[2020] UKFTT 0060 (TC)

TC07556

Appeal number: TC/2018/00259

Corporation Tax – group relief – claimant company resident in the United Kingdom – subsidiaries resident in other EU member states – whether making a claim for group relief implies the withdrawal of an earlier claim for group relief in respect of losses of companies resident in the United Kingdom – whether claim made in the alternative to the earlier claim – Income and Corporation Taxes Act 1988, Part X, chapter IV – Finance Act 1998, schedule 18

FIRST-TIER TRIBUNAL
TAX CHAMBER

LINPAC GROUP HOLDINGS LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE NICHOLAS PAINES QC

Sitting in public at Taylor House, Rosebery Avenue London EC1R 4QU on 6 and 7 March 2019

Jonathan Bremner QC, instructed by Joseph Hage Aaronson LLP, for the Appellant

Sadiya Choudhury, barrister, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal relates to claims for group relief, then governed by chapter IV of Part X of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), made by the appellant, LINPAC Group Holdings Ltd ("Holdings"), in respect of its accounting periods ending 31 December 2006 and 31 December 2008. In respect of both periods Holdings made (what I shall call) "domestic" claims for group relief in respect of the losses of group companies in the United Kingdom in its tax returns filed shortly before the filing deadlines of 31 December 2007 and 2009 respectively. It is common ground that those claims were for relief that Holdings was substantively entitled to.

2. However, in respect of each accounting period Holdings subsequently made further "cross-border" claims for group relief; these were in respect of a combination of losses of group companies resident in other EU member states as well as in the United Kingdom. It did so shortly before the applicable amendment deadlines of 31 December 2008 and 31 December 2010 respectively. At those times, the scope of a United Kingdom company's entitlement to claim group relief in respect of losses of group companies elsewhere in the EU – established in principle by a decision of the European Court of 2006 in litigation between HMRC and Marks & Spencer plc – was unclear. In the result, Holdings later accepted that the cross-border claims did not meet the criteria of entitlement. It therefore seeks to rely on its original claims for group relief in respect of the United Kingdom group companies.

3. HMRC maintain that the claims are no longer open to Holdings because its making of the cross-border claims involved the withdrawal of the domestic claims and, as is common ground, it was too late to present those claims afresh. For the reasons given in this decision I have concluded that (a) the making of the cross-border claims did not involve the withdrawal of the domestic claims; (b) Holdings withdrew its cross-border claims at HMRC's invitation and (c) only the domestic claims remain extant, with the consequence that Holding is entitled to pursue them.

The LINPAC group

4. The former LINPAC group of companies, formed in 1959, comprised businesses concerned with plastic mouldings and the manufacture of plastic (and previously cardboard) packaging materials. In the early years of this century it expanded globally, establishing subsidiaries abroad, including in the European Union. In 2009 it fell into financial difficulties resulting from the global financial crisis; in consequence it divested itself of various subsidiaries and non-core businesses. It is currently part of the Klöckner Pentaplast group and is concerned in the manufacture of plastic film and single use recyclable plastic trays.

5. At the material time the ultimate holding company in the then group was LINPAC Group Ltd ("Group"), which had a wholly-owned subsidiary, LINPAC Finance Ltd ("Finance"). Finance had a wholly owned subsidiary, Holdings, which

held the shares in the group's trading subsidiaries in the United Kingdom and elsewhere.

The facts

6. As a result of staff changes, none of the individuals who were involved in the events giving rise to this dispute are still with the group. The evidence before me comprised relevant documentation (including correspondence and some notes of telephone calls) together with witness statements of Mr Piet Kingsley (who joined the group in November 2016) and Mr Michael Nicholls (who has been with the group since 1986 but was not involved in its tax affairs at the relevant time). Both of them gave oral evidence. There is no dispute of primary fact. I make the following findings of fact.

7. The two accounting periods (APs) in respect of which the disputed issue arises are those ending on 31 December 2006 and 2008. It is convenient to consider the tax returns and correspondence in relation to each accounting period separately. I shall generally also round the figures I mention to the nearest £100,000.

(1) APE 2006

8. Holdings filed its corporation tax return for the accounting period ending on 31 December 2006 ("APE 2006", for which the filing deadline was 31 December 2007) under cover of a letter dated 27 December 2007. The accompanying accounts showed profit before group relief of £49.2 million. The return claimed group relief of £48.5 million; this was by way of losses surrendered to Holdings by Finance (its parent company) and four of its United Kingdom subsidiaries. No enquiry was opened into the return.

9. In a letter of 22 December 2008, Mr McDonald who was then the Group Tax Manager wrote to HMRC on the notepaper of Group (the ultimate holding company) in the following terms:

> Dear Mrs Madden
>
> **Group relief**
> **Year ended 31 December 2006**
>
> I enclose a revised group relief matrix for the year ended 31 December 2006. I draw your attention to the inclusion on the Group relief schedule of losses incurred in seven EU based subsidiaries.
>
> If you have any queries, please do not hesitate to give me a call.

10. The accompanying schedule was headed "LINPAC Finance Ltd Losses". It covered the APEs 2003 to 2006. It showed revised figures for losses to be carried forward by Finance (not Holdings, the appellant). In APE 2006 the revised carry forward figure was £42.9 million. Under the subheading "Summary – excluding EU

losses" the column for APE 2006 added that figure to the losses being brought forward so as to reach a total of £100.1 million of losses to be carried forward. Then, under the subheading "Including EU losses", it included some further amounts relating to the years 2004 to 2006; the figure relating to 2006 was £8.3 million. These reflected the lower surrender of losses from Finance to Holdings in the event that EU losses could be claimed instead. The overall effect was to increase Finance's carry-forward to £129.2 million. A further sheet of calculations broke down the £8.3 million figure into losses sustained by seven EU group companies.

11. This prompted Mrs Madden to give notice on 12 February 2009 of HMRC's intention to open an enquiry into the tax return of Holdings (the appellant) for APE 2006. In a covering letter to Mr Hugh Ellis, then Director of Group Taxation, Mrs Madden said

> The notice is issued in response to the recent group relief claim in respect of losses surrendered by seven EU based subsidiaries.
>
> Losses claimed as group relief must be … supported by accounts…. I appreciate that you may wish to delay providing the supporting documentation until the outcome of the litigation is known.

12. The cross-border group relief claim was subsequently amended before finally being abandoned. A letter of 5 November 2009 reduced the amounts claimed by way of losses of the seven EU subsidiaries. A letter of 28 September 2010 gave additional information in respect of cross-border loss claims in a number of APs, including APE 2006; in particular it withdrew claims where losses had been used abroad (this was in accordance with the *Marks & Spencer* case-law that I discuss below). HMRC's reply of 19 October 2010 asked for tax to be paid on the profits against which the relevant cross-border losses had previously been relied on in respect of APEs 2001 and 2002.

13. In relation to APEs 2005 and 2007 (not in issue in this appeal) the letter noted LINPAC's withdrawal of claims in respect of losses that could be used in Belgium and added "As the Group was loss making during these years then no action is required at present". Similarly in relation to APE 2006 it noted the withdrawal of a group relief claim in respect of one of the seven subsidiaries referred to in paragraph 9 above and similarly continued "As the Group was loss making during this year then once again no action is required at present". I return to this below; the clear implication was that HMRC were at that time prepared to allow claims based on other losses to be (to put it neutrally) reinstated.

14. Further correspondence from Mr Ellis to HMRC in March 2011 made renewed claims for group relief in respect of three additional EU subsidiaries. The letters, which were in similar terms, said among other things

> This letter is a claim for group relief relied on by [Holdings] in accordance with section 402 ICTA 1988 as interpreted in line with the European Court of Justice Case C-446/03 *Marks & Spencer v Halsey* in respect of losses of an EU subsidiary….

> This claim is made without prejudice and in the alternative to the original claims made on 22 December 2008 and 5 November 2009. The claimant does not seek group relief twice for the same profits and losses for the same accounting period….

15. There followed undertakings to withdraw claims other than the most favourable valid claim and assertions that the claim satisfied the criteria of entitlement (the so-called "no possibilities" test described in paragraphs 52 and 53 below). The wording was clearly copied from that used by Marks & Spencer (see paragraph 55 below); it is to be noted that the claims to which the further claim was said to be in the alternative were not the original domestic group relief claim but the earlier cross-border claims.

