

**FIRST-TIER TRIBUNAL  
TAX**

**MARKS AND SPENCER PLC**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS [Corporation Tax]**

**Respondents**

**Tribunal: TRIBUNAL JUDGE JOHN F. AVERY JONES CBE  
TRIBUNAL JUDGE MALCOLM GAMMIE CBE QC**

Sitting in public in London on 23 to 26 February 2009

**Nicola Shaw**, counsel, instructed by **Dorsey & Whitney (Europe) LLP**, for the Appellant

**David Ewart QC** and **Sarah Ford**, counsel, instructed by the **General Counsel and Solicitor to HM Revenue and Customs** for the Respondents

## DECISION

1. This is a continued hearing of the appeals by Marks and Spencer plc in relation to claims for group relief for losses of its German and Belgian subsidiaries in accordance with the Order of Park J as varied by the Court of Appeal. In addition we had three joint referrals relating to both subsidiaries in respect of the years ended 31 March 2000, 2001 and 2002. Although the original case name of this appeal showed the Inspector, Mr Halsey, as the respondent in accordance with the then procedure since case names no longer give the name of the Inspector we have renamed the case to show HMRC as the Respondents which will make the case easier to find by someone looking for tax cases by searching HMRC. We hope that Mr Halsey will not mind bearing in mind that we know that he has not been concerned with the case since our last hearing. The Appellant was represented by Miss Nicola Shaw, and HMRC by Mr David Ewart QC and Ms Sarah Ford.
2. We originally gave a decision on 17 December 2002 (*Marks and Spencer plc v Halsey* [2003] STC (SCD 70)). This was appealed to Park J who, without giving a judgment, made a reference to the European Court of Justice which gave its decision in December 2005 (Case C-446/03, [2006] Ch 184). The *dispositif* 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.”

On its return to Park J he gave further guidance on the meaning of the ECJ’s judgment in 2006 ([2006] STC 1235), which was appealed and cross-appealed to the Court of Appeal which gave its judgment in 2007 ([2008] STC 526). It has now returned to us to find the facts in accordance with the Order of Park J as varied by the Court of Appeal.
3. It was originally expected that there might be a dispute about the application of German and Belgian law in accordance with the ECJ’s judgment but the effect is agreed. The appeal is now a dispute about the application of the ECJ’s judgment to domestic law and in particular the validity and effect of various group relief claims made by the Appellant.

4. We had 17 ring binders of documents. We heard evidence from Mr Graham Oakley, Group Secretary and head of Corporate governance of Marks and Spencer Group plc, and Mr Abdul Nabi, Group Tax manager of the Appellant. We also heard evidence from two expert witnesses called by the Appellant, Mr Ira Kalish of Deloitte Services LLP of Los Angeles and Mr Frank Ilett FCA of Deloitte & Touche LLP, London. We had agreed statements from the following expert witnesses Professor Jürgen Lüdicke, PricewaterhouseCoopers AG WPG Hamburg, Mr Pascal Janssens, PricewaterhouseCoopers Tax Consultants scrl-bcvba, Antwerp (both instructed by the Appellant), and Mr Georges Keymeulen, Grant Thornton Tax Consultants BVBA Brussels and Dr Frank Roser, Grant Thornton GmbH branch Hamburg (instructed by HMRC). We treat the evidence of the last four named experts (taking into account any corrections made by Professor Lüdicke to Dr Roser’s report and by Mr Janssens to Mr Keymeulen’s report) as findings of fact whether or not we refer to them.
5. There was a statement of facts that was agreed except for some passages about which HMRC reserved their position. In the light of the evidence we also find such passages as facts. The statement including both is as follows:

*Background to the Appellant*

(1) Marks and Spencer plc (“The Appellant”) was incorporated and registered in England and Wales on 17 June 1926 as a company with registered number 214436. Its registered office is Waterside House, 35 North Wharf Road, London, W2 1NW.

(2) The Appellant is the principal trading company and holding company for a number of UK and overseas companies. The Appellant is one of the UK’s leading general retailers, selling clothing, food and homeware.

(3) The Appellant is resident in the UK for tax purposes. It is not a dual resident company.

(4) Germany and “MSG” refers to Marks and Spencer (Deutschland) GmbH, described further in paragraphs 22 to 24 and 31 to 36 below. Belgium and “MSB” refers to Marks and Spencer (Belgium) SA, described further in paragraphs 22 to 24 and 42 to 45 below.

(5) In this statement, a comparison of the financial performance of a subsidiary over the period to closure with the group’s expectations and plans is only given for Germany. While full financial, accounting and tax records exist for both the German and Belgian subsidiaries, additional management information for the period preceding closure of the business in 2001, such as budgets and performance forecasts, reviews and assessments, could not be located for Belgium.

*Background to Overseas Expansion*

(6) In order to expand its international operations, the Appellant began to move into overseas jurisdictions in 1975 with the opening of the Boulevard Haussmann store in Paris. By 1999 the consolidated accounts show that it was operational in about 718 locations in more than 34 countries, through

wholly owned subsidiaries and third party franchises. As well as Continental Europe, the Appellant had a presence in the US and Hong Kong. Despite this international outlook, the UK continued to account for over 80% of total sales.

(7) Most of the overseas operations were directly owned by a Dutch group holding company. Once a decision had been made to establish the subsidiaries in Continental Europe consideration was then given to which location would be suitable as a holding company. In common with many international groups, a decision was taken to use the group's Dutch holding company to own the subsidiaries for, amongst other reasons, the facilitation of effective dividend repatriation were the subsidiaries, as hoped, to be profitable. The relevant subsidiaries were at all times the wholly owned indirect subsidiaries of the Appellant.

(8) In Continental Europe by 1995 the Appellant's group had opened 29 stores in France, Spain, the Republic of Ireland, the Netherlands and Belgium which were owned and operated through indirect trading subsidiaries of the Appellant resident in those jurisdictions. At that time the group's business in Belgium comprised three stores in Brussels (opened in 1975), Liège (opened in 1983) and Antwerp (opened in 1991). In 1995 the Appellant had not set up any German subsidiaries to carry out its retail operations.

(9) At a meeting on 1 March 1995, following an investigation of its feasibility, the Board of the Appellant resolved to embark on a programme of expansion across Continental Europe and approved proposals to enter Germany. The plan was announced publicly in a press release of 27 March 1995 in the following terms:

“International Retail Group M&S today confirmed that it will continue to expand its European operations by actively seeking to develop a chain of stores in Germany. A detailed assessment of opportunities in Italy continues.”

(10) The group's German business commenced with the opening of its first store in Cologne in October 1996. It then acquired three stores in the Ruhr region in 1997 at Dortmund, Essen and Wuppertal which were opened in 1998. The statutory accounts of MSG show that it did not make a profit in any year before it ceased trading. A report prepared by the director with responsibility for Europe, Derek Hayes, for the Board meeting of the Appellant on 25 March 1998 stated that:

“... none of our options show a contribution to Group profit over the short term and therefore we have considered the implications of withdrawing from the German market. Whilst we have not been able to evaluate this option fully, initial estimates suggest the cost of staff redundancy, write-off costs and buying out contractual arrangements could amount to possible 90m DM net of property sales.

Set against this if we continue to trade against the scenario of low sales, poor margins and less competitive prices with a 6 store chain, the

cumulative present value cost of loss of interest earnings and trading losses over the next 5 years would be 125m DM.

Irrespective of the cost implications, we must consider the major impact that such a negative signal would give to the Business as a whole and the financial markets.

....

Although we face short term issues, this market will remain a strategic priority and should justify the Company's investment in its future growth potential."

Two further stores were opened in central and suburban Frankfurt in 1999.

(11) Further stores were opened in France, Spain, and the Netherlands throughout the late 1990s and in Portugal in the accounting period 2000/1. In Belgium a further store was opened in Wijnegem in 1996. A store was opened in Luxembourg as a branch of the Belgian subsidiary in 1998. The statutory accounts of MSB show that it did not make a profit during the years ended 31 March 1998 to 31 March 2001 before it ceased trading.

(12) In Continental Europe, performance was variable but a trend developed towards rising losses in the second half of the 1990s. These arose from lack of clarity in market position, over-footaged stores and too few products appealing to a broad customer base. Stores were concentrated in high cost prime city sites which became increasingly marginalised through the increase in edge of town developments. The well-publicised factors which impacted the UK business at this time relating to sourcing, values and margins were exacerbated by the consistent strength of sterling against European currencies.

(13) Attached to a report from the director of European operations, Derek Hayes, dated 21 November 1995 addressed to the Chairman and the Board was a forecast for the first five full years of trading in Germany. The minutes of the Board meeting of the Appellant of 29 November 1995 record:

"The Board considered the Company's strategy for entry into the German market as set out in Mr D K Hayes' paper dated 21 November 1995 and received a presentation from Mr Hayes and the presenters...After discussion the Board noted and approved the entry strategy as presented..."

Attached to a report from the director in charge of property acquisitions, Roger Aldridge, dated 18 June 1997 headed "Project Atlanta" addressed to the Chairman and the Board was a forecast for five years of trading in Germany from the year ending 31 March 1998. The minutes of the Board meeting of the 25 June 1997 record:

"The Board considered a Capital Expenditure request in relation to Project Atlanta as summarised in Mr R Aldridge's paper dated 18 June 1997... After discussion the Board approved the proposal as submitted..."

(14) The actual performance of the German business against these forecasts is set out in Schedule 1. The November 1995 forecast envisaged a trading profit by the second full year of trading and a profit before tax by the third year. By the fifth year that plan anticipated that the German business would comprise 7 stores generating a trading profit. The 1997 plan also anticipated that the business would be generating a profit before tax by the year ended 31 March 2000. Schedule 1 shows that from a profit and loss perspective, the actual results for the German business were significantly down on plan for the four years ended 31 March 2001 and that trading losses before tax were incurred throughout 1997 to 2001. In addition to the business failing to meet its profit projections, the Marks and Spencer group made significant capital injections totalling DM197m in the years ended 31 March 1998, 1999 and 2000. By the year ended 31 March 1999, external and intercompany borrowings amounted to DM118m and the business had net current liabilities of DM120m. The business remained in a net liability position in 2000 and 2001. The extent of the accumulated tax losses generated by the business are set out at Schedule 2.

(15) By March 1998 the Marks and Spencer group had invested £340 million of capital in the Continental European businesses.

(16) By 1999 the group's UK businesses also began to suffer with profits decreasing from £1.05 billion in the year ending March 1998 to £600 million in the following year.

(17) On 24 June 1999 the board of the Appellant met to consider proposals for a withdrawal from its German business and a restriction of its trading activities in other continental European locations. It resolved to close its smaller stores in Dortmund, Essen, Wuppertal and suburban Frankfurt and concentrate business on two stores in Cologne and central Frankfurt (Frankfurt Zeil) opening the latter on a reduced footage than originally anticipated. These smaller stores were closed during the accounting period ending 31 March 2000.

(18) Losses from the continental European businesses increased. On 27 September 2000 the Board of the Appellant met to decide between three options for the future of these businesses. All three involved the withdrawal from Germany. For the Belgian business the options ranged from complete closure to a reduction in stores. No final decision between the options was reached until a Board meeting on 28 March 2001 when the Board decided to adopt the option of a complete closure of all its direct Continental European businesses.

(19) On 29 March 2001 the Appellant announced its intention to divest itself of its Continental European activity. By 31 December 2001 the French and Spanish subsidiaries had been sold to third parties, and trading operations had been discontinued in the remainder of the subsidiaries, including the German and Belgian companies which were at the time of the previous agreed statement of facts essentially dormant. Buyers were not found for the German and Belgian subsidiaries.

