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CONTENTS

Comment
Andrew Bowen 1
Insolvency
Donna McKenzie Skene
University of Aberdeen 3
Taxation
William Craig
University of Aberdeen 7

COMMENT

Challenging the Financial Services Ombudsman:

Bunney v Burns Anderson plc; Cahill v Timothy James & Partners Ltd

[2008] B.C.L.C. 17

Andrew Bowen
Advocate

Introduction:

Part XVI of the Financial Services and Markets Act 2000, which brought about a major reorganisation of the regulation of financial services, established the Ombudsman Scheme "under which certain disputes may be resolved quickly and with minimum formality by an independent person" (s.225). Lewison J. in the Chancery Division was faced with actions to enforce decisions of Financial Services Ombudsman ("FSO") and defences based on excess of jurisdiction by the FSO. His decision dealt both with the wider legal issue of challenging the decision of a statutory body where there was no statutory right to appeal and the narrower issue of construction of the particular powers of the FSO conveyed by the 2000 Act.

The Facts:

The claimants B and C, both brought claims against the respective defender financial adviser firms for injunctions under s.229(9) of the Financial Services and Markets Act 2000 for enforcement of directions given by the FSO under the Financial Ombudsman Service scheme. The defenders raised the defence that the FSO had exceeded his powers because the effect of the injunctions would have been to

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require the defenders to pay in excess of the maximum award which the FSO was entitled to make (£100,000). Although it was not expressly stated why both claims were heard together, both defenders were represented by the same legal team and the Financial Ombudsman Service Limited appeared in support of B's claim and was separately represented. The claimants' position was that once an award had become final and binding it could only be challenged by way of judicial review.

In relation to B's complaint about the defenders' advice on the transfer of his deferred benefits under his employer's pension scheme, the FSO decided that the advice given was unsuitable and directed that the firm carry out a loss assessment and to redress any loss assessed, with leave to refer back to him any unresolved issues: B had accepted that direction. The firm carried out a loss assessment which would have required it to pay B in excess of the £100,000 which it was prepared to pay. Similarly, in relation to C's complaint about advice on his final salary scheme, the FSO upheld the complaint and the direction to compensate C, which he accepted, would have required payment by the firm of sums substantially in excess of £100,000. The defender had again accepted that it would pay the sum of £100,000. As a result, B and C were effectively seeking injunctions which would order the defenders to pay the respective sums in excess of £100,000.

The Law:

While the FSO has both a compulsory jurisdiction (s.226) and a voluntary jurisdiction (s.227), the claims concerned an exercise of the former jurisdiction. Section 228(2) provides that a "complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". The determination has to be in writing, with reasons, and has to be notified to both complainant and respondent, with the difference that the complainant is asked whether he accepts or rejects the determination and, if he accepts it, is final and binding on both parties (s.228(5)). Under s.229 the FSO can make a "money award" which is fair compensation for the loss or damage suffered by the complainant or a direction that the respondent take such steps in relation to the complaint as the FSO considers just and appropriate (whether or not a court could order those steps to be taken). A money award can be enforced in England via the county court and in Scotland via the sheriff court as if it were a judgment of the sheriff (and whether or not the sheriff could himself have granted such judgment while compliance with a direction is enforceable by injunction in England and an order under s.45 of the Court of Session Act 1988 in Scotland (specific performance of a statutory duty).

Although there is no statutory right of appeal on the merits of a decision the court would be empowered to set aside an invalid determination via judicial review. The House of Lords' decisions in *O'Reilly v Mackman* [1983] 2 AC 237 and *Wandsworth London BC v Winder* [1985] AC 461 held that the general rule was that it would be an abuse of the process of the court to allow a person to proceed by way of an ordinary action rather than judicial review to establish that a decision of a public authority infringed rights to which he was entitled protection under public law. However, that general rule could not apply where the invalidity of the decision was pled as a defence to a claim on the basis that claim arose from a resolution that was invalid, in other words, the defender was seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he was not liable for the whole sum claimed (Lord Fraser in *Wandsworth* at 509).

First Instance Decision:

The Chancery judge described the issues as, firstly, if the FSO made a direction which if implemented would require a firm to pay a complaining customer more than £100,000 was that outside his powers and, secondly, if it was could the firm make that assertion in proceedings to enforce the direction or was it confined to an application for judicial review.