(2) APE 2008

16. Holdings' corporation tax return for APE 2008 was filed under cover of a letter dated 23 December 2009. The computation included group relief of £91 million, of which £59.8 million had been surrendered by Finance. HMRC did not enquire into the return.

17. On 22 December 2010 Mr Ellis wrote to HMRC as follows:

> LINPAC Group Holdings hereby makes a claim for group relief in respect of losses arising in a number of its EU based subsidiaries as follows: [there followed a list of losses of six named subsidiaries, totalling £31.9 million].
>
> Please find enclosed group relief surrender in respect of each of the claims. A summary of LINPAC Finance Limited losses is also enclosed for your reference.

18. The enclosed schedule was in the same format as the schedule referred to in paragraph 10 above, including a "Summary – excluding EU losses" which showed a carry-forward of £105.7 million and a summary "Including EU losses" which showed a carry-forward of £183.7 million. The difference was accounted for by EU losses sustained between 2004 and 2008, the 2008 figure being the £31.9 million of losses itemised in the covering letter.

19. The claim was revised by a letter of 31 December 2010 which followed the same format as the letters referred to in paragraph 14 above and were expressed to be in the alternative to the cross-border relief claim of 22 December 2010. It was accompanied by a consent to surrender on the part of LINPAC Materials Handling France SA, one of the six subsidiaries. A further letter of 5 January 2011 referred to the liquidation of that subsidiary and continued "Accordingly, please find enclosed additional EU loss relief claims and surrenders in respect of the tax losses of the company….". The letter continued by saying "If successful, these claims will result in" tax refunds for two group companies and a revised loss carry forward for Finance of £120 million as at 31 December 2009", implying that Finance's carry-forward position would be different if the claims were not successful.

20. HMRC opened an enquiry into the amended return on 17 January 2011. The covering letter to Mr Ellis said "This notice is issued in response to the recent group relief claim in respect of losses surrendered by six EU based subsidiaries". It referred to section 403F of and schedule 18A to ICTA 1988 and asked for evidence that the conditions were met. A letter of the same date from LINPAC's Customer Relationship Manager at HMRC to Mr McDonald, the Group Tax Manager, acknowledged receipt of LINPAC's letter of 5 January and continued "No action will be taken until the outcome of the Marks and Spencer case is known, although I have written to you separately about the claim by LINPAC Group Holdings for the accounting period ending 31 December 2008".

21. On 17 March 2011 Mr Ellis wrote making a further claim for group loss relief in respect of LINPAC Mouldings GmbH. The letter contained the same wording as the letters referred to in paragraph 12 above, together with a paragraph of explanation of why the no possibilities test was said to be satisfied. A separate letter of the same date gave notice of surrender on behalf of the German company.

Subsequent correspondence

22. Correspondence continued. In March 2011 Holdings gave the requested further information in relation to the 2008 claims. In July 2011 HMRC gave LINPAC an update, listing the points of principle that remained open in the *Marks & Spencer* litigation. In August HMRC sought further information about satisfaction of the no possibilities test, which was provided in October. In January 2012 Mr McDonald sent a schedule summarising the position in respect of a number of accounting periods; this followed the withdrawal of certain claims, including those relating to two of the seven subsidiaries referred to in the letter of 22 December 2008.

23. I have referred to the first of these, and HMRC's reaction to the withdrawal, in paragraph 13 above; that claim had been for £1.176 million. The second withdrawn claim had been for £346,000. In this connection Mr Bremner refers me to the closure notice subsequently issued in respect of APE 2006, which found Holdings' group relief claim to have been overstated by some £6.8 million rather than the £8.346 million originally claimed in the letter of 22 December 2008. The difference between these figures is equal to amount of these two cross-border claims; it therefore appears that HMRC allowed domestic loss claims to be (as I have called it) reinstated in place of these two cross-border claims, but not any others. I agree with Mr Bremner that HMRC appear to have been prepared to accept reinstatement of domestic loss claims at the time of the two withdrawals in October 2010 and January 2012, and appear to have changed their minds by the time of the later attempts to reinstate that I describe below.

24. In October 2012 HMRC wrote saying that was it not possible to agree many of the claims owing to the ongoing litigation, but seeking further information relevant to the no possibilities test. The letter asserted that the further claims of November 2009 and March 2011 in relation to APE 2006 were out of time. In a reply of December LINPAC declined to withdraw them given that the ECJ was considering the legality

of the United Kingdom legislation (in what became Case C-172/13 *European Commission v United Kingdom* [2015] STC 1055).

25. Judgment was given in that case in February 2015; the amendments that had been made to ICTA 1988 and the Finance Act 1998 were held compatible with EU law; these included provisions for applying the no possibilities test as at the end of the accounting year of the surrendering company rather than at the date of claim (as to which see paragraph 53 below). In March and July 2015 HMRC wrote to LINPAC inviting it to withdraw certain of its cross-border claims. In relation to claims from APE 2006 onwards (the APs covered by the amendments to ICTA 1988) the letter said "it is my view that the claims for APs ended 31 December 2006 to 31 December 2010 do not satisfy the No Possibilities Test as at the end of each loss making AP. Please not that a penalty may arise where a company does not take action, in a timely fashion, to remedy claims where they become aware that they are incorrect" and included a factsheet about penalties. LINPAC's reply asked for discussion of withdrawal to be deferred until HMRC had clarified their position in relation to earlier claim years. There ensued correspondence and telephone conversations, mainly about years prior to 2006 (to which the amended legislation had not applied).

26. This culminated in LINPAC agreeing to withdraw most of its cross-border relief claims for APE 2006 and all of its claims for APE 2008. HMRC were informed of this in telephone conversations in August 2015, in the first of which Mr Battiscombe of LINPAC undertook to consider claims from 2006 onwards in detail and in the second of which he said that LINPAC were minded to withdraw all of those claims other than that for APE 2009. In the result, an offer to withdraw the 2008 cross-border claim and three quarters of the remaining 2006 claim, on what was referred to as a "without prejudice" basis, was communicated by letter of 11 November 2015.

27. A possible indication of HMRC's change of position regarding reinstatement of the domestic claims was in an email of 6 November 2015 in which HMRC asked for "an update on the formal withdrawal of cross-border group relief claims" and also asked for "any additional group relief claims the group wishes to make for those periods where the group are still in time to do so based on the time limits set out at S74 Schedule 18 FA 1998". It nevertheless did not clearly indicate that original domestic loss relief claims would not be reinstated.

28. The letter of 11 November 2015 was discussed in a telephone conversation on 26 January 2016, of which I have HMRC's note. HMRC told LINPAC of their intention to proceed to issue closure notices for the APs in respect of which cross-border relief claims had been withdrawn. HMRC invited LINPAC to make new group relief claims in respect of the years in which it was still in time to do so; these did not include 2006 or 2008 since only limited enquiries had been opened in relation to those years (see paragraph 43 below). In relation to the original domestic group relief claims HMRC asserted, inconsistently with their stance in October 2010 and January 2012, that it "was not possible to have two group relief claims at the same time. When the company submitted the claim with the overseas losses, this meant that the original claim was withdrawn". LINPAC could make late claims for those years, subject to HMRC's consent.

29. Following further telephone calls and discussions LINPAC wrote formally to HMRC on 28 April 2016. In relation to the cross-border claims the letter said "LINPAC now accepts the alternative [cross-border group relief] claims it sought to make on 22 December 28 and 22 December 2010 were invalid/ineffective". In relation to the original domestic group relief claims it said that "the claims for group relief contained within the original returns were validly made and therefore must stand, the alternative claims having now fallen away". Without prejudice to its contention that the original domestic group relief claims were still live, the letter requested HMRC to accept further claims in respect of the domestic group losses originally relied on. Almost a year later, by letter of 11 April 2017, HMRC declined to accept these further claims out of time on the grounds that LINPAC had not been prevented from making the claims in time for "reasons outside its control".

30. Closure notices in respect of APEs 2006 and 2008 were issued on 9 October 2017 and upheld on review in December 2017. Holdings brought this appeal in January 2018. Though the appeal originally also covered APEs 2007 and 2010, HMRC have in the meantime accepted that Holdings was in time to make fresh domestic group relief claims in respect of those APs. The issue that arises in respect of APEs 2006 and 2008 not longer arises in those other years.