*Summary of Claims*

(20) The Appellant has made group relief claims in respect of losses incurred by certain of its EU subsidiaries for the accounting periods ended 31 March 1996 to 31 March 2002 pursuant to paragraph 6 of Schedule 17A ICTA 1988 or paragraph 67 of Schedule 18 of the Finance Act 1998 (as applicable). The claims which were made in respect of the Spanish and French subsidiaries were subsequently withdrawn. The claims regarding the German and Belgium subsidiaries remain extant.

(21) The amounts of the losses and profits, which are relevant to the claims, are set out in Schedules 2 and 3. The amount of losses which are potentially capable of surrender will vary depending on the method used to calculate them. Schedules 4 and 5 show the amount of unutilised losses applying three methods of computation:

- (a) using local tax returns for computing the losses and their utilisation against profits;
- (b) applying the UK group relief regime to the losses computed under local tax law; and
- (c) computing the tax losses on a UK equivalent basis applying UK rules to determine their utilisation against local profits.

(22) The Appellant has submitted group relief claims as follows:

<b>Germany – Summary of Claims</b>			
Year ending	Original Claim submitted	Alternative Claim submitted	Further Alternative Claim submitted
31 March 1996	20 March 2007		12 December 2007
31 March 1997	20 March 2007		12 December 2007
31 March 1998	31 March 2000	20 March 2007	12 December 2007
31 March 1999	30 March 2001	20 March 2007	12 December 2007
31 March 2000	24 September 2001	20 March 2007	12 December 2007
31 March 2001	24 September 2001	20 March 2007	12 December 2007
31 March 2002	17 February 2003 <sup>1</sup>	20 March 2007	12 December 2007

<b>Belgium - Summary of Claims</b>				
	Original Claim	Alternative	Further Alternative	Further

<sup>1</sup> An amended corporation tax return was submitted on 26 March 2004 to include a claim for the losses of Marks and Spencer (France) SA but did not amend the claims for that year for MSG and MSB.

Year ending	submitted	Claim submitted	Claim submitted	Alternative Claim submitted
31 March 1998	27 June 2007		12 December 2007	11 June 2008
31 March 1999	27 June 2007		12 December 2007	11 June 2008
31 March 2000	24 September 2001	20 March 2007	12 December 2007	11 June 2008
31 March 2001	24 September 2001	20 March 2007	12 December 2007	11 June 2008
31 March 2002	17 February 2003 <sup>2</sup>	20 March 2007	12 December 2007	11 June 2008

(23) Of those claims, the parties agree that the following group relief claims are valid, were made within the necessary time periods and are in correct form and the notices of surrender and claims are effective to permit the surrender of such losses as the Tribunal determines are capable of surrender to the Appellant:

	<b>Germany</b>	<b>Belgium</b>
Year ending	Claim submitted	Claim submitted
31 March 1998	31 March 2000	
31 March 1999	30 March 2001	
31 March 2000	24 September 2001	24 September 2001
31 March 2001	24 September 2001	24 September 2001
31 March 2002	17 February 2003 <sup>3</sup>	17 February 2003 <sup>4</sup>

(24) Of the remainder, the parties agree that the group relief claims are in the correct form and the notices of surrender and claims would be effective to permit the surrender of such losses as the Tribunal determines are capable of surrender to the Appellant, save that it is contended by the Respondent (and not accepted by the Appellant) that:

(a) the following claims were made outside the period permitted to claim group relief:

	<b>Germany</b>	<b>Belgium</b>
	Claim submitted	Claim submitted

<sup>2</sup> As above.

<sup>3</sup> As above.

<sup>4</sup> As above.

Year ending		
31 March 1996	20 March 2007	
31 March 1997	20 March 2007	
31 March 1998		27 June 2007
31 March 1999		27 June 2007

(b) the following claims are a procedural nullity and outside the period permitted to claim group relief:

<b>Germany</b>		
Year ending	Alternative Claim submitted	Further Alternative Claim submitted
31 March 1996		12 December 2007
31 March 1997		12 December 2007
31 March 1998	20 March 2007	12 December 2007
31 March 1999	20 March 2007	12 December 2007
31 March 2000	20 March 2007	12 December 2007
31 March 2001	20 March 2007	12 December 2007
31 March 2002	20 March 2007	12 December 2007

<b>Belgium</b>			
Year ending	Alternative Claim submitted	Further Alternative Claim submitted	Further Alternative Claim submitted
31 March 1998		12 December 2007	11 June 2008
31 March 1999		12 December 2007	11 June 2008
31 March 2000	20 March 2007	12 December 2007	11 June 2008
31 March 2001	20 March 2007	12 December 2007	11 June 2008
31 March 2002	20 March 2007	12 December 2007	11 June 2008

#### *Group Structure*

(25) Extracts from the group structure chart are enclosed as Schedule 6, showing the relationships between the relevant companies in the periods before trading ceased.

(26) Marks & Spencer (Nederland) BV (“BV”) is a corporation organised under Dutch law, having its registered office at Prins Bernhardplein 200, 1097 JB Amsterdam, Netherlands Amsterdam, the Netherlands. It was incorporated on 22 August 1958. It is resident in the Netherlands for tax purposes. It is not a dual resident company.

(27) BV is a holding company for certain of the Appellant’s overseas subsidiaries including in respect of the accounting periods for which the claims are made, MSG and MSB.

(28) Marks & Spencer International Holdings Limited (“MSIH”) is a UK incorporated company resident in the UK for tax purposes. It is not a dual resident company. It is an investment holding company owning certain shares in the Appellant’s non-UK subsidiaries, including 100% of BV.

(29) In summary, the Appellant owns 100% of MSIH which in turn owns 100% of BV. Until trading activities in Belgium ceased BV beneficially owned 100% of MSB. In respect of the German subsidiary, BV owned 100% of MSG in 1998 and 1999. On 10 March 2000, MSIH acquired one preference share in MSG from BV, representing 33% of the total number of shares in the company. This facilitated an additional capital injection by MSIH (of GBP 23,248,605.08) to MSG. The remaining two ordinary shares in MSG (representing 67% of the total number of shares in issue) were retained by BV.

(30) On 22 February 2006, BV sold all of the shares it held in MSB to MSIH and on 13 October Mr Oakley sold the remaining share to MSIH. On 7 July 2006, MSIH acquired the two ordinary shares in MSG held by BV, increasing its shareholding in MSG to 100%. On 28 September 2006, MSIH then transferred its one preferential share in MSG to the Appellant.

#### *Germany*

(31) MSG was a corporation organised under German law, having its registered office at Antoniterstrasse 17, 50667 Cologne, Germany. It was incorporated in November 1995. The first store (in Cologne) opened in October 1996. MSG was resident in Germany for tax purposes. It was not a dual resident company.

(32) The Appellant’s group held no other interests of any kind in Germany other than MSG.

(33) MSG operated 7 retail stores in Germany for clothing, foods, home furnishings, furniture, gifts, accessories, toiletries and cosmetics and various other products under the name “Marks and Spencer”. The number of employees (excluding head office functions) exceeded 160 reducing to 118 by June 2001. As at June 2001 there were only two stores still operating, namely Cologne and Frankfurt Zeil. The company ceased trading in August 2001. Thereafter it generated no further revenue from sales activities and its activities consisted mainly in disposing of its property interests and administering those property interests of which it was unable to divest itself.

(34) The disposal of its assets produced cash which was lent within the group producing some interest income, of approximately £1.3m (from the year ended 31 March 2002 until liquidation). Otherwise, following disposal of its assets MSG was left with an interest in a lease until at least 31 January 2012 on its former store in Cologne which was sublet to a third party at a small ongoing loss<sup>5</sup>.

(35) In the period from the closure of the trade, accounting or tax profits shown for MSG (in Schedule 2) arose mainly from disposal of assets, adjustment of provisions made for anticipated closure costs and the waiver of loans by the Appellant

(36) The Appellant's group took the following steps to liquidate MSG:

(a) On 28 June 2006 the consent of the landlord of the Cologne property was obtained to permit the sale of BV's shareholding to MSIH;

(b) On 9 October 2006 the shareholder of MSG resolved to appoint a liquidator;

(c) On 25-27 October 2006 there was publication of the liquidation;

(d) Under German law a minimum period of one year must pass following publication before the company can be finally liquidated;

(e) Completion of the liquidation required the assignment of MSG's liabilities under the Cologne lease to another group company with the consent of landlord and sub-tenant. This was completed on 1 October 2007;

(f) The liquidator settled all third party liabilities of MSG by 3 December 2007;

(g) A final distribution of assets took place on 4 December 2007;

(h) MSG was dissolved on 14 December 2007, the date on which it was removed from the commercial registry.

#### *German Law on loss Utilisation*

(37) Under German law:

(a) corporation tax is assessed on a calendar year basis;

(b) a company can carry forward losses indefinitely until it is dissolved;

(c) a company could carry back:

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<sup>5</sup> The details are summarised in paragraph 11 of the first witness statement of Mr Abdul Nabi dated 14 April 2008 and the sub lease to GbR Köln dated 21 November 2003.

- (i) a maximum of DM 10 million for 2 years from 1996 to 1998;
- (ii) a maximum of DM 2 million for 1 year from 1999 to 2000;
- (iii) a maximum of DM 1 million (or €11,500) for 1 year from 2001 to 2007;

(d) prior to 2004 there was no limit on the amount of brought forward losses which could be utilised in any year. From 2004 the maximum amount of losses which can be utilised in any year is 60% of that year's profits after the first €1 million;

(e) there is no order in which losses are utilised;

(f) there is no distinction between types of losses

(38) Under German law from 1997, loss deduction rules were further limited on a change of ownership. From 1997, a company could not utilise brought forward losses if more than 50% of its shares were transferred and the company resumed or continued its business with predominantly new assets. This exclusion was not triggered if the contribution of new assets solely served the purpose of the recovery of the business from which the losses derived and the company maintained that business for 5 years to an economically comparable extent. Once a business ceased it could not be recovered and this exception could not apply:

(a) The recovery clause only applies if the size of the loss making business in the period of losses is not reduced by more than 50 % in the recovery period; and

(b) A business that had ceased could not be recovered. A material change of the business may have a negative impact on the recovery clause.

(39) Under the relevant German law of the time:

(a) the losses of a subsidiary could be applied to the profits and losses of its German parent within an "Organschaft";

(b) from 1997 to 2006 the losses of a company absorbed by merger with another German company could be transferred to the merged entity provided the merger was with another German company (and not a partnership) and the business which had caused the loss was maintained to a comparable extent for 5 years following the merger. Following 2006 losses could not be transferred upon a merger. The possibility to transfer losses within a merger procedure to a profitable company was restricted for all mergers whose registration with the Commercial register was applied for after 5 August 1997 and was then eliminated for all mergers, for which application for registration with the Commercial register took place after 12 December 2006;

(c) upon the commencement of a liquidation the object of the company is restricted to completion of the liquidation. A loss carried forward remaining after the completion of the liquidation cannot be utilised (as the company has ceased to be liable to corporation tax).

(40) The tax return of MSG shows that after completion of the liquidation, the unutilised losses carried forward of €25,293,506 remained unused and could no longer be used for tax purposes.

#### *Belgium*

(41) MSB was a corporation organised under Belgian law, having its registered office at this time at Rue D'Argent 10/20, B-1000 Bruxelles, Belgium. MSB was resident in Belgium for tax purposes. It was not a dual resident company.