The judge dealt first with the question of whether the respondent firms required to challenge the direction via judicial review. He exhaustively reviewed the *O'Reilly v Mackman* and *Wandsworth* line of authorities and concluded, at [47], that the principle in *O'Reilly v Mackman* had never applied to defenders, "who wished to challenge public law decisions upon which a private cause of action against them was asserted in proceedings which they wished to defend…In construing statutory schemes which enable decisions to be made under them there is a strong presumption, based on the importance of the rule of law, against concluding that the only permissible means of challenge is by judicial review." At [53] he found that words of the 2000 Act were not clear enough to defeat the strong

presumption that a citizen has a right to defend himself against an unfounded claim, so that the firms were entitled to raise the issue of validity in the enforcement proceedings.

When the judge turned to the construction of the statutory provisions, he said at [68] that the key question was whether, if the FSO could direct a firm to make a payment that exceeded the statutory cap, what was the point of the cap? He held that the question was "unanswerable", in the sense that the FSO did not have power to make a direction that would require a firm to make a payment that exceeded the statutory cap, while if the cost of compliance with a direction was unknown at the time the direction was made (also a money award, in his view), it was subject to the implicit limitation that it was not enforceable beyond the statutory cap.

In relation to B's action, he found that the direction to carry out a loss assessment was not a money award, while the direction to redress any loss might result in a guarantee, or persuading trustees of an occupational pension scheme to re-admit a former member or to waive future charges was also not a requirement to make a money payment. The fact that the FSO had invited the parties to refer back any unresolved issues meant that the question of what loss had been assessed and what money award should be made (subject to the statutory cap) could be dealt with at that stage. As a result, the judge refused the injunction on the ground that it would serve no useful purpose: the firm was prepared to pay the statutory maximum and the FSO had no power to require payment in excess of that cap.

He held at [76] that the fact that the 2000 Act provided for enforcement by injunction did not change the discretionary nature of the remedy so where the FSO had exceeded his powers it would not be right for the court to exercise its discretion in B's favour. "Put another way, what is enforceable by injunction is a valid direction and not an invalid one."

He held that C's action also failed since the FSO had made a money award which was invalid insofar as exceeding the statutory cap; an injunction was not needed to enforce the payment of £100,000 because the firm was prepared to pay that sum.

Conclusion:

Although this decision covers acts of the FSO in England there seems no reason why either the sheriff court or the Court of Session would refuse to allow a respondent to raise the validity of a direction or money award in the context of enforcement proceedings rather than requiring the respondent to have the particular act challenged by way of judicial review. Certainly the views expressed by Lewison J. on the construction of the 2000 Act are likely to be treated with respect by the Scottish court and so offer a useful template for future arguments on the validity or otherwise of FSO determinations.

Insolvency

Donna McKenzie Skene
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Bankruptcy reform update

The Bankruptcy and Diligence etc (Scotland) Act 2007 (Commencement No 3, Savings and Transitionals) Order 2008 (SSI 2008/115), brought into force on April 1, 2008, the bankruptcy provisions of the Bankruptcy and Diligence etc (Scotland) Act 2007 so far as not already in force, with some minor exceptions. The exceptions are: the provisions for inclusion of particulars of income payment orders and agreements in the register of insolvencies; the changes to the composition procedure; the increase in the debt limit for sequestration in so far as it applies to debtor applications; and certain minor and consequential amendments. Also brought into force on that date are the provisions of Pt 6 of the 2007 Act relating to diligence on the dependence (with one minor exception), prescription of arrestment and the abolition of letters of loosing; Pt 7 of the 2007 Act (interim attachment); Pt 9 of the 2007 Act (diligence against earnings); Pt 10 of the 2007 Act (arrestment in execution and action of furthcoming) (to the extent specified only); the provisions of Pt 11 of the 2007 Act relating to the abolition of sequestration for rent and the restriction of the landlord's hypothec; Pt 12 of the 2007 Act (summary warrants, time to pay and charges); and related minor and consequential amendments and repeals, some for specified purposes only. A number of other provisions also brought into force on that date, including parts of the provisions relating to the changes to the composition procedure and the increase in the debt limit for sequestration in so far as it applies to debtor applications, for the purpose of making regulations, orders, etc only. Transitional provisions apply.