The legislation

31. The substantive entitlement to claim group relief in APEs 2006 and 2008 was governed by Part X of ICTA 1988, whose provisions were amended over the relevant period and are now restated in Part 5 of the Corporation Tax Act 2010. The procedural requirements governing the claims were and are set out in schedule 18 to the Finance Act 1998, as amended. I shall refer to the schedule as "schedule 18".

Substantive entitlement

32. Section 402 of ICTA 1988 permitted trading losses to be surrendered by one company and claimed by another company by way of group relief; it also provided for different portions of a surrendering company's losses to be surrendered to different claimant companies. Before July 2006, the section required both companies to be in the same group or consortium and to be resident in, or to trade from a permanent establishment in, the United Kingdom. An amendment which came into force in that month allowed surrenders by companies chargeable to tax in any EEA territory provided that they were parent and subsidiary, or fellow subsidiaries, as to 75%. Further detail, which it is not necessary to go into, was contained in sections 403 to 403ZE. Section 403A, which is very dense, set limits on group relief. I need to discuss it as I invited submissions on it.

33. At the material times, section 403A provided as follows:

> **403A.— Limits on group relief.**
>
> (1) The amount which, on a claim for group relief, may be set off against the total profits of the claimant company for an accounting period ('the claim period'), and accordingly the amount to which any consent required in respect

of that claim may relate, shall not exceed whichever is the smaller of the following amounts—

> (a) the unused part of the surrenderable amount for the overlapping period; and
>
> (b) the unrelieved part of the claimant company's total profits for the overlapping period.

34. References to the overlapping period (which complicate the drafting of the section) cater for cases where the accounting periods of the claimant and surrendering companies are not the same; in the present case, all the companies' accounting periods are the calendar year, so that the overlapping period is the same as the accounting period. The unused part of the surrenderable amount and the unrelieved part of the claimant company's profits were defined by subsection (2) as follows:

> (2) For the purposes of any claim for group relief—
>
> > (a) the unused part of the surrenderable amount for the overlapping period is the surrenderable amount for that period reduced by the amount of any prior surrenders attributable to the overlapping period; and
> >
> > (b) the unrelieved part of the claimant company's total profits for the overlapping period is the amount of its total profits for that period reduced by the amount of any previously claimed group relief attributable to the overlapping period.

35. Subsection (3) provided for apportionment to the overlapping period where accounting periods did not coincide, and can be ignored for present purposes. Subsections (4) and (5) set out the calculation of the "amount of any prior surrenders" and "the amount of any previously claimed group relief" respectively. The drafting is complicated by the need to make provision for apportionment to overlapping periods, but the relevant aspects of the subsections for present purposes were their references to "claims made before" the claim to which section 403A is being applied. The definition of a "claim made before" the relevant claim is contained in subsection (6), which provided as follows:

> (6) For the purposes of this section the amount of group relief allowable on any claim ('the finalised claim') shall fall to be determined as at the time when that claim ceases to be capable of being withdrawn as if—
>
> > (a) every claim that became incapable of being withdrawn before that time were a claim made before the finalised claim; and
> >
> > (b) every claim that remains capable of being withdrawn at that time were a claim made after the finalised claim.

36. The priority of claims thus depended on when they became "incapable of being withdrawn". In the present case that was on 31 December 2008 for APE 2006 and 31

December 2010 for APE 2008. Since both the original domestic group relief claims and the first iterations of the cross-border relief claims for each AP were made before those dates, subsection (6) did not establish any priority between them. Provision for that situation was made in subsection (7):

> (7) Subject to subsection (6) above and without prejudice to any power to withdraw and resubmit claims, where (but for this subsection) more than one claim for group relief would be taken for the purposes of subsections (4) and (5) above to have been made at the same time, those claims shall be deemed, instead, to have been made—
>
> > (a) in such order as the company or companies making them may, by notice to any officer of the Board, elect or, as the case may be, jointly elect; and
> >
> > (b) if there is no such election, in such order as an officer of the Board may direct.

Procedural requirements

37. The procedural requirements governing claims for group relief are contained in schedule 18 to the Finance Act 1998 ("schedule 18"). First, I note for completeness that under paragraph 14 the filing deadline for a company tax return is 12 months after the end of the accounting period. By virtue of paragraph 24 (whose wording, but not its the effect as regards LINPAC, changed during the period) an enquiry could be opened up to 12 months from the filing date. By paragraph 25, an enquiry could also be opened as a result of an amendment of the return but, if it was opened more than 12 months after the filing date, its scope was limited to the amendment.

38. Claims for group relief are governed by paragraphs 67 onwards. Paragraph 67 requires the claim to be made in the claimant company's tax return, either as originally made or by amendment. Under paragraph 68 the claim must specify a quantified amount of group relief and the name of the surrendering company. Under paragraph 69(1) and (2) a claim for group relief may be for less than the amount available for surrender but is ineffective if it exceeds that amount. The amount available for surrender is to be calculated in accordance with subparagraph (3), which requires reference to be made to the surrendering company's tax return; broadly speaking, it is the amount of the surrendering company's losses minus any amounts already surrendered.

39. Paragraph 70 stipulates that a claim for group relief is ineffective unless it is accompanied by the written consent of the surrendering company, containing the details required by paragraph 71(1). I need to refer to paragraph 71 in some detail since Mr Bremner based a submission on it.

40. Paragraph 71(1) sets out the required contents of a notice of consent by a surrendering company to a group relief claim; these are the names of itself and the claimant company, the amount of relief being surrendered, the relevant accounting period of the surrendering company and the surrendering company's tax district

reference. Paragraphs 71(2) and (3) provide that notice of consent may not be amended but may be withdrawn and replaced by another notice of consent; withdrawal is by notice to the officer of the Board to whom the original notice of consent was given. Paragraph 71(4) and (5) stipulate that

> (4) Except where the consent is withdrawn under paragraph 75 (withdrawal in consequence of reduction of amount available for surrender) the notice of withdrawal must be accompanied by a notice signifying the consent of the claimant company to the withdrawal. Otherwise the notice is ineffective.
>
> (5) The claimant company must, so far as it may do so, amend its company tax return for the accounting period for which the claim was made so as to reflect the withdrawal of consent.

41. Under paragraph 72, where a surrendering company gives notice of consent to a claim for group relief after it has filed its own tax return, it must in consequence amend that return; the normal time limits for amendment of returns do not apply. If it does not, the notice of consent is ineffective.

42. Paragraph 73, which is central to the appeal, provides:

> (1) A claim for group relief may be withdrawn by the claimant company only by amending its company tax return.
>
> (2) A claim for group relief may not be amended, but must be withdrawn and replaced by another claim.

43. Paragraph 74(1) sets the deadlines for making or withdrawing a claim for group relief. The deadline is the last of the following dates:

> (a) the first anniversary of the claimant company's filing date;
>
> (b) if notice of enquiry is given into the return, 30 days after the enquiry is completed;
>
> (c) if HMRC amend the return after an enquiry, 30 days after the notice of amendment; or
>
> (d) if the amendment is appealed against, 30 days after the appeal is finally determined.

However, (b), (c) and (d) do not apply to an enquiry restricted to a previous amendment relating to group relief (paragraph 74(4)); but HMRC may allow a late claim or withdrawal (paragraph 74(2)).

44. Paragraph 75 applies where a surrendering company's total amount available for surrender becomes less than the total of its notices of surrender; it requires the company to withdraw and replace notices of surrender so as to bring the amount surrendered within the total available.

45. Paragraph 77 empowers the Treasury to make regulations under which (broadly speaking) companies in a group may authorise one of them to amend others' tax returns for the purposes of "claiming or surrendering group relief or revising the amounts of group relief claimed or surrendered". The relevant Regulations are the Corporation Tax (Simplified Arrangements for Group Relief) Regulations 1999.

46. Finally, paragraph 77A is one of a number of provisions introduced into the Finance Act 1988 to cater for group relief claims pursuant to *Marks & Spencer*. It provides that notice of a surrendering company's consent to a claim for group relief is to be given by the claimant and not the (overseas) surrendering company.