(42) MSB operated 4 retail stores in Belgium and a branch in Luxembourg for clothing, foods, home furnishings, furniture, gifts, accessories, toiletries and cosmetics and various other products under the name "Marks and Spencer". The number of employees (excluding head office functions) exceeded 200. The company ceased trading by 31 December 2001.

(43) After the decision on 29 March 2001 to withdraw from the Continental European market, unsuccessful attempts were made to find a purchaser for MSB. Thereafter, the company began to dispose of its assets, with the Brussels and Antwerp properties being sold on 31 October 2001. Trading ceased on 22 December 2001. Thereafter MSB generated no further revenue from sales activities. In the period from closure any accounting or tax profits shown for MSB (Schedule 3) arise mainly from the sale of fixed assets or the reversal of provisions made for anticipated closure costs.

(44) The Appellant's group took the following steps to liquidate MSB:

(a) By October 2006 accounts were prepared and audited for the accounting period ending 31 March 2006;

(b) On 30 October 2006 its intra group debts were capitalised to enable MSB to be liquidated on a solvent basis;

(c) On 30 October 2006 the shareholder of MSB resolved to appoint a liquidator and the Board of MSIH approved the liquidation of MSB;

(d) On 31 October 2006 the liquidator was appointed;

(e) On 16 November 2006 MSB applied to the Court for the approval of the appointment of a liquidator;

(f) By 23 November 2007 the liquidator had resolved all outstanding debts and claims, all necessary accounts had been drawn and the liquidator reported on his plan for the distribution of assets;

- (g) On 27 December 2007 the shareholders of MSB approved the liquidators planned distribution;
- (h) On 27 December 2007 MSB was dissolved and the assets of the company were then held by the liquidator on behalf of the shareholders;
- (i) On 17 January 2008 the Court approved the closure of the liquidation;
- (j) On 30 January 2008 the Court approved the planned distribution of assets which took place on 26 February and 17 March 2008.

*Belgian Law on loss Utilisation*

(45) Under Belgian law:

- (a) corporation tax is assessed on the basis of the financial accounting period;
- (b) losses could not be carried back but could be carried forward indefinitely until the dissolution of the company;
- (c) there is no limit on the brought forward losses which can be offset against profits in any year;
- (d) a liquidator is not able to restart a ceased business or commence a new one;
- (e) there is no order in which brought forward losses are utilised;
- (f) there is no distinction between types of losses.

(46) Under Belgian law, brought forward losses cannot be offset against profits following a change of control of the company unless justified by legitimate financial or economic reasons. If such reasons cannot be established on a change of control, all carried forward losses in the company are lost.

(47) Under Belgian law a limited amount of brought forward losses of a company can be transferred to the new entity upon merger with another Belgian company, provided the merger meets the conditions for a tax free merger. As MSB had negative equity at the time of the closure of its activities in 2001, any merger would not have met the requirements of a tax free merger and consequently, no amount of its losses could have been carried forward and used by the new entity.

(48) The tax return for MSB shows that after completion of the liquidation, the unutilised losses carried forward of €25,394,877 remained unused and could no longer be used for tax purposes.

## **Schedule 1: Performance against Forecast - Germany**

DM'000

<i>Year ending 31 March</i>	<i>Notes</i>	<b>1997</b>	
		<i>95 Plan</i>	<i>Actual</i>
<b>Profit and Loss</b>			
Turnover		18,930	22,083
Cost of Sales		<u>(11,395)</u>	<u>(15,302)</u>
Gross Profit		<u>7,535</u>	<u>6,781</u>
Operating Profit/(loss)		<u>(500)</u>	<u>(16,267)</u>
Profit/(loss) before tax		<u>(14,150)</u>	<u>(16,149)</u>
<b>Balance Sheet</b>			
Capital Injections in year			10,000
Amounts owed intragroup at year end	1		2,372
Bank loans at year end	1		2,676
Net current liability/(asset)	1		4,607

<i>Year ending 31 March</i>	<i>Notes</i>	<b>1998</b>		
		<i>95 Plan</i>	<i>97 Plan</i>	<i>Actual</i>
<b>Profit and Loss</b>				
Turnover		57,550	37,900	32,492
Cost of Sales		<u>(34,595)</u>	<u>(23,600)</u>	<u>(20,073)</u>
Gross Profit		<u>22,955</u>	<u>14,300</u>	<u>12,419</u>
Operating Profit/(loss)		<u>(355)</u>	<u>(5,600)</u>	<u>(12,810)</u>
Profit/(loss) before tax		<u>(4,055)</u>	<u>(6,700)</u>	<u>(12,395)</u>
<b>Balance Sheet</b>				
Capital Injections in year				112,000
Amounts owed intragroup at year end	1			2,788
Bank loans at year end	1			1,568
Net current liability/(asset)	1			9,551

<i>Year ending 31 March</i>	<i>Notes</i>	<b>1999</b>		
		<i>95 Plan</i>	<i>97 Plan</i>	<i>Actual</i>
<b>Profit and Loss</b>				
Turnover		98,055	127,200	54,603
Cost of Sales		<u>(58,690)</u>	<u>(73,400)</u>	<u>(39,699)</u>
Gross Profit		<u>39,365</u>	<u>53,800</u>	<u>14,904</u>
Operating Profit/(loss)		<u>(2,401)</u>	<u>7,400</u>	<u>(46,725)</u>
Profit/(loss) before tax		<u>(1,049)</u>	<u>(12,900)</u>	<u>(49,210)</u>
<b>Balance Sheet</b>				
Capital Injections in year				0

Amounts owed intragroup at year end		109,000
Bank loans at year end		9,000
Net current liability/(asset)		120,000

<i>Year ending 31 March</i>	<i>Notes</i>	<b>2000</b>		
		<i>95 Plan</i>	<i>97 Plan</i>	<i>Actual</i>
<b>Profit and Loss</b>				
Turnover		161,260	201,400	65,703
Cost of Sales		(95,965)	(115,700)	(46,726)
Gross Profit		<u>65,295</u>	<u>85,700</u>	<u>18,977</u>
Operating Profit/(loss)		<u>8,550</u>	<u>13,800</u>	<u>(35,002)</u>
Profit/(loss) before tax		<u>3,551</u>	<u>4,600</u>	<u>(94,883)</u>
<b>Balance Sheet</b>				
Capital Injections in year				75,000
Amounts owed intragroup at year end				84,000
Bank loans at year end				15,000
Net current liability/(asset)				17,700

<i>Year ending 31 March</i>	<i>Notes</i>	<b>2001</b>		
		<i>95 Plan</i>	<i>97 Plan</i>	<i>Actual</i>
<b>Profit and Loss</b>				
Turnover		127,025	117,648	32,256
Cost of Sales		(75,444)	(67,439)	(20,808)
Gross Profit		<u>51,581</u>	<u>50,209</u>	<u>11,448</u>
Operating Profit/(loss)		<u>8,948</u>	<u>8,743</u>	<u>(8,951)</u>
Profit/(loss) before tax		<u>4,807</u>	<u>6,800</u>	<u>(11,118)</u>
<b>Balance Sheet</b>				
Capital Injections in year				0
Amounts owed intragroup at year end	1			18,951
Bank loans at year end	1			1,839
Net current liability/(asset)	1			51,627

#### Notes

1 All data taken from the report prepared by Frank Ilett, Deloitte UK, dated 31 March 2008 and based on stat pack information, with the exception of the indicated balance sheet data, which is based on information from the company balance sheet in the statutory accounts.

## Schedule 2: Profits/(Losses): Germany

### Germany Losses (Local and £)

Period of Account	Notes		Profit/(loss) before tax per German statutory accounts	Profit/(loss) per German tax return	Tax losses brought forward per German tax return	Tax losses carried forward per German tax return	Profit/(loss) before tax per German statutory accounts	Profit/(loss) per German tax return	Tax losses brought forward	Cumulative tax losses
			(DM/€)	(DM/€)	(DM/€)	(DM/€)	(£)	(£)	(£)	(£)
31 March 1996	1	DM	(1,954,423)	(1,954,423)	(589)	(1,955,012)	(873,033)	(873,033)		(873,033)
31 March 1997		DM	(16,260,979)	(16,260,979)	(1,955,012)	(18,215,991)	(6,601,459)	(6,601,459)	(873,033)	(7,474,492)
31 March 1998		DM	(13,084,556)	(13,084,556)	(18,215,991)	(31,300,547)	(4,439,205)	(4,439,205)	(7,474,492)	(11,913,697)
31 March 1999		DM	(50,253,415)	(50,184,974)	(31,300,547)	(81,485,521)	(17,506,851)	(17,483,008)	(11,913,697)	(29,396,705)
31 March 2000		DM	(94,513,749)	(94,535,148)	(81,485,521)	(176,020,669)	(30,718,197)	(30,725,152)	(29,396,705)	(60,121,857)
31 March 2001	2	€	(42,243,785)	(42,256,960)	(89,997,939)	(132,254,899)	(26,074,802)	(26,082,933)	(60,121,857)	(86,204,790)
31 March 2002		€	12,503,065	3,951,663	(132,254,899)	(128,303,236)	7,686,153	2,429,251	(86,204,790)	(83,775,539)
31 March 2003	3	€	18,070,775	5,987,075	(128,303,236)	(122,316,161)	11,550,512	3,826,830	(83,775,539)	(79,948,709)
31 March 2004		€	2,403,105	(1,556,003)	(122,316,161)	(123,872,164)	1,667,086	(1,079,433)	(79,948,709)	(81,028,142)
31 March 2005	4	€	4,279,460	2,988,622	(123,872,164)	(121,678,990)	2,912,981	2,034,322	(81,028,142)	(78,993,820)
P/e 8 October 2006	5	€	318,308	(79,519)	(121,678,990)	(121,758,509)	217,066	(54,226)	(78,993,820)	(79,048,046)
P/e 3 December 2007	6	€	176,522	(3,534,997)	(121,758,509)	(125,293,506)	120,377	(2,410,650)	(79,048,046)	(81,458,696)

1 Local currency as DM until 2000. From 2001, € applies. For period of account 31 March 1996 actual loss in accounts is DM 1,954,422,53.

The figure in Schedule 2 has been rounded up to DM 1,954,423 to correspond to amount given in PWC expert witness report (para 4.6.1.)

2. For the accounting period ending 31 March 2001, the figures from the returns have been converted to Euros, the actual figures in DM as per

the returns are: Profits/(loss) per German tax return - DM 82,647,430 & tax losses brought forward of DM 176,020,669 and tax losses carried forward of DM 258,668,099.

