal remedies to challenge the refusal with which the tax authorities would inevitably have met their application"); and 106 ("had not applied for a tax advantage which national law denied them").

119. The same line of thought is reflected in the conclusion in para 107:

> "The answer to the fifth question must therefore be that it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available

> to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime."

120. The first criticism which Dr Plender made of the Court of Appeal's treatment of *Hoechst* (made by reference to the very first sentence in the judgment of Peter Gibson LJ) was that the effect of the decision was too widely stated. I see little force in this criticism (the second sentence in the judgment qualifies the generality of the first) and little relevance in any element of criticism that might survive.

121. The second criticism (central to Dr Plender's submissions) needs fuller examination. It is true that the ECJ, in dealing with the fifth question, was not concerned at all with the issue of the jurisdiction of any national court, but only with whether relief should be reduced (or even refused completely) on the ground that the claimant had not shown reasonable diligence in seeking domestic remedies. That criticism is, so far as it goes, correct. The ECJ was not faced with the argument that the High Court did not have jurisdiction, because the revenue chose not to contest that point. But I do not consider that this takes the revenue very far. The clear and robust terms in which the ECJ dealt with the fifth question in paras 103 to 107 of its judgment (and the similarly robust and clear language in para 58 of the Advocate-General's opinion) leave little room for doubt that, had the question of jurisdiction been raised, it would have been disposed of in the same way, and for the same reasons.

Conclusions

122. My Lords, I have set out the background to this appeal, and the issues which it raises, at some length—I fear at tedious length. I can however state my opinion fairly shortly, especially as I have the misfortune to differ from the majority of your Lordships. With great respect to Park J, who has exceptional knowledge and experience in tax cases, I think (as the Court of Appeal did) that he underestimated the impact, in these cases, of the superior legal order constituted by EU law. I also think that he took too narrow a view of the High Court's jurisdiction in proceedings with a tax content. I prefer the formulation put forward by Lord Wilberforce in *Vandervell's* case [1971] AC 912, 939 F-H (with which Lord Morris of Borth-y-Gest agreed, and with which none of their Lordships positively disagreed). That passage is

quoted in the opinion of my noble and learned friend, Lord Hope of Craighead, and I need not repeat it.

123. I also respectfully differ from the view of the Court of Appeal that because of the Community principle of effectiveness it was unnecessary to address the question of jurisdiction in its purely domestic context. The Court of Appeal had very little time to consider this difficult matter, and cannot have had the benefit of such fully developed argument as your Lordships have had. But the general guidance given by the ECJ in *Peterbroeck* [1995] ECR I-4599, 4621, para 14 (which I have already set out) suggests that whenever an issue is raised as to the principle of effectiveness, it is necessary to analyse the position under national jurisdictional and procedural rules.

124. I do not in this context discern any bright line between jurisdictional and procedural limitations. Dr Plender contended that there is an important distinction, drawing attention to the phrase "in a case within its jurisdiction" used in *Simmenthal* [1978] ECR 629, 643, para 16, and reflected in later cases (including *Peterbroeck* [1995] ECR I-4599,4623, para 21—"seised of a matter falling within its jurisdiction"). Jurisdiction is "an expression which is used in a variety of senses and takes its colour from its context" (Diplock LJ in *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862, 888). I am not sure what precise shade of meaning the ECJ intended it to have in this context, but I think it likely that it was being used in a fairly broad sense. I am sure that the ECJ would have rejected as absurd (in much the same way as in *Peterbroeck* it rejected the notion that there was no court or tribunal capable of making a reference to the ECJ) any suggestion that, because tax law is involved, there is in the United Kingdom no court or tribunal with jurisdiction to hear the respondents' claims alleging serious breaches of EU law.