The issues

47. HMRC maintain that Holdings' original group relief claims were withdrawn upon the making of the cross-border claims by virtue of paragraph 73 of schedule 18. In response Mr Bremner makes a number of submissions. In summary he submits (1) in reliance on the *Marks & Spencer* case, that group relief claims can be made in the alternative (that is to say, without the prior withdrawal of a previous claim with which it is incompatible); (2) that, as a matter of construction of the cross-border claims, they were (and at the time were understood by HMRC to be) alternatives to the domestic relief claims; and (3) that even if, as a matter of construction of the cross-border claims, they purported to withdraw the domestic relief claims, they were ineffective to do so because they were not accompanied by notices of consent of the surrendering companies.

48. Ms Choudhury's response is (1) that *Marks & Spencer* only permits claims in the alternative in the specific circumstances of that litigation, which concerned repeated claims for relief of the same losses of the same surrendering companies in the same accounting period; the original and cross-border claims here were for relief against the same profits of Holdings, but based on different combinations of losses of different assortments of surrendering companies; (2) that the cross-border relief claims were self-contained claims that were not stated to be in the alternative to the original claims; and (3) that schedule 18 does not require the withdrawal of a claim to be accompanied by a notice of consent.

49. I asked counsel for submissions on what the outcome should be in the event of my concluding that the domestic relief claims had not been withdrawn. Unlike the position in the *Marks & Spencer* litigation (which I discuss below), where it had remained open to Marks & Spencer to make and withdraw group relief claims, the time limit for Holdings to make or withdraw claims in respect of APE 2006 and 2008 (save with HMRC's consent under para 74(2) of schedule 18) had expired on 31 December of 2008 and 2010 respectively. Mr Bremner submitted that the position in that event would be governed by section 403A of ICTA 1988, whereas Ms Choudhury disputed that the section applied. I gave both of them permission to file supplementary written submissions on the issue after the hearing with (if so advised) submissions in reply.

50. Both counsel submitted written submissions and Mr Bremner submitted a response to Ms Choudhury's submission. Mr Bremner's submissions included a further review of the correspondence in the course of which he submitted that all the cross-border claims were progressively withdrawn and were withdrawn in their entirety by the letter of 26 April 2016 (referred to in paragraph 29 above).

51. The issues in the appeal are accordingly as follows:

(1) can a claim for cross-border group relief be advanced in the alternative to a claim for domestic group relief in the circumstances of the present case?

(2) were Holdings' claims for cross-border group relief alternative to its original claims for domestic group relief?

(3) if the answer to issues (1) and/or (2) is 'no', were the claims for cross-border group relief nevertheless ineffective to withdraw the original claims for domestic group relief?

(4) if the claims for domestic group relief were not withdrawn, what is the current status of the cross-border relief claims?

The *Marks & Spencer* litigation

52. The amended group relief claims were made as a result of the decision of the Court of Justice of the European Union ("the ECJ") in Case C-446/03 *Marks & Spencer plc v Halsey (Inspector of Taxes)* [2006] STC 237 and the consequent amendments of Part X of ICTA 1988. The *Marks & Spencer* litigation arose out of HMRC's refusal of a claim by Marks & Spencer plc ("M&S") for group relief in respect of the losses of subsidiaries in Belgium and Germany, M&S maintaining that the Act infringed articles 43 and 48 of the then EC Treaty by not allowing it to claim group loss relief in respect of the losses of subsidiaries elsewhere in the EU. On a reference of this question from the High Court (Park J) the ECJ held, for reasons that it is unnecessary to go into, that it was in general compatible with the Treaty to leave the tax affairs of non-resident subsidiaries to be dealt with in their state of residence, save where there was no scope for the losses to be relieved in that country. The ruling was:

> As Community law now stands, Articles 43 EC and 48 EC do not preclude provisions of a Member State which generally prevent a resident parent company from deducting from its taxable profits losses incurred in another Member State by a subsidiary established in that Member State although they allow it to deduct losses incurred by a resident subsidiary. However, it is contrary to Articles 43 EC and 48 EC to prevent the resident parent company from doing so where the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods and where there are no possibilities for those losses to be taken into account in its State of residence for future periods either by the

subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

53. The final part of the ruling – the "no possibilities test" as it has come to be known – gave rise to considerable further litigation which reached the Supreme Court on two occasions. A major issue in contention related to the date at which the "no possibilities" test had to be satisfied; the main contenders were the end of the relevant accounting period of the surrendering subsidiary – which was problematic in that it would only exceptionally be the case, if matters were viewed as at that date, that there was no possibility of using the losses in a subsequent tax year – and the date of the claimant company's claim for loss relief. The use of that later date gave greater scope for satisfying the no possibilities test, since possibilities that were extant on the last day of the accounting period might have evaporated by the date of the claim, but was problematic in that it created scope for claimant companies to engineer a situation in which no possibility of using the subsidiary's losses existed, such as by putting the subsidiary into liquidation; this laid it open to the objection that it amounted to enabling a taxpayer to choose where to be taxed.

54. As regards the period before the domestic legislation was amended in response to *M&S*, the issue was definitively settled in favour of the date of the claim by a decision of the Supreme Court in May 2013 ([2013] UKSC 30, [2013] STC 1262). Other related issues were only definitively resolved by a further decision of the Supreme Court in February 2014 (*M&S (No 2)* [2014] UKSC 11, [2014] STC 819). One of these arose out of the fact that M&S (which was in time to do so, since enquiries into its returns were still open) had made further group relief claims on two or three occasions in the course of 2007/2008. The new claims related to the same losses of the same overseas subsidiaries in the same accounting periods as the original claims. They were made in order to maximise the chance of establishing – at as early as possible a date of claim – that the no possibilities test was satisfied as at the claim date.

55. The new claims had been expressed to be in addition to and not in substitution for the original claims; the letters in which they were made stated that M&S did not seek group relief twice for the same profits and losses for the same accounting period. The letters asserted that M&S was entitled to claim that it satisfied the requirements of the no possibilities test either as at the date of the original claims or as at the date of the new claims. M&S undertook to withdraw the new claims if the original claims succeeded or to withdraw the original claims if the new claim succeeded; if both claims succeeded, M&S undertook to withdraw whichever claim produced the lower group relief entitlement or, if the amounts were the same, the new claim.

56. It was apparent that M&S wished to keep all the claims open; success in the original claims would produce cash flow advantages; on the other hand, success in them was less likely. One of the issues in the litigation following the ECJ judgment was whether the law allowed this. The Upper Tribunal ([2010] UKUT 213 (TCC), [2010 STC 2470), the Court of Appeal ([2011] EWCA Civ 1156, [2012] STC 231) and the Supreme Court held that it did.

57. The issues in *M&S* were different from the issue in the present case. In *M&S,* only overseas losses were in issue. Moreover, the successive claims were in respect of the same losses. As things turned out, M&S wished to rely on its later claims. HMRC's argument was that, because M&S had *not* withdrawn its original claims, the later claims were invalid under paragraph 73 of schedule 18; M&S was therefore fixed with the first claims, which were doomed to fail as the no possibilities test was not satisfied at the time they were made. In the present case, the successive claims relate to different combinations of losses: entirely domestic group losses in the original claims and, in the later claims, a mixture of overseas group losses and a smaller element of domestic group losses. LINPAC wishes to rely on its original (domestic group relief) claims, the later (cross-border) ones having failed the no possibilities test. They are met with an argument that the later claims *had* involved the withdrawal of the original ones, which it is now too late to reassert.

58. One common feature of the two cases is that the original and later claims in both cases are mutually incompatible: together they exceeded the group loss relief to which the claimant company might be entitled.

Issue (1): can a claim for cross-border group relief be advanced in the alternative to a claim for domestic group relief in the circumstances of the present case?

59. As already mentioned, the Supreme Court held in *M&S (No 2)* that, notwithstanding paragraph 73 of schedule 18, M&S could advance its revised claims without withdrawing its original claims. Ms Choudhury submits that that decision was confined to the circumstances of that case; Mr Bremner submits that it applies equally to Holdings' claims. Deciding which of them is right involves closer examination of the reasoning in *M&S (No 2).*

60. Issue 2 before the Supreme Court in *M&S (No 2)* was framed as follows. If (as had been held) the date of application of the no possibilities test was the date of claim

> does the date of claim include the date of sequential/cumulative/alternative claims by the same company for the same losses of the same surrendering company in respect of the same accounting period provided that the statutory time period for claiming loss relief remains open?