3. For the accounting period ending 31 March 2003 the figure in the return is €5,987,133 - this has been reduced to €5,987,075

4. Loss offset in year subject to a set-off restriction of €795,449

5. For the accounting period ending 8 October 2006, profit/loss before tax per German statutory accounts:	
profit for the year in the period 1/4/05 to 31/3/06:	349,190
loss for the period 1/4/06 to 8/10/06:	30,882
as per this Schedule and the accounts:	318,308

6 Per final submitted tax return

### Schedule 3: Profits/(Losses): Belgium

#### Belgium Losses (Local and £)

Period of Account	<i>N</i>	<i>o</i>	Profit/(loss) before tax per Belgium statutory accounts	Profit/(loss) per Belgium tax return	Tax losses brought forward per Belgian tax returns, as amended for agreed adjustments with tax authorities	Tax losses carried forward per Belgian tax returns, as amended for agreed adjustments with tax authorities	Profit/(loss) before tax per Belgium statutory accounts	Profit/(loss) per Belgium tax return	Tax losses brought forward	Tax losses carried forward
	<i>t</i>		(BEF/€)	(BEF/€)	(BEF/€)	(BEF/€)	(£)	(£)	(£)	(£)
	<i>e</i>									
	<i>s</i>									
31 March 1998	<u>1</u>	BEF	(37,182,072)	(34,752,952)	0	(34,752,952)	(618,388)	(577,988)	0	(577,988)
31 March 1999	<u>2</u>	BEF	(265,686,081)	(264,120,286)	(34,752,952)	(298,873,238)	(4,471,511)	(4,445,158)	(577,988)	(5,023,146)
31 March 2000	<u>3</u>	BEF	(193,527,045)	(192,517,426)	(298,873,238)	(491,390,664)	(3,045,243)	(3,029,357)	(5,023,146)	(8,052,503)
31 March 2001	<u>4</u>	€	(69,583,514)	(25,461,678)	(12,168,735)	(37,630,413)	(42,950,135)	(15,716,115)	(8,052,503)	(23,768,618)
31 March 2002	<u>5</u>	€	10,749,943	12,816,776	(37,630,413)	(24,813,637)	6,608,436	7,879,004	(23,768,618)	(15,889,614)
31 March 2003	<u>6</u>	€	(1,820,349)	(1,817,899)	(24,813,637)	(26,631,536)	(1,163,534)	(1,161,968)	(15,889,614)	(17,051,582)
31 March 2004	<u>6</u>	€	1,447,719	1,447,990	(26,631,536)	(25,183,546)	1,004,314	1,004,502	(17,051,582)	(16,047,080)
31 March 2005	<u>6</u>	€	(80,181)	(80,046)	(25,183,546)	(25,263,592)	(54,578)	(54,486)	(16,047,080)	(16,101,566)
31 March 2006		€	(52,049)	(51,671)	(25,263,592)	(25,315,263)	(35,494)	(35,236)	(16,101,566)	(16,136,802)
31 March 2007 P/e 27	<u>7</u>	€	26,591	45,177	(25,315,263)	(25,270,086)	18,133	30,957	(16,136,802)	(16,105,845)
December 2007	<u>8</u>	€	(124,791)	(124,791)	(25,270,086)	(25,394,877)	(85,100)	(85,100)	(16,105,845)	(16,190,945)

1. The 1998 figures for profit/(loss) are per the Belgian tax return and tax losses carried forward are those as adjusted by the Belgian Revenue -

see paragraphs 3.3.2 and 3.3.6 of the expert report of Pascal Janssens of PWC.

2. For 1999, the tax losses brought forward and the tax losses carried forward figures provided in the Schedule are those which were adjusted

by the Belgian Revenue as per PWC expert witness report (Pascal Janssens) at paragraphs 3.4.2 and 3.4.4.  
The difference between the loss carried forward per the submitted Return (BEF 300,235,365) and the Schedule 3 (BEF 298,873,238)

is BEF 1,362,127, being the 1998 agreed adjustment.

3 Local currency as BEF until 2000. From 2001, € applies

4. For a/p ending 31 March 2001 the profit/loss per Belgian tax return, the loss brought forward and tax losses carried forward were the subject of amendment by the Belgian Revenue - see their letters of 14 January 2008, 10 May 2004 and 24 November 2006 (attached) for details of these adjustments

The figures as originally recorded in the return are €60,241,189, €12,181,256 and €72,423,189 respectively as per Box 7 of the declaration (see paragraphs 3.6.1. - 3.6.12 of the expert report of Pascal Janssens of PWC.)

The figure provided in the Schedule has been rounded up from €69,583,513.94 in the accounts

5. For a/p ending 31 March 2002, the figures for the profit/loss per Belgian tax return, tax loss brought forward and tax loss carried forward are those as adjusted by the Belgian Revenue - see letters referred to at note 4. The original figures in the Return appear as follows: (a) €47,490,472; (b) €72,423,189 and (c) €24,836,717 respectively.

6. There are slight discrepancies between the figures in the tax return and the Schedule resulting from a rounding up exercise.

7. For period of account ending 31 March 2007, the figures for profit/loss as per Belgian accounts is reached as follows:

Profit for the period 1/4/2006 to 31/10/2006	52,127
Loss for period to 1/11/06 - 31/3/2007	(25,536)
As per Schedule 3	26,591

8 Per final submitted tax return

## Schedule 4: German Surrenderable Losses

### Summary of Germany Losses under the Three Computational Methods

Period of Account	Losses calculated as per German tax rules	On a German tax basis assuming a UK group relief rules	Losses calculated on a UK tax basis
	(£)	(£)	(£)
31 March 1996	0	(658,082)	0
31 March 1997	0	(6,601,459)	(1,791,988)
31 March 1998	(4,164,747)	(4,439,205)	(4,485,549)
31 March 1999	(17,483,008)	(17,483,008)	(19,561,628)
31 March 2000	(30,725,152)	(15,879,533)	(15,634,116)
31 March 2001	(26,082,933)	(18,537,440)	(18,497,152)
31 March 2002	0	(1,997,696)	(15,849,941)
31 March 2003	0	0	0
31 March 2004	0	0	0
31 March 2005	0	0	0
P/e 8 October 2006	0	0	0
P/e 3 December 2007	0	0	0
<b>TOTAL</b>	<b>(78,455,839)</b>	<b>(65,596,423)</b>	<b>(75,820,374)</b>

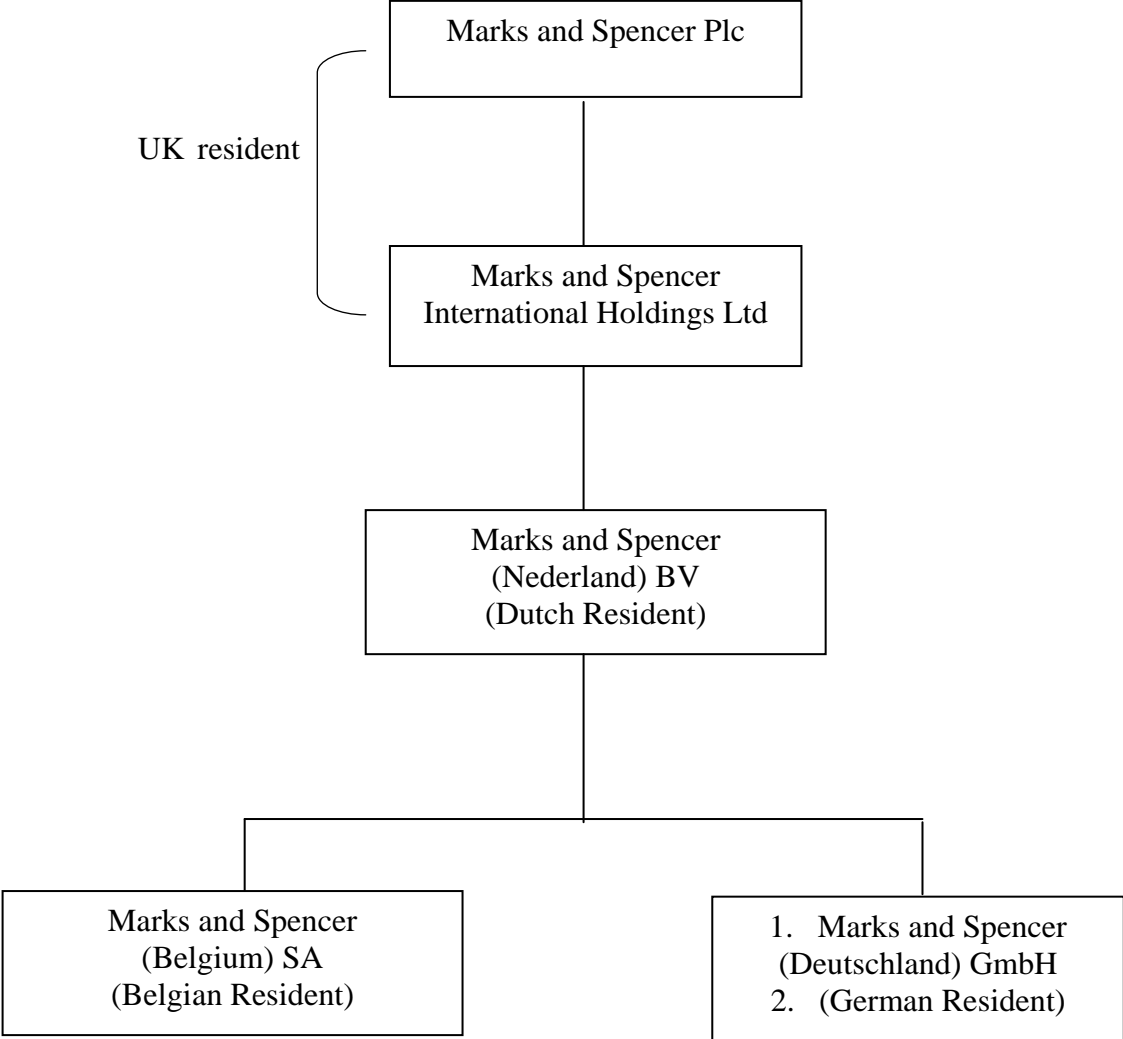
## Schedule 5: Belgian Surrenderable Losses

### Summary of Belgium Losses under the Three Computational Methods

Period of Account	Losses calculated as per Belgian tax rules	On a Belgian tax basis assuming UK group relief rules	Losses calculated on a UK tax basis
	(£)	(£)	(£)
31 March 1998	0	0	0
31 March 1999	0	0	(3,867,786)
31 March 2000	0	(2,448,118)	(2,340,914)
31 March 2001	(14,854,155)	(13,365,369)	(12,120,578)
31 March 2002	0	0	0
31 March 2003	0	0	0
31 March 2004	0	0	0
31 March 2005	0	0	0
31 March 2006	0	0	0
31 March 2007	0	0	0
P/e 27 December 2007	0	0	0
<b>TOTAL</b>	<b>(14,854,155)</b>	<b>(15,813,487)</b>	<b>(18,329,278)</b>