The Bankruptcy (Scotland) Act 1985 (Low

Business Law Bulletin 93:Criminal Law 2008-05-13 11:40 Page 4

Income, Low Asset Debtors etc) Regulations 2008 (SSI 2008/81), the Bankruptcy (Scotland) Regulations 2008 (SSI 2008/82) and the Protected Trust Deeds (Scotland) Regulations (SSI 2008/143) also came into force on April 1, 2008. Consequential changes to the sheriff court and Court of Session rules are made by the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 (SSI 2008/119), the Act of Sederunt (Sheriff Court Rules Amendment) (Diligence) 2008 (SSI 2008/121) and the Act of Sederunt (Rules of the Court of Session Amendment No 3) (Bankruptcy and Diligence etc (Scotland) Act 2007) 2008 (SSI 2008/122) which also came into force on April 1, 2008.

Further changes to bankruptcy fees

The Bankruptcy Fees (Scotland) Amendment (No 2) Regulations 2008 (SSI 2008/79) make a number of amendments to the Bankruptcy Fees (Scotland) Regulations 1993 (SI 1993/486) consequential on the coming into force of the bankruptcy provisions of the Bankruptcy and Diligence etc (Scotland) Act 2007 on Apri 1, 2008. They make provision, inter alia, for the fees to be payable to the Accountant in Bankruptcy in respect of the new functions conferred on her by the Bankruptcy and Diligence etc (Scotland) Act 2007. The provisions came into effect on April 1, 2008 and apply only to applications for sequestration lodged or protected trust deeds granted after that date.

Update on changes to the treatment of unoccupied property rates in administration

Following the item in the last column, it can now be reported that the Non-Domestic Rating (Unoccupied Property) (Scotland) Amendment Regulations 2008 (SSI 2008/83) came into force on April 1, 2008. The regulations extend empty property relief to companies in administration and also to limited liability partnerships in administration and liquidation.

Update on changes to the Insolvency (Scotland) Rules 1986 relating to expenses in administration

Following the item in the last column, it can now be reported that the Insolvency (Scotland) Amendment Rules 2008 (SI 2008/662) came into force on April 6, 2008. They amend the existing provisions of the Insolvency (Scotland) Rules 1986 relating to expenses in administration by inserting a separate new Chapter 8A dealing with the expenses of administration and making appropriate consequential amendments to the existing provisions. The new provisions apply in any case where a company enters administration on or after April 6, 2008.

Change to fee payable on an application to the Secretary of State for authorization as an insolvency practitioner

The Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) (No 2) Order 2008, SI 2008/672 makes provision for an increase in the fee to be paid on an application to the Secretary of State for authorization as an insolvency practitioner under s.392 of the Insolvency Act 1986. The change came into effect on April 6, 2008.

Scottish Court Service consultation on fees

The Scottish Court Service has issued a consultation paper on review of fees charged by the Court of Session, Sheriff Courts, Office of the Public Guardian, Accountant of Court and High Court. The paper proposes a move towards full-cost pricing in relation to the fees under discussion. The consultation paper is available on the Scottish Courts website (*http://www.scotcourts.gov.uk*) and the Scottish Executive website: (*http://www.scotland.gov.uk/consultations*) and responses are sought by May 6, 2008.

Consultation on financial stability and depositor protection

The Bank of England, HM Treasury and the Financial Services Authority have published a consultation document entitled *Financial stability and depositor protection: strengthening the framework* (Cm 7308). The proposals on which views are sought include the introduction of a "special resolution regime" for banks in financial difficulty and the introduction of a bespoke insolvency procedure for banks and building societies. The consultation paper can be found on HM Treasury's website (*www.hm-treasury.gov.uk*) and responses are sought by April 23, 2008.

The use and effectiveness of director disqualification in health and safety cases

The Health and Safety Executive has published a survey of the use and effectiveness of the Company Directors Disqualification Act 1986 as a legal sanction against directors convicted of health and safety offences (Research Report RR597). The report is available on the Health and Safety Executive website

Business Law Bulletin 93:Criminal Law 2008-05-13 11:40 Page 5

(*http://www.hse.gov.uk*).

Complaints Handling in the Insolvency Practitioner Profession

A report on complaints handling in the insolvency practitioner profession prepared for the Insolvency Practices Council by a team from Nottingham Law School has now been published and is available on the Insolvency Practices Council website *http://www.insolvencypractices.org.uk*

Further decision on the prescribed part

It was reported in the last column that in *Re Permacell Finesse Ltd*, November 30, 2007, Birmingham District Registry, unreported, Purle J. held that a floating charge holder was not entitled to participate in the prescribed part for the unsecured balance of his claim secured by the floating charge. In *Thorniley v HM Revenue and Customs* [2008] EWHC 124 (Ch), Patten J. agreed with that decision (which was brought to his attention after submissions had been made and in respect of which he then heard further submissions), but went further and held that any secured creditor, not just the floating charge holder, is excluded from participating in the prescribed part for any unsecured balance of his claim. This runs contrary to views previously expressed by commentators that only the floating charge holder is so excluded.