This question was answered in the affirmative.

61. Lord Clarke, who gave the only judgment, approached the issue before the Court first as a matter of domestic law and then as a matter of EU law. At the outset of his discussion under the heading "Domestic law" at paragraph 23 he summarised HMRC's argument and expressed disagreement with it:

> 23. As noted in para 7 above, M&S made three new claims in respect of the same losses on 20 March 2007, 12 December 2007 and 11 June 2008. HMRC submit that those claims are invalid as a matter of domestic law. They rely upon para 73(2) of Schedule 18 to the Finance Act ("FA") 1998, which provides that "a claim for group relief may not be amended, but must be withdrawn and replaced by another claim". They say that the original claims were not

> withdrawn and that it follows that the new claims cannot be valid claims. Further or alternatively, they say that the new claims were not claims at all but merely repetitions of valid claims already made.
>
> 24. I would not accept those submissions. There is in my opinion no support for them in the provisions [of schedule 18]….

62. I do not take Lord Clarke to be disputing that M&S's original claims were not withdrawn at the time of the making of the later claims. It had been found as a fact that M&S's later claims did not withdraw the original claims (see paragraph 22 of the decision of the First-tier Tribunal, cited at paragraph 60 of the decision of the Upper Tribunal [2010] UKUT 213 (TCC), [2010] STC 2470). Later in his judgment (paragraph 32) Lord Clarke accepted M&S's submission "that it made it clear from the outset that, *once the courts had determined which claims were valid*, it would withdraw the other claims" (my emphasis). Paragraph 24 of his judgment must therefore be rejecting the proposition that "it followed" from the non-withdrawal that the new claims were not valid.

63. Lord Clarke went on to observe in paragraph 24 that schedule 18 did not contemplate cross-border relief, but envisaged the tax returns of an English company, and to note the existence of provisions that "contemplate that successive claims can be made". This part of his reasoning culminated in paragraph 27 where, after citing a paragraph of the decision of the Upper Tribunal, he continued:

> 27. I agree. In short, simply as a matter of construction of the relevant provisions, without any manipulation made necessary by the fact that the draftsman did not have cross-border relief in mind, there is no support for the conclusion that only one claim can be made. Paragraph 73(2) makes that clear. It does not provide that successive claims cannot be made. On the contrary, it expressly provides that a claim for group relief may not be amended but must be withdrawn and replaced by another claim and thus necessarily contemplates that successive claims may be made.

64. I take Lord Clarke's rejection of the proposition that "only one claim can be made" to be directed at the final part of HMRC's argument recorded in paragraph 23 of the judgment; he was asserting that the same losses can be the subject of successive claims. Ms Choudhury understandably emphasises Lord Clarke's reference, in the context of successive claims, to paragraph 73 and his quotation of its words "withdrawn and replaced". Her submission on paragraph 27 of the judgment is that, while the Supreme Court confirmed that successive claims could be made, the Court considered this to be because claims could be withdrawn and (thereafter) replaced; the Court did not, she submits, go so far as to say that earlier claims would remain valid after the making of a later claim.

65. I do not consider that Lord Clarke can have been requiring an earlier claim to be withdrawn *before* another claim was advanced. That is not what M&S had done. I accept that the Supreme Court was concerned with the "validity" (as Lord Clarke put it in paragraph 23) of M&S's later claims and not – as in the present case – with the

continuing "validity" of the earlier claims; but, once it is accepted that a later claim can be "valid" despite the non-withdrawal of an earlier claim, it seems to me to follow that earlier and later claims can coexist; the withdrawal of the earlier claim does not have to precede the advancing of the later one, but may be effected later .

66. Under the heading "the European Union context", Lord Clarke referred (at paragraph 28) to the European law principle of "effectiveness", requiring the domestic legislation to be construed so as to ensure that EU rights are "effective in the sense that they are not practically impossible or excessively difficult to exercise and also so as to ensure that the statutory code provides an effective remedy". In that context he referred to paragraph 69 of schedule 18 (see paragraph 37 above), pointing out in essence that the tax returns to which paragraph 69(3) directed attention were not apt, in the case of an overseas group company, to identify the amount available for surrender; in particular, they would not reveal whether any losses satisfied the no possibilities test. He referred to the Upper Tribunal's conclusion that paragraph 69(2) (which makes a claim ineffective if it exceeds the amount available for surrender as disclosed in those returns) had to be disregarded, and proceeded to quote paragraph 112 of their decision, which is as follows:

> To summarise: in our view, a claimant company seeking group relief in respect of the losses of a foreign group company can make successive claims, provided that all those claims are made within the time limit for claims specified by paragraph 74. It does not have to withdraw an earlier claim before making another claim. The validity of the later claim depends on the facts as they are at the time of the later claim. If the first claim results in no relief being given because at the time that first claim is made the no-possibilities test is not fulfilled in respect of any part of the losses in respect of which relief is claimed, a later claim can be made for such amount of those losses as satisfies the no-possibilities test as at the time of the later claim. If an earlier claim is valid in respect of part of the losses (because the no-possibilities test is satisfied in respect of part) then a later claim can be made for the balance. This, in our view puts the company claiming group relief for the losses of a foreign group company in effectively the same position as though it were claiming such relief for domestic losses, after taking account of those factors and difficulties which are not present in the domestic context. It does not put the claimant company in any better a position (save possibly – and if so, legitimately – in relation to cash flow) than if it waits until the last possible moment within the time limit period to make its claim, that is, the point at which it is most likely to be able to satisfy the no-possibilities test.

67. Lord Clarke made the following comment at paragraph 32, to which I have already referred:

> As I read it, it was not part of the Upper Tribunal's reasoning that the first claims were not valid claims at all. However, whether they were or not, the taxpayer is entitled to withdraw any unnecessary claims and advance a new claim at any time before such a claim becomes time-barred. Moreover, on the facts, I would accept M&S's submission that it made it clear from the outset

that, once the courts had determined which claims were valid, it would withdraw the other claims. The correspondence amply supports the conclusion that M&S made it clear that their successive claims were made in the alternative to their original claims and that, if the original claims succeeded, they would withdraw their later claims and vice versa….

68. At paragraphs 33 to 35 Lord Clarke cited passages from the judgment of the Court of Appeal upholding the Upper Tribunal's decision, and expressed agreement with those passages. Broadly they were to the effect that, once it is accepted that the no possibilities test is to be applied as at the date of a claim, it makes no sense to penalise a taxpayer who has made a claim at a point when the claim does satisfy the test on the grounds that the taxpayer made an earlier, premature claim. Lord Clarke concluded

35 Again, I agree. I also agree with Moses LJ's conclusion at paragraph 62 that the decision of the first Court of Appeal dictates that the claimant M&S is permitted to make successive claims to the same loss and rely on the claim which satisfies the [no possibilities test], and *then* withdraw any earlier claims in respect of the same surrendered losses. [Emphasis added]

36 In these circumstances I would answer the question posed in issue two in the affirmative….

69. Here it is explicit that the making of a later claim does not have to be preceded by the withdrawal of an earlier one; the only time limit for withdrawal is that in paragraph 74 of schedule 18. Ms Choudhury submits that that conclusion only applies to the circumstances of *M&S*: successive claims to the same overseas losses, designed to maximise the chances of satisfying the no possibilities test. She is certainly right that satisfaction of the no possibilities test was the courts' preoccupation in *M&S*. The issue for me is the scope of the principle that withdrawal of an earlier claim does not have to precede the making of a later one: does it extend to the circumstances of LINPAC, involving a domestic group relief claim followed by mixed domestic/cross-border claims?

70. I have already endeavoured to analyse Lord Clarke's treatment of the domestic law position, and explained why it seems to me that Lord Clarke must have been holding, as a matter of domestic law, that a later claim does not need to be *preceded* by the withdrawal of an earlier claim. If I am wrong about that, I nevertheless consider that the conclusion that he stated on the basis of EU law also applies to LINPAC. I do not consider that Lord Clarke's reference to "these circumstances" at paragraph 36 means that the principle at play only comes into operation in the precise circumstances of M&S.