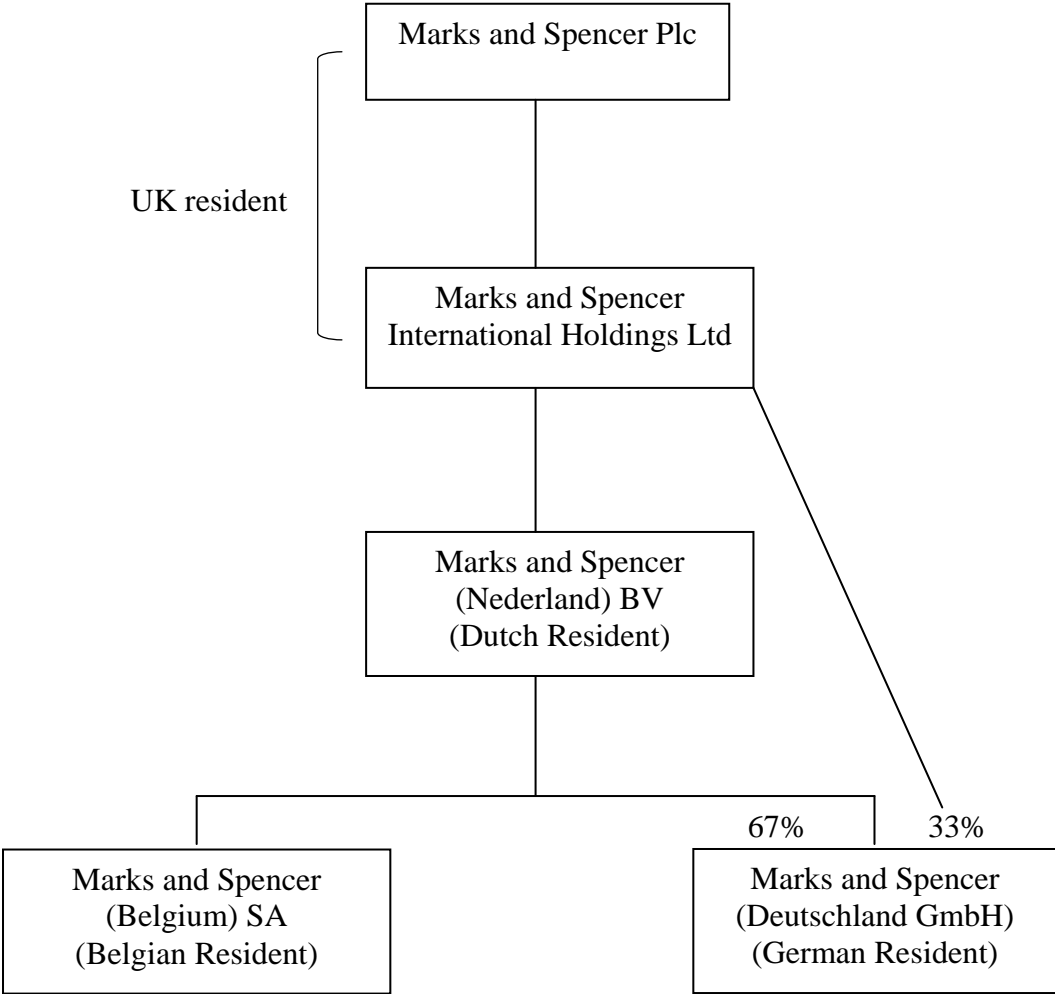
GROUP STRUCTURE FOR 1996 TO 1999

(all holdings 100%)



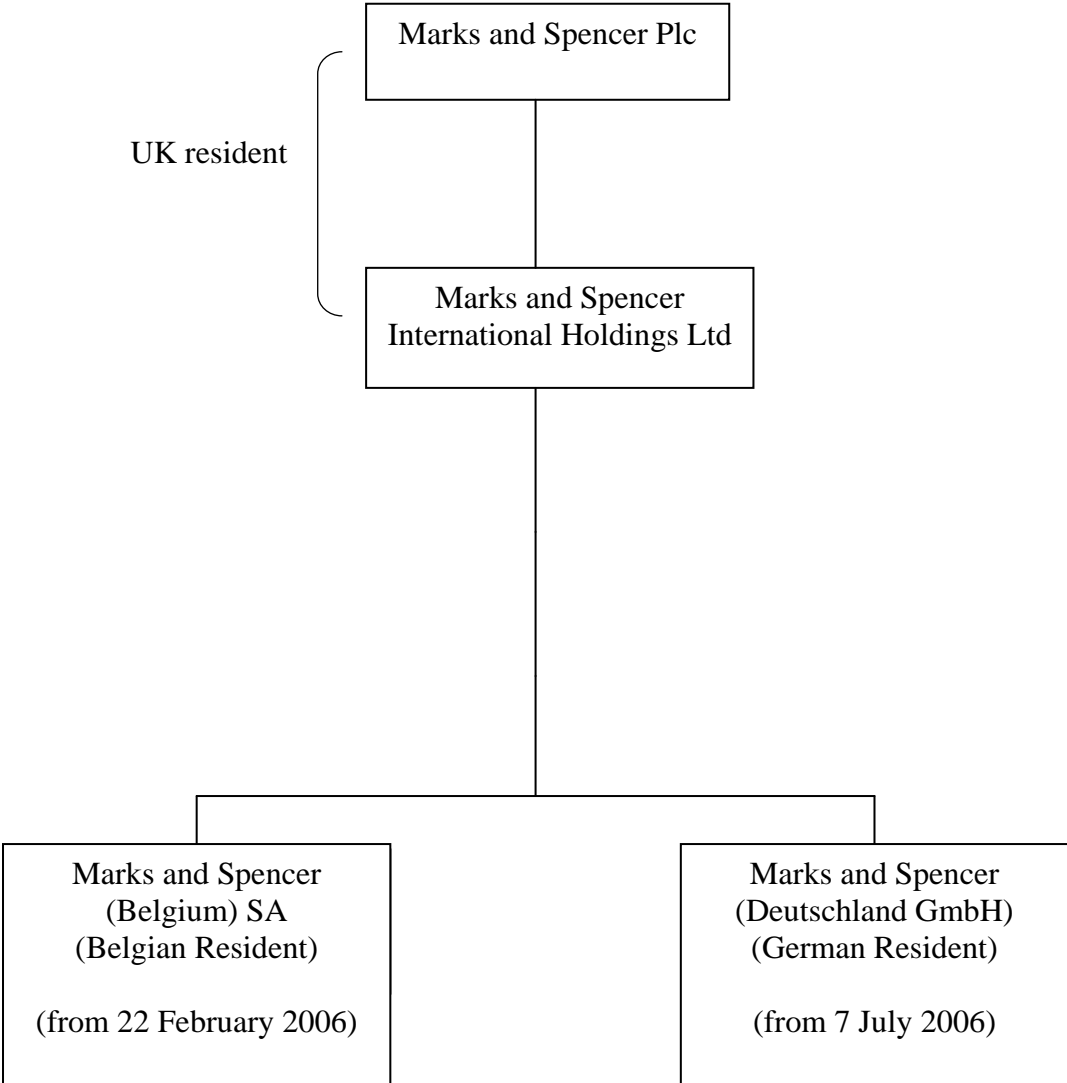
GROUP STRUCTURE FOR 2000 TO 2006

(all holdings 100% except where shown)



GROUP STRUCTURE FROM 2006

(all holdings 100%)





*Preliminaries*

7. It may be helpful to start by summarising the chronology in the following table:

	<b>Germany</b>	<b>Belgium</b>
31 March 2000	First group relief claim for year 1998	
28 March 2001	Decision to cease trading	
30 March 2001	First group relief claim for year 1999	
August 2001	Ceased trading	
24 September 2001	First group relief claim for years 2000 and 2001	First group relief claim for years 2000 and 2001
22 December 2001		Ceased trading
8 March 2002	Figures for losses adjusted for years 1998 – 2001 [bundle E1/7]	Figures for losses adjusted for years 2000 - 2001 [bundle E1/7]
17 February 2003	First group relief claim for year 2002	First group relief claim for year 2002
26 March 2004	Amended first group relief claim for year 2002 [bundle G1/21]	Amended first group relief claim for year 2002 [bundle G1/9]
13 December 2005	ECJ judgment	
10 April 2006	Park J's judgment	
9 October 2006	Resolution to appoint liquidator; published 25-27 October 2006	
30 October 2006		Resolution to liquidate (liquidator appointed 31 October 2006, liquidator approved by court 16 November 2006)
20 February 2007	Court of Appeal judgment	
20 March 2007	Second group relief claims for years 1996-2002	Second group relief claims for years 2000-2002
27 June 2007		First group relief claims for years 1998 - 1999
3 December 2007	All third-party liabilities paid	
4 December 2007	Distribution of assets	
12 December 2007	Third group relief claims for years 1996-2002	Third group relief claims for years 1998-2002
14 December 2007	Company dissolved	
27 December 2007		Company dissolved and assets held on behalf of the shareholders
17 January 2008		Court approves closure of liquidation
17 January 2008		Court approved distribution of assets which took place on 26 February 2008 and 17 March 2008
31 March 2008		Liquidator signs consent to surrender
11 June 2008		Fourth group relief claim for 2000-2002

References in this decision to the first, second, third and fourth claims are to the claims described above.

8. It is now common ground that if the losses available for group relief are calculated on a local basis (that is to say by applying local tax rules) the effect of using the losses shown in Schedules 2 and 3 of the Agreed Statement of Facts on a first in first out basis is that there are no remaining losses of MSG for the years ended 31 March 1996 and 1997, or for MSB for the years ended 31 March 1998, 1999 and 2000 (this is shown in the second columns of Schedules 4 and 5 of the Agreed Statement of Facts). Accordingly we shall not deal with these years.
9. There is no issue about the losses of the French subsidiary as this was sold and the losses used by the purchaser's group.
10. The rules for claiming group relief changed with effect (in this case) from the year ending 31 March 2000. The only years affected by the former pay and file rules are for MSG for the years ended 31 March 1998 and 1999. All other years fall within the self-assessment rules in the Finance Act 1998. We shall deal with the latter and return to deal with the two earlier years for MSG.

*The decision of the ECJ*

11. As set out above, the ECJ decided that the UK group relief rules constituted a restriction on the freedom of establishment but were justified. On this point the ECJ held:

“42 On that point, the United Kingdom and the other Member States which submitted observations put forward three factors to justify the restriction.

43 First, in tax matters profits and losses are two sides of the same coin and must be treated symmetrically in the same tax system in order to protect a balanced allocation of the power to impose taxes between the different Member States concerned. Second, if the losses were taken into consideration in the parent company's Member State they might well be taken into account twice. Third, and last, if the losses were not taken into account in the Member State in which the subsidiary is established there would be a risk of tax avoidance.

44 As regards the first justification, it must be borne in mind that the reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (see, in particular, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 49 and the case-law cited).

45 None the less, as the United Kingdom rightly observes, the preservation of the allocation of the power to impose taxes between Member States might make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses.

46 In effect, to give companies the option to have their losses taken into account in the Member State in which they are established or in another Member State would significantly jeopardise a balanced allocation of the power to impose taxes between Member States, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred.

47 As regards the second justification, relating to the danger that losses would be used twice, it must be accepted that Member States must be able to prevent that from occurring.

48 Such a danger does in fact exist if group relief is extended to the losses of non-resident subsidiaries. It is avoided by a rule which precludes relief in respect of those losses.

49 As regards, last, the third justification, relating to the risk of tax avoidance, it must be accepted that the possibility of transferring the losses incurred by a non-resident company to a resident company entails the risk that within a group of companies losses will be transferred to companies established in the Member States which apply the highest rates of taxation and in which the tax value of the losses is therefore the highest.

50 To exclude group relief for losses incurred by non-resident subsidiaries prevents such practices, which may be inspired by the realisation that the rates of taxation applied in the various Member States vary significantly.

51 In the light of those three justifications, taken together, it must be observed that restrictive provisions such as those at issue in the main proceedings pursue legitimate objectives which are compatible with the Treaty and constitute overriding reasons in the public interest and that they are apt to ensure the attainment of those objectives.

52 That analysis is not affected by the indications, set out in the second part of the first question, relating to the arrangements applicable in the United Kingdom:

- to the profits and losses of a foreign subsidiary of a company established in that Member State;
- to the dividends distributed to a company established in that State by a subsidiary established in another Member State.”

12. The important part of the ECJ’s decision for our purposes is the following part dealing with whether the restriction went beyond what was necessary to attain the objectives pursued. On this the ECJ said:

“55 In that regard, the Court considers that the restrictive measure at issue in the main proceedings goes beyond what is necessary to attain the essential part of the objectives pursued 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, if necessary by transferring those

losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and

– there is no possibility for the foreign subsidiary’s 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.

56 Where, in one Member State, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to Articles 43 EC and 48 EC to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.”