Protective awards in liquidation

In *Day v Haine* [2007] EWHC 2691 (Ch), the liquidator of a company sought directions as to whether protective awards made in favour of the company's employees under s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992 as a result of the company's failure to consult those employees prior to their dismissal as required by that Act were provable debts in the company's liquidation. The employees were dismissed before the company, which had gone into administration before it went into liquidation, went into administration. The protective awards were applied for and made after the date of liquidation.

Rattee J. held that the protective awards were not provable debts in the liquidation. He held that at the date the company went into liquidation, the employees had no certain debt or claim against the company because although the company was at that time in breach of its obligation to consult, that breach of itself conferred no rights on the employees except the right to complain to an Employment Tribunal, which had a discretion as to whether or not to make a protective award. Nor did they have a contingent debt, because a claim which, at the commencement of the liquidation, was dependent for its existence on the exercise of discretion by the court or a third party was not a contingent debt for this purpose. He also rejected an argument that the protective awards constituted a debt or liability to which the company became subject after the date on which it went into liquidation by reason of an obligation incurred before that date since the breach of the duty to consult itself gave the employees no enforceable right against the company. Finally, he rejected an argument that the protective awards were "necessary disbursements" and therefore expenses of the liquidation.

The decision turns on the interpretation of the relevant provisions of the Insolvency Rules 1986 (SI 1986/1925), which are in different terms from the relevant Scottish provisions, i.e. the provisions of the Bankruptcy (Scotland) Act 1985 as applied to liquidations by the Insolvency (Scotland) Rules 1986 (SI 1986/1915). Nonetheless, if Rattee J's classification of the nature of the claim at the date of liquidation is correct, it is suggested that the same result would obtain in Scotland. It is understood that the decision may be leapfrog appealed directly to the House of Lords.

Effect of discharge under a protected trust deed and the Third Parties (Rights Against Insurers) Act 1930

In *Junespear Ltd v Dear*, January 25, 2008, Cupar Sheriff Court, reported at *http://www.scotcourts.gov.uk/opinions/a281_05.html*, the pursuers sought damages against the defender for breach of contract. The defender took a preliminary plea to the effect that he had been discharged from the claim by his discharge under a protected trust deed and that the pursuers were precluded from insisting in the action. The court therefore had to consider the effect of the protected trust deed and the debtor's discharge thereunder and, in particular, whether the pursuers were precluded from raising an action for the purpose of constituting the debt for the purposes of the Third Parties (Rights Against Insurers) Act 1930.

It was a matter of agreement between the parties that the protected trust deed provided for the discharge of the defender by acceding creditors but the pursuer was not an acceding

creditor and had not received the documentation which the trustee was required to send to every known creditor in terms of para.5(1)(c) of Sch.5 to the Bankruptcy (Scotland) Act 1985. Paragraph 6 of Sch.5 to the Bankruptcy (Scotland) Act 1985 provides that where a trust deed has become protected, subject to specified rights to present a petition for the debtor's sequestration, a creditor who has not received that documentation has no higher right to recover his debt than an acceding creditor. The pursuers argued that while that provision might prevent them from enforcing any decree obtained in the action against the defender, it did not prevent them from seeking such a decree in the first place with a view, not to enforcing it, but to using it as a basis for a claim against the defender's professional indemnity insurers under the Third Parties (Rights Against Insurers) Act 1930. The defender argued that since the protected trust deed had now come to an end and he had been discharged, on a proper construction of these provisions the pursuers were precluded from pursuing their claim, and that since the Third Parties (Rights Against Insurers) Act 1930 could not come into play until the debt had been constituted, the fact that the pursuers were now precluded from doing so rendered the provisions of that Act irrelevant.

At first instance, the sheriff held that while the provisions of para.6 did not preclude the pursuers from raising the action, once the defender had been discharged under the protected trust deed, the discharge was effective in relation to the claims of non-acceding creditors as well as those of acceding creditors. However, he also held that the Third Parties (Rights Against Insurers) Act 1930 gave the pursuers a freestanding cause of action with the result that the effect of the protected trust deed was irrelevant.