71. Lord Clarke began his discussion of EU law with a reference to the principle of effectiveness. In my judgment, in the circumstances of LINPAC a requirement to withdraw the domestic relief claims before making the cross-border claims would have made it excessively difficult, if not practically impossible, to advance the cross-border claims. As I have explained, the cross-border claims for each AP were made

approximately ten days before the deadline imposed by paragraph 74. If the law required LINPAC to make a final choice between the domestic and the cross-border claims by 31 December 2008 and 2010 respectively – points in time at which various issues affecting the viability of the cross-border claims had still not been finally settled – Holdings could not reasonably have been expected to abandon definitively the unquestionably valid domestic claims in favour of the speculative cross-border claims; it would have had to give up the cross-border claims. The putative EU right to cross-border group relief would have been impossible in practice to exercise.

72. This would have been a dilemma not faced by M&S, for the adventitious reason that the paragraph 74 deadline had been extended in M&S's case by the making of enquiries into its returns. I shall return to consider briefly below how the law deals with a situation where none of such claims have been withdrawn by the applicable paragraph 74 deadline.

Issue (2): were Holdings' claims for cross-border group relief alternative to its original claims for domestic group relief?

73. Holdings' cross-border claims did not expressly keep its domestic relief claims open, in the way that M&S's did. Nor, on the other hand, did they explicitly replace them. I have to decide, as a matter of construction of the correspondence, whether they should be interpreted as replacing the domestic claims. The absence of witness evidence means that I am without information as to any oral communications that almost certainly supplemented the correspondence; I cannot speculate as to what may have been said.

74. Mr Bremner advances five reasons why the cross-border claims are to be read as being in the alternative to the original domestic claims. In summary these are:

(1) neither they nor any other communication evinced an intention of Holdings to withdraw the original claims, or said which of the originally claimed losses were being displaced; on the contrary, the schedules attached to the December 2008 and 2010 letters showed the loss carry-forward position in the alternative "scenarios" that the EU losses were and were not included, without giving any precedence to either "scenario";

(2) Finance's tax returns for APs following APE 2006 continued to calculate the carry-forward of its losses on the footing that in each AP Finance was surrendering losses to Holdings at the higher level that would be necessary to support Holdings' group relief claims if EU losses could not be claimed; HMRC never disputed this method of presentation, indicating its acceptance that that level of carry-forward remained a live possibility;

(3) the background was the developing *M&S* litigation, making it uncertain whether the cross-border relief claims would succeed; a prudent taxpayer would not be taken to be abandoning the domestic claims;

(4) the subsequent correspondence showed Holdings as making the cross-border claims in the alternative: he referred to the words in the letter I have referred to at

paragraph 19 above, to the effect that "if successful" the claims would result in revised carry-forward, the implication being that if the claims were not successful the carry-forward (and thus the amount of domestic group relief claimed in the year) would be as originally stated; similarly there was no suggestion by HMRC (before 2016) that the new claims withdrew the original ones;

(5) any other analysis would make the operation of the group relief system capricious and unworkable.

75. Ms Choudhury responds as follows:

(1) the withdrawal of the domestic claims was the consequence of the new claims, by virtue of paragraph 73; moreover, the new claims were not expressed to be in the alternative; the matrices enclosed with each cross-border claim letter merely illustrated the consequences of the original and new claims;

(2) the subsequent tax returns of Finance (whose returns were not under enquiry) did not alter the effect of the amendment of Holdings' returns;

(3) it was not for HMRC to determine the motivation behind the claims, but to deal with them in accordance with the legislation;

(4) it was not for HMRC to advise Holdings of the effect of the new claims; moreover, it was not until 2016 that Holdings indicated that the cross-border claims were in the alternative to the domestic claims; the letter referred to in paragraph 19 above related to a different accounting period and HMRC's response referring to the M&S litigation (see paragraph 20 above) was not in relation to APE 2008, about which HMRC had written separately;

(5) it is Holdings' analysis of the group relief provisions that produces capricious and unworkable results, by enabling a taxpayer to make multiple claims with no means of determining which claim takes precedence.

76. The background against which I am approaching this question of construction is my decision that submission of a further group relief does not of itself amount to withdrawal of an earlier claim. Mr Bremner's submission at paragraph 74(5) and Ms Choudhury's counter-submissions at paragraph 75(1) and (5) above do not seem to me to illuminate the meaning of the correspondence but are in truth directed at the interpretation of the legislation.

77. I have concluded that the letters of 22 December 2008 and 2010 and their enclosures are not to be taken to amount to an implicit withdrawal of Holdings' domestic group relief claims for the APs in question. An important part of their context is the fact that the cross-border claims were at that time speculative, as HMRC acknowledged in their responses (see paragraphs 11 and 20 above referring to the outcome of the *M&S* litigation). It is true, as Ms Choudhury points out (paragraph 75(4) above), that there were two communications from HMRC on 17 January 2011 and that the letter referring to the *M&S* litigation may not have concerned APE 2008;

that does not detract from the fact that the uncertainties of cross-border group relief claims were well known to all concerned.

78. Against that background, the enclosures to both letters stated the alternative positions in the event that the cross-border claims did or did not succeed. Ms Choudhury submits that that was purely to illustrate the difference between the old and new computations, but I cannot see why LINPAC would have recapitulated the "excluding EU losses" carry-forward position in considerable detail if the claims for relief of domestic losses that underlay those calculations had been definitively withdrawn. The correct construction of the letters of 22 December and their enclosures is, in my judgment, that the cross-border claims were being advanced as preferred alternatives to the domestic claims, conditionally upon their proving to be well-founded.

79. Subsequent communications, such as the correspondence in January 2011 and Finance's subsequent tax returns, cannot strictly illuminate the meaning of the 22 December communications. But HMRC's failure to remark upon, or object to, Finance continuing to file returns calculated on a basis inconsistent with the cross-border claims – together with the fact that HMRC initially accepted the "reinstatement", as I have called it, of domestic losses when overseas loss claims were withdrawn (see paragraph 23 above) leads me to conclude that HMRC interpreted those communications in the same way as I do.

Issue (3): were the claims for cross-border group relief ineffective to withdraw the original claims for domestic group relief?

80. This issue only arises if I am wrong in my conclusion on issues (1) and/or (2). In that event, Mr Bremner submits that the communications of 22 December 2008 and 2010 were ineffective to withdraw the domestic relief claims, by virtue of paragraph 71 of schedule 18 (see paragraph 40 above) which relates to the giving and withdrawal by a surrendering company of notice of consent to surrender; paragraph 71(4) stipulates, subject to an exception not relevant here, that notice by a surrendering company of withdrawal of its consent to surrender must be accompanied by a notice of consent by the claimant company to that withdrawal. Mr Bremner submits that, if the communications of 22 December 2008 and 2010 purported to withdraw the original group relief claims, they were ineffective to do so because they were not accompanied by a notice from Finance withdrawing its consent to surrender the higher amount of its losses that had been included in Holdings' domestic group relief claim.

81. In support of that, Mr Bremner pointed out that the calculations including EU losses in the schedules accompanying the letters sought to "preserve" the portion of Finance's losses that was displaced by EU losses by that portion being "returned" to Finance and carried forward in Finance's accounts. This he characterised as an attempted withdrawal under paragraph 71 of the schedule of Holdings' claim for relief in respect of that portion of Finance's losses, which failed for want of the notices required by paragraph 71(4).

82. In response Ms Choudhury submitted: (1) that the giving and withdrawal by a surrendering company of notices of consent to surrender (governed by paragraph 71) is distinct from withdrawal by a claimant company of a notice of claim, which is governed by paragraph 73; (2) that Holdings did not need Finance's consent to reduce the amount of losses surrendered by Finance that were included in Holdings' claim, because paragraph 69(1) provides that a notice of claim may be for less than the amount available for surrender and (3) that the LINPAC group had simplified arrangements pursuant to the 1999 Regulations (see paragraph 45 above) under which a group relief matrix could be submitted by an authorised company within the group without separate notices from other group companies.