Accordingly the question for us is whether the Appellant has demonstrated that it has fulfilled the conditions in [55], which we shall call the “no-possibilities test.”

13. The ECJ gave further guidance on the no-possibilities test in *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn*, Case C-414/06, in relation to losses in the Luxembourg permanent establishment of a German limited partnership. Under the tax treaty between Germany and Luxembourg the profits of the permanent establishment were not taxable in Germany, which did not give relief for the losses either, although losses incurred in a German permanent establishment would be deductible. The losses were in fact all subsequently used in Luxembourg (para 14 of the Advocate General’s Opinion). The question was raised whether all three justifications present in *Marks and Spencer* were necessary. The court said:

“46. It should be pointed out that reference was made in paragraph 54 of the judgment in *Marks & Spencer* to the possibility of making the benefit of the tax advantage at issue subject to such a condition, together with the possibility of making the benefit of that advantage conditional upon the subsidiary established in a Member State other than that in which the principal company has its seat having taken full advantage of the possibilities available in its Member State of residence of having the losses taken into account.

47 In that regard, the Court held in paragraph 55 of the judgment in *Marks & Spencer* that a measure which restricts the freedom of establishment goes beyond what is necessary to attain the objectives pursued where a non-resident subsidiary has exhausted the possibilities for having the losses incurred in the Member State where it is situated taken into account for the accounting period concerned and also for previous accounting periods and where there is no possibility for that subsidiary’s losses to be taken into account in that State for future periods.

48 In paragraph 56 of that judgment, the Court also stated that where, in one Member State, the resident parent company demonstrates to the national tax authorities that those conditions are fulfilled, it is contrary to Article 43 EC to preclude the possibility for the parent

company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.

49 As regards the main proceedings, it must be pointed out that Luxembourg tax legislation provides for the possibility of deducting a taxpayer's losses in future tax years for the purposes of calculating the tax base.

50 As was confirmed at the hearing before the Court, Lidl Belgium has in fact benefited from such an offsetting of the losses incurred by its permanent establishment in 1999 in a subsequent tax year, namely 2003, in which that entity generated profits.

51 Accordingly, Lidl Belgium has not shown that the conditions laid down in paragraph 55 of the judgment in *Marks & Spencer*, for establishing the situation in which a measure constituting a restriction on the freedom of establishment for the purposes of Article 43 EC goes beyond what is necessary to attain legitimate objectives recognised by Community law, were satisfied.”

*The meaning of the no-possibilities test*

14. Following the ECJ decision, Park J gave the following guidance on the meaning of the no-possibilities test:

“[31] It follows from what I have said in relation to the losses of M&SF that M&S can be entitled to group relief for the losses of M&SG and M&SB only if those losses come within the circumstances described by the ECJ in the two indents of para 55 of the judgment. Paraphrasing them in relation to M&SG: (the first indent) M&SG must have exhausted the possibilities available to it in Germany of having the losses taken into account for the accounting periods concerned by the claim for relief and also for previous accounting periods, if necessary by transferring them to a third party or by offsetting them against the profits made by ‘the subsidiary’ (presumably M&SG itself) in previous accounting periods; further (the second indent) there must be no possibility of M&SG’s losses to be taken into account in Germany for future periods either by M&SG itself or by a third party, in particular where M&SG has been sold to the third party. *Mutatis mutandis* the same applies to the losses of M&SB.

[32] In submissions to me a number of questions were canvassed as to what the ECJ had in mind by the concepts which it set out in para 55. I believe that it is my responsibility to interpret the judgment of the court, but if an interpretation may give rise to a question of how it would apply to the particular facts of M&SG or M&SB, that would be a matter to be determined in the first instance by the Special Commissioners. I should add that such a question could include a question of what the law of Germany or Belgium is or was about tax relief for the losses of companies.

[33] There are a number of points which I believe that I can appropriately and, I hope, helpfully make. The first is that, in my view, when the ECJ refers to ‘possibilities available’ it means recognised possibilities legally available given the objective facts of the company’s situation at the relevant time. What is the relevant time

could be a question of considerable importance. I will consider it later, but first I will focus on the other elements of what I have just said: possibilities legally available, the objective facts of the company's situation at the relevant time, and the possibilities being recognised possibilities.

[34] I start with the assumption, which is certainly correct, that the tax laws of Germany and Belgium do contain provisions under which relief for losses can be obtained in some circumstances. That, however, is not enough to mean that M&SG and M&SB could never satisfy the conditions of para 55 of the ECJ judgment. In any developed tax system there will be detailed rules regulating at least the following matters: (1) what kinds of losses qualify for some form of tax relief; (2) for what form or forms of tax relief they qualify; that is what the kinds of profits or income are which, apart from the losses, would be taxable, but against which relief for the losses can be obtained; (3) what the periods are against the profits or income of which the losses can be relieved. These can be complicated matters.

[35] The UK rules about the availability of tax relief for losses made by companies are not directly relevant to the present case: it is the German and Belgian rules which are relevant. However, the UK rules illustrate the range of potential complications. Just for trading losses there are: (a) rules which provide for the losses to be carried forward indefinitely to be set against future trading profits of the same trade (but not against other kinds of taxable income or gains); (b) rules which permit the losses to be carried back for a limited time against past profits of the same trade (but again not against other kinds of taxable income or gains); (c) rules which permit the losses to be carried across against other income or gains of any kind (not just trading profits), but only of the same accounting period; and (d) the group relief rules which permit the losses to be surrendered to other group companies and set against the taxable income or gains (of any kind) of the surrenderee company, but only for the same accounting period.

[36] Thus the UK rules about relief for trading losses of companies are reasonably generous, but situations can arise, and frequently do, where a UK company has made trading losses but has no possibility of obtaining any tax relief for them. In particular that will be so in the following case: the company, after making the trading losses, has ceased to trade so that it can no longer carry the losses forward and use them against future profits (even if some form of taxable income arises to it in future); further, it has made all the use which was available to it of the rights (i) to carry the losses back against past trading profits, (ii) to carry them across against other taxable income or gains of its own for the current period, and (iii) to surrender them to other companies in the same group; and there is still a balance of unrelieved losses left.

[37] I have no knowledge of how the detailed rules of German and Belgian tax law operate in relation to these matters, but the application of the criteria in para 55 of the ECJ's judgment requires an ascertainment of what forms of loss relief are provided for in Germany and Belgium and an application of them to the particular circumstances of M&SG and M&SB. I do, however, say that in my view the

particular circumstances of M&SG and M&SB do not for these purposes include the degree of probability or improbability of them returning to profitability in future. Suppose (1) that at the relevant time (which I am going to expand on below) they were still trading; (2) that, if they returned to profit in future accounting periods, their losses would, under German and Belgian tax law, have been relievable against the future profits; but (3) that evidence is given on behalf of M&S that there was little or no real likelihood of their returning to profit in the future. In that case the criteria of para 55 of the judgment would not be satisfied: the objective facts were that the company was still trading and the national tax law permitted past trading losses to be set against future trading profits. With reference to the second of the two indents in para 55 it would not be the case that there was no possibility for the losses to be taken into account in Germany and Belgium for future periods: the possibility would exist, even if it was unlikely that it would ever happen.

[38] I will give one other example to illustrate the same point. Suppose that: (1) one of the companies, say M&SG, had already ceased to trade at the relevant time; (2) German tax law, unlike UK tax law, contained provisions under which M&SG's unrelieved trading losses from its discontinued trade could be carried forward and used against future income or gains from sources other than the trade (like interest on loans); but (3) the evidence is that the M&S group in general, and M&SG in particular, had no intention that the company should ever be in receipt of other income or gains in the future. In that situation also the criteria of para 55 would not be satisfied.

[39] Here I give an example which, if it corresponds to the facts of either M&SG's or M&SB's losses, would lead to the opposite conclusion. Suppose that the principles of German or Belgian tax law were in all essential respects the same as those of UK law which I illustrated in para [36] above, and that the facts of M&SG or M&SB corresponded to those in that illustration. That is, suppose that at the relevant time either company had ceased to trade, that the German or Belgian law did not permit any carry forward of unrelieved losses of a discontinued trade, that all possibilities for which the German or Belgian law provided of carrying the losses back or setting them against other current income had been used, and that there was still a balance of unused losses. Those losses would in my judgment comply with the para 55 conditions, and M&S would in principle be entitled to group relief in respect of them.

[40] I have one other point to make before I move on to consider what is the relevant time for applying the tests which I have sought to describe. Part of what I said in para [33] was that, in my view, 'possibilities available' meant recognised possibilities. I included the word 'recognised' against the background that the ECJ's formulation effectively places on the claimant for group relief (in this case M&S) the burden of proving a negative: that there were no possibilities of obtaining German or Belgian tax relief for the losses. To prove a negative is always difficult: the litigant is exposed to the risk of it being said that he has identified a number of possibilities and shown

that they do not apply in his case, but who can say that there may not be other possibilities which have not been considered at all?

[41] However, a principle which runs through the whole of Community law and has been enunciated by the ECJ in numerous cases is the principle of effectiveness: procedures in member states must not render practically impossible or excessively difficult the exercise of rights conferred by Community law. In my view the burden cast on M&S does require it to ‘demonstrate’ (the word used in para 56 of the ECJ judgment) that none of the generally recognised means of obtaining tax relief in Germany or Belgium for a company’s trading losses existed as possibilities at the relevant time. It does not require M&S to demonstrate more than that. In particular I do not think that M&S should be at risk of losing the case by reason of an argument that there might be some other possible way of getting relief for the losses which, despite making reasonable enquiries of German and Belgian tax specialists, it has not thought of and therefore has not eliminated.”

15. This was slightly qualified by the Court of Appeal in which Chadwick LJ said:

“[45] The first of the two para 55 conditions requires that the non-resident subsidiary should have exhausted the possibilities available in its state of residence of having the losses taken into account for the surrender period or for previous accounting periods. The condition envisages that losses may be taken into account under the local law ‘by transferring those losses to a third party’ or ‘by offsetting the losses against profits made by the subsidiary in previous periods’. It is clear, therefore, that the Court of Justice had in mind that, under the local law, losses incurred by company A in the surrender period might be taken into account (i) in the computation of the taxable profits of that company for the surrender period, (ii) by way of relief (carry-back) against the profits of company A in a previous accounting period or periods or (iii) by transfer to another company, company B, who could use them to obtain relief against its taxable profits in a period corresponding to the surrender period or in a previous period or periods. Park J plainly had that well in mind when making the observations which he did at paras [34] and [35] of his judgment.

[46] As I have said, at [33] of his judgment Park J explained that ‘possibilities available’ meant ‘recognised possibilities legally available given the objective facts of the company’s situation at the relevant time’. The judge explained what he meant by ‘recognised possibilities’ at [40] and [41] of his judgment. It was necessary to demonstrate that ‘none of the generally recognised means of obtaining tax relief in Germany or Belgium for a company’s trading losses existed as possibilities at the relevant time’. It was not necessary to show that there was not ‘some other possible way of getting relief for the losses which, despite making reasonable enquiries of German and Belgian tax specialists, [M&S] has not thought of and therefore has not eliminated.’ But subject to that (with which, I think, M&S can have no quarrel) and, perhaps, to the judge’s emphasis that the possibilities must be legally available (by which he meant available within the domestic law—a point with which, again, M&S can have no quarrel)

there seems to me no material difference between the expression used by the judge—‘possibilities ... available given the objective facts of the company’s situation at the relevant time’—and that used by M&S in the skeleton argument—‘the actual possibility of use in the light of both the taxpayer’s situation and the theoretical possibilities available under the local law’.