On appeal, the defender conceded that the discharge was not in fact effective in relation to the pursuers as non-acceding creditors and the Sheriff Principal took the view that that concession was well-founded. He also took the view that while the provisions of para.6 nonetheless prevented a non-acceding creditor whose debt had not been discharged under the protected trust deed from taking action to enforce it, they did not prevent him from raising an action to constitute it. He noted that the courts would, of course, be reluctant to allow such an action where there was no practical purpose for it, but that it was the pursuers' argument that the Third Parties (Rights Against Insurers) Act 1930 provided a practical purpose for the raising of the action. The Sheriff Principal took the view that this argument was correct since, contrary to the arguments for the defender, if the pursuers were successful in obtaining a decree, they would be able to pursue their claim against the defender's insurers under the Third Parties (Rights Against Insurers) Act 1930 notwithstanding that they would not be in a position to enforce it against the defender personally.

Basis for reduction of sequestration

In *Parkes v MacGregor* [2008] CSOH 43, the pursuer had raised an action of reduction of sequestration. Following earlier authorities, Lady Paton confirmed that such a remedy may be granted only in exceptional circumstances. Such circumstances might include a fraud on the court or lack of jurisdiction, but in any event, the pursuer had to demonstrate that the proceedings were fundamentally null and not simply that the court had made an error in law or taken an approach or a view of the facts with which the pursuer did not agree. She held that in this case, the pleadings did not contain any averments of exceptional circumstances of the requisite type. The decision is useful in demonstrating the kind of averments which will not support an action of reduction.

It was also argued that an action of reduction was incompetent where the procedure for recall had been invoked, as it had been in this case. Lady Paton did not, however, express any view on this point since it was not necessary to do so in the light of her decision on relevancy, and the resolution of this point will therefore require to wait another day.

Meaning of company's inability to pay debts as they fall due

In *Re Cheyne Finance plc* [2007] EWHC 2402 (Ch), Briggs J. had to construe the provisions of s.123(1)(e) of the Insolvency Act 1986, which provides that a company is deemed to be unable to pay its debts "if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due". The issue arose in the context of the construction of an agreement which defined an "insolvency event" by reference to s.123(1) of the Insolvency Act 1986.

Briggs J., after a review of the history of the provision, academic opinion (which was divided) and certain Australian authorities,

held that the presence of the words "as they fall due" in s.123(1)(e) required that appropriate account be taken of the company's ability to pay future debts in determining whether a company was unable to pay its debts within the meaning of that provision.

TAXATION

The ongoing European tax sovereignty debate

William J. Craig
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The Prime Minister, Mr Brown, is not known for being particularly pro-European. While he was Chancellor he steadfastly resisted the charms of the Euro, when that would now appear to have been a poor decision based on emotion rather than judgment. He has also fought off repeated attempts by the European Union to create a unified European tax system, despite the clear treaty commitments to this which have been endorsed by successive UK governments largely without quibble.

Happily, some things remain beyond Gordon's grip. The tax cases brought by European companies over the last 10 years have seen power over UK corporate tax law ebb away from the Treasury and towards the EU in the shape of the ECJ (European Court of Justice), a theme I have often visited in this column. The legal challenges, upheld on the basis that the UK tax regime breaks rules, guaranteed by European treaty, on the freedom of establishment or freedom of the movement of capital, have forced the UK into retreat.

The loss of hundreds of millions in tax revenues may please some with a well honed sense of schadenfreude, others will be nervously anticipating the fall-out which could see the Treasury coffers losing between £10bn and £20bn and the government has to make up the likely shortfall somewhere. Group litigation orders (GLOs), for at least five of the six major cases causing the trouble are now ready, so what is likely to be the consequence of the UK government losing the cases?

Controlled foreign companies

The controlled foreign companies (CFCs) challenge is similar to the M&S case set which is discussed later on in this article, in that one company, Cadbury Schweppes, is pursuing the arguments. Cadbury had set up an Irish treasury function that was taxed at the 10 per cent Irish tax rate.

Controlled foreign companies rules dictate that any company set up in a foreign jurisdiction just to obtain a lower tax rate is treated as forming part of the UK's group profits, and taxed as such. Cadbury and others are arguing that the rules themselves contradict EU rules on freedom of establishment. The courts ruled last September that CFC rules were fine in principle, as long as they were only used to rule out "artificial arrangements".

Cadbury and HM Revenue & Customs are now set to return to the special commissioners in the UK so that they can argue over whether the company's arrangements were "artificial".