83. I agree with Ms Choudhury's analysis of schedule 18 in this regard. The withdrawal of a notice of claim is governed by paragraph 73, which does not contain any stipulation that withdrawal (by a claimant company) of a notice of claim be accompanied by a notice of consent from the surrendering company (nor a notice of withdrawal of the surrender on which the claim was based). Paragraph 71(4) is dealing with a different matter, namely the situation where a surrendering company does withdraw its consent to surrender. In that event the withdrawal is only effective if accompanied by a notice from the claimant company consenting to the withdrawal of the surrender. The intention of the schedule is plainly to protect the revenue against double relief being claimed: once losses have been surrendered, they can only be taken back (and potentially carried forward by the surrendering company or surrendered elsewhere) with the consent of the claimant company, which must if possible amend its claim in consequence.

84. Mr Bremner objects that this construction of the schedule leads to the tax advantage of losses being lost if the claimant company withdraws its claim to relief in respect of them and the surrendering company does not withdraw its surrender. I agree that that is the consequence, but find it unsurprising that the legislation should leave it to the respective group companies to protect their own interests by giving the necessary notices. In short, I agree with Ms Choudhury that paragraph 71 does not contain any prerequisites to the validity of a notice of withdrawal of a claim; I think that Mr Bremner's argument confuses the various notices and consents provided for by schedule 18 and treats the requirement for a claimant's consent to withdrawal of a surrender as though it were a requirement for a surrenderer's consent to withdrawal of a claim (it has to be said that the concept of a notice of consent to notice of withdrawal of a notice of consent creates something of the effect of a hall of mirrors).

85. In the alternative Ms Choudhury invites me to find that LINPAC had simplified arrangements in place which had the effect that the requisite notices were given. Regulation 6 of the Corporation Tax (Simplified Arrangements for Group Relief) Regulations 1999 enables an "authorised company" to apply in writing to enter into simplified arrangements; the application must be signed on behalf of the authorised company and the authorising companies, all of which must be members of a group or consortium, and must be accompanied by a specimen of the form of statement that the authorised company proposes to use pursuant to regulation 10(2) of those Regulations. The application may be accepted or declined (on particular grounds) by HMRC but, where simplified arrangements are in place, regulation 10(2) enables the

authorised company to make statement in a form provided or authorised by HMRC containing information necessary for the amendment in accordance with schedule 18 of the company tax returns of itself and the authorising companies for the purpose of making a withdrawing claim for group relief.

86. For this purpose, regulation 10(3) modifies Part VIII of schedule 18 in two ways. First, references to the claimant and surrendering companies are read as including references to the authorised company; this does not, however, apply to regulations 70(4) and 71(4), with the result that a consent to surrender must be given by the surrendering company itself (but this is in turn subject to paragraph 9A of the schedule) and a consent to withdrawal of a surrender must be given by the claimant company itself. Secondly, amendments to the authorising companies' tax returns made in reliance on the information contained in the statement have effect as if made by the authorising companies themselves.

87. Regulation 10(4) specifies some mandatory contents of the statement. It must include the information specified in paragraphs 68 and 71(1) as well as

(c) where applicable, details showing the effect of the claim on each company's self-assessment included in its company tax return,

(d) where applicable, details showing which of the company tax returns of the companies concerned are returns into which an enquiry is in progress under Part IV of schedule 18.

Regulation 10(5) provides that a statement that does not contain information sufficient for the amendment of the tax returns of the various companies is ineffective.

88. Neither party has been able to locate a copy of an application for the use of simplified arrangements by LINPAC, but Ms Choudhury invites me to find that such arrangements have been authorised from the fact that LINPAC has filed returns for a number of years on the basis that simplified arrangements were in place, without challenge from HMRC. She drew my attention to the group relief pages of Holdings' tax return for 2006, which were completed in a way indicating that simplified arrangements were believed to be in place, the authorised company being Group.

89. At this point in the debate, the arguments widened beyond the (admitted) absence of any notice of consent by Finance to Holdings claiming a lower amount of group relief in respect of Finance's losses. Mr Bremner submitted that, even if simplified arrangements were in place, the letters of 22 December and their enclosures did not purport to amend any tax returns and did not contain the information required by regulation 10(4)(c) and (d) as to the effect of the new claim on each company's self-assessment or details of enquiries under way. This made them ineffective pursuant to regulation 10(5).

90. In that connection Mr Bremner drew my attention to a note of a meeting indicating that, as at both 22 December 2008 and 2010, there were ongoing enquiries into Holdings' tax returns for APEs 2000–2005 and that as at 22 December 2010 there was an ongoing enquiry – prompted by the 22 December 2008 letter – into the return

for APE 2006, pointing out that neither of the 22 December letters disclosed any ongoing enquiries.

91. In response Ms Choudhury submitted that the enclosures to the letters of 22 December did not fall short of regulation 10(3)(c) as the cross-border group relief claims did not have any effect on the domestic surrendering companies self-assessments: their tax liability for the years in question was unaffected; there was no falling short of regulation 10(3)(d) as it refers to tax returns for the years affected by that statement. More generally, she submitted that there is no formality required in an amendment of a tax return; it can be done by letter, a point which Mr Bremner accepted in his submissions in reply.

92. I agree with Ms Choudhury on the simplified arrangements issue. I find on the balance of probabilities that there were simplified arrangements in place. It seems to me that the letters of 22 December and their enclosures contained the necessary information for the amendment of Holdings' and Finance's returns: in Holdings' case they itemised the group losses being claimed and in Finance's case they showed the alternative carry-forward positions. Finance's self-assessment was not affected by the alternative claims, since its losses were either being surrendered or carried forward. I do not agree with Mr Bremner that regulation 10(3(d) refers to enquiries into returns other than those being amended by a regulation 10 statement; I consider that subparagraph (d) is referring to the same returns as subparagraph (c).

93. My conclusion on issue (3) as a whole is that, had I been against Mr Bremner on issues (1) and/or (2), I would not have concluded that the letters of 22 December were ineffective for want of any compliance with the requirements of schedule 18.

Issue (4): what is the current status of Holdings' cross-border group relief claims?

94. The effect of my conclusion on issues (1) and (2) is that Holdings' domestic group relief claims for APEs 2006 and 2008 were not withdrawn by the cross-border claims of 22 December 2008 and 2010. Additional relevant circumstances are first that both the domestic and cross-border claims ceased to be capable of withdrawal (barring HMRC's consent to a late withdrawal) on 31 December of those years; secondly, the domestic and cross-border claims for each AP are mutually incompatible, since each of them is for the whole of the unrelieved part of Holdings' profits for each AP. This potentially raised an issue, which did not arise in *M&S*, of how the law deals with the coexistence of alternative claims which exceed the unrelieved part of the claimant company's profits but none of which can be withdrawn as of right pursuant to paragraph 73 of schedule 18. In the course of argument it seemed to me that section 403A of ICTA 1988 might supply the solution and I invited the parties to supplement their oral submissions on this point with written submissions.

95. The result of that has been that I am now persuaded that all of the cross-border claims were withdrawn at HMRC's invitation or with their consent pursuant to paragraph 74(4) of schedule 18, so that the section 403A issue does not arise. I have

reviewed the correspondence earlier in this decision. It shows, first, an invitation from HMRC to LINPAC to withdraw the claims, backed by a threat of penalties and secondly a course of correspondence in which LINPAC explicitly withdrew certain claims and, in respect of others, made a "without prejudice" offer to withdraw the bulk of them followed on 26 April 2016 by a written acknowledgement that they were all "invalid".

96. HMRC's invitation to withdraw the claims is in my judgment sufficient to engage paragraph 74(2) of schedule 18, removing any issue of any withdrawal being out of time. I am, moreover, satisfied that the correspondence amounts to a withdrawal of the cross-border claims. Some of the correspondence used the term "withdrawal" in relation to certain of the claims. The letter of 11 November 2015 only amounted to a without prejudice offer to withdraw claims, and did not cover the whole of the remaining claims; I do not consider that it amounted to an effective withdrawal of any claims. The letter of 26 April 2016 did not use the term "withdrawal" but amounted instead to an acknowledgement that the claims could not succeed.