[47] There is, perhaps, rather more force in the criticism of the judge’s interpretation of the ‘no possibilities’ test as it is to be applied in relation to the availability, under the local law, of loss relief in relation to future periods. At [37] of his judgment, when addressing the second of the two para 55 conditions (no availability of carry-forward relief), the judge observed that: ‘the particular circumstances of M&SG and M&SB do not for these purposes include the degree of probability or improbability of them returning to profitability in future’. He illustrated that view, at [37] and [38], by examples. I have set out the text of those paragraphs out earlier in this judgment; but it is convenient to refer, again, to the material passages (with emphasis added):

[37] ... Suppose (1) that at the relevant time ... [M&SG and M&SB] were still trading; (2) that, if they returned to profit in future accounting periods, their losses would, under German and Belgian tax law, have been relievable against the future profits; but (3) that evidence is given on behalf of M&S that there was little or no real likelihood of their returning to profit in the future. In that case the criteria of para 55 of the judgment would not be satisfied: the objective facts were that the company was still trading and the national tax law permitted past trading losses to be set against future trading profits ... .

[38] ... Suppose that: (1) one of the companies, say M&SG, had already ceased to trade at the relevant time; (2) German tax law, unlike UK tax law, contained provisions under which M&SG’s unrelieved trading losses from its discontinued trade could be carried forward and used against future income or gains from sources other than the trade (like interest on loans); but (3) the evidence is that the M&S group in general, and M&SG in particular, had no intention that the company should ever be in receipt of other income or gains in the future. In that situation also the criteria of para 55 would not be satisfied.’

The judge’s comment, at [37], explains why he took the view that, in neither example, would the second of the para 55 conditions be satisfied:

[37] ... With reference to the second of the two indents in para 55 it would not be the case that there was no possibility for the losses to be taken into account in Germany and Belgium for future periods: the possibility would exist, even if it was unlikely that it would ever happen.’

[48] The judge was clearly correct, if I may say so, to recognise that a possibility can exist even if it is unlikely that it will ever happen. It is, I

think, plain that the Court of Justice did not intend that the test posed by the second of the para 55 conditions would be satisfied if the claimant did no more than demonstrate that it was improbable or unlikely, or that there was little or no real likelihood, or that the claimant (or the surrendering company) had no intention, that losses could or would be set against future profits. In my view the examples which the judge gave cannot be said to be flawed. The danger, I think, is that more may be read into the judge's observation that 'the particular circumstances of M&SG and M&SB do not for these purposes include the degree of probability or improbability of them returning to profitability' than, perhaps, he intended.

[49] In my view M&S is correct in its contention that there is no reason to think that the test under the second condition is of a different nature from that under the first; that is to say, that there is no reason why the test under the second condition should not have regard to 'the objective facts of the company's situation at the relevant time'. So that, if on an objective appraisal of the surrendering company's situation, the proper conclusion is that there is no real possibility for losses incurred in the surrender period to be taken into account in its state of residence for future periods, either by the surrendering company or by a third party, then the second of the para 55 conditions is satisfied. Given the context, the phrase 'no possibility' in the second condition is to be read as 'no real possibility'; in the sense that a real possibility is one which cannot be dismissed as fanciful. It is, perhaps, unnecessary to add that a test of 'no real possibility' is not to be equated with a test of 'little or no real likelihood'. As I have said, the judge was correct in his view that a possibility may exist even where there is little or no real likelihood that the event will happen.

[50] It is because and only because I think that there is some danger that more may be read into the judge's observation that 'the particular circumstances of M&SG and M&SB do not for these purposes include the degree of probability or improbability of them returning to profitability' than, perhaps, he intended that I would allow the M&S appeal to the extent of varying the order of 11 April 2006 by deleting the words 'to determine it in the light of the judgment of the High Court' from para 2."

16. Therefore we must consider "recognised possibilities legally available given the objective facts of the company's situation at the relevant time." This is different from there being "little or no real likelihood, or that the claimant (or the surrendering company) had no intention, that losses could or would be set against future profits." It is also the case that "'no possibility' in the second condition is to be read as 'no real possibility'; in the sense that a real possibility is one which cannot be dismissed as fanciful." The second condition must also have regard to "the objective facts of the company's situation at the relevant time." Park J's example in [38] shows that the fact that the loss company had ceased to trade was not enough if the losses could still be carried forward (and the fact that the company had no intention of receiving further income was also irrelevant).

*The relevant time for the no-possibilities test to be satisfied*

17. The ECJ was silent on the time at which the no-possibilities test had to be satisfied. Guidance on this was given by Park J and the Court of Appeal. Park J said:

“[42] What is the relevant time as at which M&S has to demonstrate that the conditions of para 55 were satisfied in relation to the losses of M&SG and M&SB? The ECJ does not deal with this. It would be excessive to refer the case back to the ECJ with a request that it should give a specific answer to the question. I believe that I should form and state my own conclusion upon it.

[43] It seems to me that there are three possibilities: (1) the end of the accounting period of loss for M&SG and M&SB, and thus also the end of the accounting period of M&S as respects which M&S has claimed group relief for the losses; (2) the time or times when M&S made the claim or claims for group relief; (3) the time when an appeal on the question is decided by the Special Commissioners.

[44] In my opinion the relevant time should be (2): the time or times when M&S made the claim or claims for group relief. Time (1) is too soon, and would be likely to rule out virtually every case. At the end of an accounting period in which M&SG or M&SB made a loss and therefore was likely still to be carrying on its trade it is hard to imagine any case in which German or Belgian law would not provide for some possibility of relief for the losses.

[45] Time (3) does have the linguistic support that in para 56 of the ECJ judgment the word 'demonstrates' is in the present tense, but I do not think that the ECJ meant to say that the para 56 tests fell to be determined only by reference to the circumstances which existed when a case came to appeal, however remote that time was from the underlying events which gave rise to the issue. If that was the position it would mean that a company could claim group relief at a time when relief was not available, but then spin out time before the matter came to appeal in the hope that by then the facts would have changed and the appeal would succeed.

[46] In contrast, time (2) in my view provides a rational basis for applying para 55. If a company claims group relief at a time when the para 55 criteria are satisfied it should get the relief. If it applies for it at a time when the criteria are not satisfied it should not.”

In the Court of Appeal, Chadwick LJ, with whom Tuckey LJ and Jacob LJ concurred, said:

“[36] I can find no support in the reasoning which underlies the approach of the Court of Justice for the proposition that the para 55 conditions must be satisfied at the end of the surrender period. It is important to keep in mind, as it seems to me, that the question whether the United Kingdom tax authorities are precluded by Community law from applying the restriction on group relief imposed by domestic law does not arise until a claim for group relief is made by the claimant company. The claim must be accompanied by a notice from the

surrendering company. At the least the surrendering company must consent to the use of its losses by the claimant company; and (as I have said) it may well be that the claimant company can be required to provide some formal confirmation from the surrendering company that the losses are not available in its state of residence. The question whether the United Kingdom tax authorities are precluded by Community law from applying the restriction on group relief imposed by domestic law turns on whether the para 55 conditions are satisfied. I can see no reason in principle why the latter question—whether the para 55 conditions are satisfied—should not be answered by reference to the facts as they are when the former question arises.”

HMRC contended that this would give rise to anomalies, about which Chadwick LJ commented:

“[40] For my part, I do not find it surprising that the ruling of the Court of Justice—that there are circumstances in which the United Kingdom tax authorities would be in contravention of Community law if they were to refuse group relief to a United Kingdom resident company on the basis that the losses in respect of which that relief was claimed were the losses of a company resident in another member state—may give rise to anomalies and inconvenience. The United Kingdom domestic tax code in relation to the taxation of companies in the same group is based on the assumption that group relief is only available as between companies which are subject to that code. It may be expected that, if relief is to be given in respect of the losses of a company which is not subject to that code, the circumstances will not sit easily within the code.

[41] The ruling of the Court of Justice requires, as it seems to me, that in cases where the restrictions on group relief in respect of the losses of non-resident companies go beyond what is necessary in the pursuit of legitimate objectives compatible with the EC Treaty, those losses are to be treated, so far as possible, in the same way as losses of resident companies. Differential treatment is to be avoided. The decision of a resident company to surrender its losses—and to give notice of consent—can be made at or up to the time when the claimant company makes its claim for group relief; and so can be made on the basis of facts as they are at the end of the period within which the claimant company is permitted to make a claim for group relief. It is, I think, plain that the decision of a non-resident company to surrender its losses—because they cannot be used in its own state of residence—can be made at or up to the time when the claimant company makes its claim for group relief. I can see no reason why that decision, also, should not be made on the basis of facts (including facts which go to the question whether or not the para 55 conditions are satisfied) as they are at the end of the period within which the claimant company is permitted to make its claim.

[42] It follows that I would dismiss the Revenue's appeal. I should add that I do not see the judge's decision on this point as providing opportunities for abuse. The Court of Justice made clear, at para 57 of its judgment, that the United Kingdom tax authorities are entitled to adopt or maintain in force rules having the specific purpose of

precluding from a tax benefit wholly artificial arrangements whose purpose is to circumvent or escape national tax law. The effect of artificial arrangements made by the non-resident company for the purpose of enabling it to be said that the para 55 conditions are met can be addressed if and when reliance is placed upon such arrangements. It is not suggested that this is such a case.”

18. HMRC reserved the right to argue for the relevant date being the end of the accounting period should this case reach the House of Lords, but we have to apply the no-possibilities test at the time of the group relief claim. Mr Ewart therefore asked us to make findings of fact about the application of the no-possibilities test at the end of each accounting period. Miss Shaw opposed our doing this on the basis that she had not provided evidence at the date of making the claims and she should have the opportunity of doing so at the end of the accounting period if necessary.
19. We shall, of course, apply the no-possibilities test at the time of the claims but if we may be allowed a comment, what is conspicuously lacking is any submissions by either party about the effect on other types of loss relief available in Europe. Although the ECJ has held in *Oy AA*, Case C-231/05, that the decision in *Marks and Spencer* is not applicable to provisions under which a profit-making company can make a tax-deductible payment to a loss-making company, similar to the system of subvention payments that used to apply in the UK, it might apply to rules that permit full integration of the subsidiary’s results in the parent company, which are unlikely to apply to groupings entered into after the end of the relevant period.

*Contentions of the parties*

20. Miss Shaw, for the Appellant, contends in outline:

- (1) The no-possibilities test was satisfied at least by the time of the second claims (although she did argue that the test was satisfied at the time of the first claims) but in any event in relation to self-assessment years the time limits for new claims were still open and there was no doubt that the no possibilities test was now satisfied.

- (2) The no-possibilities test had to be applied to each euro of losses. The fact that, for example, during the liquidation some amount of losses might be used, did not mean that the rest could not satisfy the test.

- (3) In relation to the pay and file years the principle of effectiveness requires that the Appellant should be allowed to make a further claim to group relief within a reasonable time after the ECJ decision outside the domestic law time limits for the pay and file years, as indicated by Chadwick LJ in the Court of Appeal at [51]. While the situation was different from the retrospective reduction in time limits in *Condé Nast* and *Fleming* the Appellant should be given sufficient notice of its right to make a group relief claim that satisfies the conditions laid down by the ECJ. As in those cases there was a gap in the legislation dealing with cross-border group relief claims which can be remedied only by legislation. The

situation was also different from an ordinary claim for repayment of amounts overpaid. Here the taxpayer has to be in a position to demonstrate the satisfaction of the conditions of the no-possibilities test.