125. On the contrary, as the argument before your Lordships developed it seemed that each side was embracing the notion that the "remarkable impact" of EU law (the expression used by Advocate-General Jacobs in *Peterbroeck* [1995] ECR I-4599, 4611, para 43) could if necessary transform the jurisdiction and powers of either the High Court or the special commissioners. Dr Plender came close to submitting (though he did not put it in these colloquial terms) that the principle of effectiveness made it a zero-sum game in which anything the High Court could do, the special commissioners could do better (the same thought appears briefly in the judgment of Park J at p 608, para 38).

126. I must with great respect differ from the view expressed in para 41 of the opinion of my noble and learned friend, Lord Nicholls of Birkenhead, that if taxpayer companies are time-barred before the Special Commissioners their remedy necessarily lies elsewhere. If the companies are compelled to seek their remedy before the Special commissioners, that tribunal would have the power (and indeed the duty) to disapply any time limits which were incompatible with Community law, even if this involved an extension of their jurisdiction: see the decisions of the Court of Appeal (handed down on the same day) in two appeals from the Employment Appeal Tribunal, *Biggs v Somerset County Council* [1996] ICR 364, 370 and *Staffordshire County Council v Barber* [1996] ICR 379, 395 both of which expressly approve passages from the judgments of Mummery J in the Employment Appeal Tribunal ([1995] 1CR 811, 826-827 and [1995] 1 RLR 452, 459). But if (as in those cases) the time limit was compatible with Community law, and the claimant had no remedy in the statutory tribunal, she had come to the end of the road. Similarly the out-of-time category (i) claimants would, as it seems to me, find that they can go no further if they are required to go to the special commissioners as their first port of call, and are there held to be time-barred.

127. I come back to the position under domestic law. As Mr Aaronson made clear in answering questions from your Lordships at the beginning of the third day of the hearing, the complaint in the test cases under the GLO is not that the claimants are entitled to group loss relief. It is perfectly clear from the legislation ("on any view" as the ECJ said in *Hoechst* [2001] Ch 620, 666, para 98) that they are not entitled to group loss relief. Their complaints (seeking a restitutionary remedy and/or damages, interest and costs) are that their non-entitlement to group loss relief is a serious breach of EU law (in that sense it is impossible to look at the matter in an entirely domestic context, since but for EU law, there would be no complaint.) These claims are in my view within the jurisdiction of the High Court, in line with Lord Wilberforce's observation in *Vandervell* [1971] AC 912, 939 F-H. They are miles away from the sort of artificial expedient which was adopted in *Argosam*, and was rightly held to be an abuse of process.

128. In paragraph 16 of his opinion my noble and learned friend, Lord Nicholls of Birkenhead, describes the effect of an inconsistency between a United Kingdom statute and a directly applicable provision of Community law, citing *R v Secretary of State for Transport, Ex p Factortame* [1990] 2 AC 85, 140 and *Imperial Chemical Industries plc v Colmer (Inspector of Taxes)* [1999] 1 WLR 2035, 2041. In the latter case Lord Nolan explained (at p 2041) that the relevant provisions of the

taxing statute took effect as if enacted as being "without prejudice to the directly enforceable Community rights of companies established in the Community." It is not a matter of construing the taxing statute, but of determining whether it is overridden by a rule from a higher legal order which gives the taxpayer companies a restitutionary claim.

129. The conclusion which I have reached seems to me to be confirmed by (but is by no means wholly dependent on) the practical difficulties and disadvantages, including the absence of GLOs, which the appellants would face in bringing their claims before the special Commissioners. Like the Court of Appeal I think that those difficulties (which I need not repeat) are formidable and that Park J did not give enough weight to them.

130. For these reasons, and for the reasons stated in the opinion of my noble and learned friend, Lord Hope of Craighead, I would dismiss these appeals. I do not think your Lordships have to express a definite view about the tiny handful of cases (not before the House) in which there is said to be an issue on the OECD non-discrimination article and no corresponding issue of EU law. At present my view is that they should properly go to the special commissioners, because of the plain terms of section 788 (3) of ICTA 1988. But the revenue will no doubt consider (as Dr Plender hinted they might) whether to press for that course if it is wasteful of time and costs on both sides.