97. I consider, however, that it was effective to withdraw the remaining claims. There are no formalities attaching to a withdrawal other than that it must be done by amendment of the taxpayer's tax return (paragraph 73(1) of schedule 18). The same formality (along with others) applies to a claim (paragraph 67). In that connection counsel agreed that a tax return can be amended by letter, and HMRC have at all times accepted that the letters of 22 December amounted to claims, even though that of 22 December 2006 (for APE 2006) did not use the word "claim". That letter clearly evinced an intention to seek group relief in respect of cross-border losses, making it sensible to regard it as a claim; the letter of 26 April 2016 likewise clearly evinced an intention no longer to seek group relief in respect of losses, making it sensible to regard it as a withdrawal.

98. Section 403A of ICTA 1988 is not therefore engaged in this case. Having invited submissions on it, I shall nevertheless state my conclusions on the issues they covered.

99. I have considered the relevant subsections of section 403A earlier in this decision. It is clear that establishing the unrelieved part of a claimant company's profits for the purposes of section 403A involves establishing a priority between its claims; in the present case no priority is established by subsection (6), since the domestic and cross-border claims in respect of each AP became incapable of withdrawal at the same time, meaning that neither of them is a "claim made before" the other within the special meaning that the subsection gives to that expression. That leaves subsection (7), under which claimant companies can "by notice to an officer of the Board, elect" a priority. The issues raised by the submissions are (1) whether, as Ms Choudhury submits, section 403A is not on its true construction applicable to the facts of this case and (2) assuming the section is applicable, whether Holdings gave notice of an election to give priority to the domestic group relief claims.

Is section 403A applicable here?

100. Ms Choudhury submits that section 403A was not intended to operate in situations of the present sort. The purpose of its introduction in 1997 was to correct a drafting error that had enabled excessive group relief to be claimed where group companies had different accounting periods. In such situations the legislation had enabled group companies that had realised profits to claim a proportion of the losses of lossmaking group companies based purely on the proportion of their accounting years that overlapped. She gave the example of two profitmaking companies whose accounting period ended in December and a lossmaking company whose accounting period ended in June; each of the profitmaking companies could claim half of the losses of the lossmaking company despite the fact that the periods of overlap were identical in both their cases. A similar account of the history of section 403A is given in an extract from BDO's *Yellow Tax Handbook* for 2009/2009 supplied by Mr Bremner.

101. In Ms Choudhury's submission, the whole purpose of section 403A was to set limits on group relief; section 403A(6) and (7) were not intended to have any wider application than preventing the double use of surrendered amounts, and in particular did not over-ride the time limits for making and withdrawing claims provided by schedule 18. She accepted that a literal reading of the subsections enabled claimant companies to make multiple group relief claims, in the aggregate exceeding their unrelieved profits, and then invoke section 403A(7) to opt between them, but that cannot have been Parliament's intention since it would render paragraph 73 of schedule 18 otiose.

102. Ms Choudhury also drew my attention to the fact that section 403A(6), relating the priority of claims to the the date on which they became incapable of withdrawal, was not carried over into the Corporation Tax Act 2010, although the remainder of the section was. She referred me to the Explanatory Notes to the Bill which explain that section 403A was enacted before the introduction of self-assessment, with which it fits badly because the date on which a claim becomes incapable of withdrawal depends on the unpredictable matter of whether HMRC enquire into the return that contains it; accordingly, the new legislation enacts the practice of dealing with claims in the order in which they are made.

103. In conclusion, Ms Choudhury submits that the election referred to in section 403A(7)(a) has to be made at the same time as the claims are made, on the grounds that its reference to a power to withdraw and resubmit claims would be redundant if the priority had to be decided at the time that they became incapable of submission or withdrawal. At the same time, she submits that the section is irrelevant to this appeal, accepting that "if the Tribunal were to find that the Appellant had made the new claims in the alternative as a matter of fact, and/or that the *Marks & Spencer* litigation supported the argument that such claims could be made, it will succeed in its appeal without any need to refer to section 403A".

104. Mr Bremner makes a number of points in reply, including that the inserted sections which include section 403A expressly contemplate their applying to

companies with the same accounting period (see section 403B(1)(a), which it is unnecessary to set out), and that Ms Choudhury's argument is predicated on the proposition that paragraph 73 of schedule 18 does not permit claims in the alternative. I agree with the first of those points: it cannot be suggested that the legislation does not apply to cases of exactly coinciding accounting periods. As to the second, it seems to me that section 403A(6) and (7) would in truth be redundant if paragraph 73 of schedule 18 ruled out the coexistence of overlapping claims.

105. It is common ground that, on its literal wording, section 403A applies to this appeal and subsection (7) allows Holdings to elect which of its group relief claims are to be given priority. Ms Choudhury has pointed to some unsatisfactory features of the operation of the section, particularly in the world of self-assessment, but they fall far short of enabling me to depart from its literal wording. Its less satisfactory fit with the subsequently introduced self-assessment regime cannot support the view that Parliament cannot, at the time it was enacted, have intended its wording to produce the result that it naturally produces. Whether the fact that it gives a right of election between claims at a point in time after they have became incapable of withdrawal is an anomaly is a matter of opinion; I am unable to conclude that parliament cannot have intended it. I conclude that that is the effect of the section.

Did Holdings make an election under section 403A(7), and if so when?

106. It is implicit in Ms Choudhury's case that Holdings could only make an election at the time of first making the cross-border claims; their withdrawal some years later cannot be based on subsection (7). Mr Bremner makes three submissions on the application of the section to this appeal, in the following order of priority:

(1) Holdings did elect at the time of first making the cross-border claims that the domestic claims would have priority unless the outcome of *M & S* entitled it to cross-border relief; in this he essentially relies on the submissions he has made to the effect that the claims were alternative to the domestic claims and were known on all sides to be uncertain of success, buttressed by the fact that HMRC did initially allow domestic losses to be resorted to again where cross-border claims were withdrawn.

(2) there was no occasion for an election because the cross-border relief claims were withdrawn; and

(3) the withdrawal of the cross-border relief claims amounted to an election under subsection (7).

107. I have already indicated my agreement with his second submission. Since issues of election under section 403A(7) do not in my view arise in this case, I shall state my conclusions briefly. I do not consider that the subsection requires that an election of priority be made at the time a claim is made. Subsection (7) is explicitly subject to subsection (6), and the terms of subsection (6) expressly provide that subsection (6) itself is to be applied as at the time when the claim under examination ceases to be capable of being withdrawn. Against that background, subsection (7)

seems to me to be designed to break any deadlocks produced by the application of subsection (6), and the most natural reading of subsection (7) is that the deadlock-breaking election can be made once the deadlock has been identified.

108. Moreover, subsection (7) *ex hypothesi* applies to two claims to which the same deadline for making any withdrawal applies. It is not obvious to me what utility a power of the taxpayer to elect a priority at the stage of making a claim would have, particularly under a regime which did not, at the time section 403A was enacted, include the uncertainties of the no possibilities test. If the taxpayer wanted the new claim to have priority over an existing but still withdrawable claim, the more obvious course would be to withdraw that other claim.

109. Mr Bremner submits that the section nevertheless allows a taxpayer to make an election at that stage, and allows it to be conditional upon a future event – here, subsequent satisfaction or not of the no possibilities test – and, moreover, allows its conditionality to be implied rather than express. I can see that, in a regime that includes the uncertainties of the no possibilities test, a conditional prioritisation could serve a purpose that an unconditional prioritisation could not serve, but the requirement of section 403A(7) is for a "notice" as to the "order in which" the claims are to be deemed to have been made; it allows a taxpayer to specify the deemed timing of claims rather than to make, as Mr Bremner is in substance contending, a conditional claim. I do not consider the subsection allow a taxpayer, at the time of making a claim, to elect that its timing should be conditional upon its well-foundedness.

110. I therefore conclude that section 403A(7) enables a taxpayer to elect the order of claims once a deadlock under subsection (6) has been detected, rather than to do so, conditionally or otherwise, at the time of making a claim. The question whether the letter of 26 April 2016 amounted to such an election does not arise on my view of the circumstances of this case. If it had arisen, I would have had difficulty in regarding the acknowledgement in that letter that the cross-border claims were "invalid" as a notice pursuant to subsection (7) that they were to be treated as having been made after the domestic claims. But the issue does not in my view arise,

111. For the reasons I have given, I allow this appeal.

112. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NICHOLAS PAINES QC
TRIBUNAL JUDGE
RELEASE DATE: 31 JANUARY 2020