The group action relating to Cadbury is still waiting for a hearing, but it expected that, like M&S, it will return to the ECJ once it has been worked through. There has also been a government response on the issue, the UK opting to fight the issue of CFCs. It said in a consultation in last year's Pre-Budget Report that it wanted to draw a new distinction for offshore companies. Either they make money from labour, which is fine, or they make money from capital, which will be taxed at UK rates. As part of its attempt to take on the ECJ challenge, and accept that dividend taxation will have to go, the UK wants to stamp out CFC abuse, but it may not be as simple as that. Advisers are fighting the new distinction tooth and nail.

Franked investment income

The franked investment income case came before the ECJ early in 2006, with the court ruling earlier this year. Franked investment income rules apply an effective tax credit when a subsidiary pays a dividend to a group, where the credit is not available, or available to a lesser extent, to foreign parents.

The UK had said that a decision against it, brought by British American Tobacco, among others, would cost £7bn, a figure disputed by claimants, who said it would be between £200m and £2bn. But no-one really has any idea whether that is likely, after the ECJ released one of its most complicated judgments which many have found impenetrable and some have described as poorly drafted. The ruling attempted to force a difference between "equivalent" treatment and "parity", essentially looking for some way of saying UK law created parity if not exactly equal

treatment. The case returns to the High Court, but the ECJ ruling has posed more questions than it has solved.

Thin capitalisation

The ECJ has already ruled on the thin capitalisation action. Thin capitalisation is all about debt levels, and loading subsidiaries with debt profit from interest relief in low-tax jurisdictions. The UK applied broad rules of thumb to such transactions, meaning many companies were caught unfairly. Challenges came from Lafarge, Pepsi, Volvo and Caterpillar (as test claimants), and the ECJ decided that the rules stood or fell on the issue of "commerciality"—in plain English, whether or not the debt being shifted around was done for legitimate commercial purposes. It too returns to the UK courts.

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Loss relief

The loss relief case-group is the best known, relating to the ability of companies to claim losses incurred elsewhere in Europe against their UK profits. The action has been brought by around 70 companies, although Marks & Spencer is trailblazing on the issue in a separate case. The European Court of Justice gave its verdict on M&S in December last year, ruling that corporate losses incurred in France or Germany, as in the case of M&S, could be offset against UK profits. But the ECJ also ruled that such losses could only be used if there was no possibility of them being used elsewhere.

That, in itself, is the subject of further action. M&S has since dropped its French claim, since the losses could have been used by Galerie Lafayette, but the retailer is pursuing its German and Belgian claims. Those claims are now going through The UK courts, and at the last count, M&S had won in the Court of Appeal, with the government refused leave to appeal. The court said losses could be used where there was "no real possibility" of them being used elsewhere, narrowing down the claim requirements.

The actual court action that awaits the claim will be heard when the M&S case has been resolved, which may or may not be imminent. And the action itself has various permutations that mean it will probably have to go to the ECJ.

The UK Treasury has responded to the action, accepting it will have to pay out some claims. And it says that companies can claim relief only on what they could have claimed abroad, or here, whichever is the smaller.

Advanced Corporation Tax

The advanced corporation tax challenge comes in four parts. In essence, the case is about whether foreign parent companies receiving UK dividends should get the same tax credits that UK parents get. The ECJ ruled a long time ago that they should, leading to various disputes over which circumstances apply. The Deutsche Morgan Grenfell case establishes how far back claims can go, ideally (for taxpayers) all the way back to 1973, when the UK joined the EU.

The House of Lords ruled in favour of Deutsche in October by a majority of four to one, but this is not conclusive. All is not lost for HMRC as the multinationals will now have to prove that they were indeed operating under a mistake, rather than acknowledging that there was doubt as to whether the tax was due but deciding nonetheless not to challenge HMRC, when paying the overpaid tax in question.

The Sempra Metals case determines whether or not claims should attract compound interest or simple interest. The Class 2ACT case determines the situation where other countries gave some tax credits. The Class 3 case is about parent companies not resident in the EU, and the Class 4 case concerns whether foreign parents can receive partial or whole credits according to what is available to them in their and other jurisdictions.

The ACT case is in various respects paying out, with the only issues then being how much and who can properly claim. The government has already admitted it has paid out hundreds of millions of pounds here, and will be wondering how much more it has to pay.

Overall, difficult times for HMG and the Brown premiership in that it has to carry the burden of appearing to accept increasing European influence and authority on tax matters, when not only is this outwith the PM's control, but it is something of which Gordon Brown personally does not approve.