(4) On the quantification of the losses one method must be applied consistently. Method A in Schedules 4 and 5 of the Agreed Statement of Facts fits best with the ECJ judgment. Method B is to compute the losses in accordance with local rules and then adjust for things like capital losses and depreciation. Method C is a full re-computation in accordance with UK rules. Whatever method is used it should be applied consistently.

21. Mr Ewart QC and Ms Ford contend in outline:

(1) The no-possibilities test is not satisfied at the date of the first claims. The subsequent claims were not valid claims as the first claims had not been withdrawn and they were not alternative claims but effectively the same as the first claims.

(2) Even if the later claims were valid the no-possibilities test was never satisfied at the date of any of the later claims. In Germany even when the company is in liquidation the liquidation can be ended and the company can start business again. In Belgium losses can be used until the end of the liquidation. In both countries once the companies cease to exist the losses can no longer be used but there is then nobody who can agree to surrender the losses. The purported surrender by the liquidator of MSB on 31 March 2008 when the company was finally liquidated on 27 December 2007 and the assets finally distributed on 17 March 2008 was a nullity. Similarly, no new claims can now be made even though they would be in time because MSB and MSG no longer exist and cannot therefore consent to surrender losses.

(3) The principle of effectiveness did not require that the later claims for the pay and file years could be made out of time. Chadwick LJ's comments in the Court of Appeal in this case at [51] onwards were obiter and not in accordance with European law.

(4) If some losses could be used it proved that the no-possibilities test was not satisfied as to any amount of losses.

*Application of the no-possibilities test*

22. We find the following further facts about the claims and the liquidation of the companies:

(1) Taking the MSB claims for the year ended 31 March 2000 as an example:

(a) the first group relief claim was made on 24 September 2001 for £3,346,511 (5,230,597 Euros). The consent was to surrender that Euro figure to the Appellant "or such higher or lower amounts that may be agreed which were incurred during the accounting period ended 31 March 2000."

(b) the second group relief claim was made on 20 March 2007 and was for the different figure of Euro 4,797,410.. It was stated to be a new claim in addition to and not in substitution for the first group relief claim which was not withdrawn. The letter also said:

“This claim is made without prejudice and in the alternative to the Original Claim for 2000 Belgian losses. The Claimant does not seek group relief twice for the same profits and losses for the same accounting period. Rather in so far as it is required to meet conditions to make group relief claims in respect of the non resident losses of non resident subsidiaries (such as those referred to in paragraphs 55 and 56 of the judgment of the European Court of Justice in *C-446/03 Marks and Spencer plc v Halsey*), the claimant is entitled to claim that it does meet those requirements either at the time and in the manner required as part of the Original Claim for 2000 Belgian losses and/or as part of this claim (see *Halsey (HMIT) v Marks and Spencer, Marks and Spencer v Halsey (HMIT)* supra at paragraphs 51 and 55.

If upon determination of the Original Claim for 2000 Belgian losses it is found that all necessary conditions are met and that claim for group relief is allowed, then the Claimant hereby undertakes forthwith thereafter to withdraw this claim. If upon determination of this claim it is found that all necessary conditions are met and this claim for group relief is allowed, then the Claimant hereby undertakes forthwith hereafter to withdraw the Original Claim for 2000 Belgian losses. If both claims are allowed, the Claimant hereby undertakes forthwith thereafter to withdraw that claim which permits the surrender of the least losses, or if in the same amount, this claim.”

The accompanying surrender was for Euro 4,797,410.

(c) the third claim was made on 12 December 2007 and was in the same form as the second claim (the covering letter made reference to the second claim), as was the surrender.

(d) the fourth claim was made on 11 June 2008 in the same form as the second and third claims except that it did refer to the previous claims, as was the consent to surrender which the liquidator signed on 31 March 2008 and which confirmed the conclusion of the liquidation on 27 December 2007.

(2) The above description of the claims is typical of the other 36 claims.

(3) Professor Lüdicke, the expert called by the Appellant, appended to his report a letter from Linklaters (Germany) about the liquidation of MSG stating that:

“[MSG] (in liquidation) does not engage in any ongoing business. The liquidator must confine himself to ensuring that the liquidation is brought to a conclusion as soon as possible within the time constraints imposed by the legislation. This means he must settle all outstanding liabilities (including the company’s remaining property obligations) and distribute any surplus assets remaining to the shareholders.

The liquidator will therefore not be able to recommence business of the company or restart any new business.”

(4) However, Dr Roser, the expert called by HMRC, said:

Until the final termination of the liquidated company is entered into the trade register, the shareholder is free to decide about the termination of the liquidation phase and a re-launch of the business activities (recreation of the company’s business).

Post liquidation (ie after the termination of the legal entity is recorded in the commercial trade register) the losses carried forward are finally lost.”

We accept this qualification and assume that Linklaters did not consider that the possibility of termination of liquidation was relevant.

(5) Professor Lüdicke’s evidence on the tax position during the liquidation of MSG was:

“However, for practical purposes, taking into consideration that the object of the company during the winding-up period is to complete liquidation, the profits that can be generated are limited to the following:

- Income from remaining assets prior to their disposal
- Capital gains from disposal of remaining assets (it should be noted assets may have an inherent value due to depreciations, which is realised upon disposal, but this is economically simply a reversal of previous years’ depreciations)
- Interest income on bank accounts
- Release of provisions in the accounts (equally, this is simply a reversal of previous years’ accounting provisions).”

(6) Mr Keymeulen, the expert called by HMRC said of the liquidation of MSB:

“As a company in liquidation only exists for the purpose of its liquidation, no new activities can be developed.”

23. We heard evidence from Mr Kalish that while anything was possible it was very unlikely that MSG would succeed in making profits given their existing strategy. It was not possible to say whether a different strategy could succeed, or whether a different business could succeed, although going outside the core business for which they had expertise was highly risky. Mr Ilett’s evidence was that MSG had no real possibility of ever making profits. He considered what adjustments could be made to the strategy, such as reducing prices, but still

considered that this would not be profitable. He had not considered the effect of changes in the economic environment or changes in exchange rates. He could not say whether the same applied to a different business.

24. This evidence was given on the basis that it was not evidence of the company's intention or likelihood of making a profit, but, as the opinion of experts was part of the objective facts of the company's situation starting with the objective facts about the commercial environment in Germany at the time and applying that to the company's situation. We are unable to accept that evidence of experts that MSG could never have made a profit is an objective fact in the sense required by the no-possibilities test; it is what it purports to be, the opinion of the experts. Even if it were capable of being a fact, it does not go as far as would be necessary to show that there was no possibility of making a profit. Neither of the witnesses could say whether profits could be made in another business, such as a financial business of making loans to group companies as Mr Ewart suggested. The losses would be available against any such profits. While a company is trading what might happen in the future goes to the likelihood of its making profits which is irrelevant to the test, as shown by Park J's example at [37]. There is a contemporary document by Mr Hayes, the director responsible for European operations, for the board meeting on 25 March 1998 which forecasts losses in the next five years of DM125m but considers that the estimates were pessimistic and could improve considerably if the German economy changed. While not relevant as it goes to the likelihood of making profits it shows that the management had not ruled out the possibility of making profits if the economy changed.
25. A further point arises on whether the no-possibilities test applies to each euro of losses (as Miss Shaw contends) or to losses in general so that if there is a possibility of some losses being used, no losses can qualify under the no-possibilities test (as Mr Ewart contends). This is relevant because there was some utilisation of losses during the liquidation period. For example, in MSB provisions relating to unpaid invoices and litigation with an ex-employee were reversed, giving rise to a profit in the period 1 April 2006 to 31 October 2006 (the date of liquidation), which for tax purposes resulted in a profit for the year to 31 March 2007 (consisting of a period before and during liquidation). We consider that the answer is determined by the proper application of the no-possibilities test in accordance with the guidance given by Park J and the Court of Appeal. At one extreme if the company is still trading (or, as in Park J's example at [37], has ceased trading) but losses can still be carried forward, whether or not it is possible to use them depends entirely on the likelihood of making profits, so that none of the losses qualify. At the other extreme if, as happened here, the company is in liquidation and cannot start any new business but is holding some cash pending distribution which earns interest against which the losses can be set, we consider that one must split the losses into those that on the balance of probabilities can be set against the interest, and those that cannot. This is on the ground that the estimated income during the liquidation is one of "the objective facts of the company's situation at the relevant time." The no-possibilities test is applicable to the latter. The fact that the liquidator might

make a profitable investment that used more of the losses is, we consider, in the fanciful category in circumstances in which the liquidator's duty is merely to pay the liabilities and distribute the assets.

26. We categorise the possibility that the liquidation of a German company can be terminated and the business re-launched as not being a real possibility, and one which can be dismissed as fanciful. It is true that the distinction depends on the likelihood of its happening but we regard it as a different likelihood than whether profits will be made. Given the "the objective facts of the company's situation at the relevant time" that the liabilities had been paid by 3 December 2007 and the assets distributed on 4 December 2007, there is no real possibility of the liquidation being ended and the business being re-launched.
27. Mr Ewart's contention is effectively that no German or Belgian losses can ever satisfy the no-possibilities test because losses might be used up to the time when the company is finally liquidated, at which time the company can no longer consent to surrender the losses as it no longer exists. He attributes this to the relatively generous nature of loss relief in those countries. We consider that this is too narrow a reading and that the ECJ was aware of the situation in those countries; it is the UK rules that are out of line with the more accounts-based approach to tax in other European countries.

*Conclusion on the application of the no-possibilities test to the facts of this case*

28. As shown in the chronology there are a number of group relief claims (we use the word claims without implying that they are valid claims). The first claims were made on dates between 2000 and 2003 before the ECJ's decision; indeed it was the refusal of the first claims for the years 1998 to 2001 that initiated this appeal. These were all made before either of the companies was in liquidation, some being before, and some after, the company ceased trading. The second claims were made on 20 March 2007 following the Court of Appeal decision at a time when both subsidiaries were in liquidation. The third claims were made on 12 December 2007 just before both subsidiaries were dissolved. The fourth claims, relating to MSB only, were made on 11 June 2008 following the dissolution of the company.
29. At the time of the first group relief claims there was nothing to prevent the losses being used by continuing to trade, or starting another trade or business. Whether or not this occurs is a matter of likelihood which is to be ignored. Accordingly, we find that the no-possibilities test was not satisfied at the time of any of the first group relief claims.
30. The second group relief claims were all made during the liquidation. In both Germany and Belgium no new activities can be started once the company is in liquidation; the liquidator's functions are to pay the liabilities and distribute the assets. In both countries losses can be carried forward to the liquidation and set against income arising during the liquidation. As we have concluded in paragraph 25 above so far as it can be estimated that there will be such income

this can be used to offset the losses, but we find that any losses in excess of such estimated income will satisfy the no-possibilities test.

31. The third group relief claims were also made during the liquidation but closer to the end of it, two days before final dissolution for MSG and about two weeks before for MSB. Our finding is the same as for the second claims.
32. The fourth claim (for MSB only) was made after the dissolution of the company. Our finding is the same as for the second and third claims.
33. We are prepared to accede to Mr Ewart's request for findings at the end of each accounting period in spite of Miss Shaw's objection because the end of all of the relevant accounting periods is necessarily earlier than the first group relief claims in respect of those periods and if MSG and MSB cannot satisfy the no-possibilities test at the date of the first claims it cannot do so at an earlier date. Accordingly we find that the no-possibilities test was not satisfied at the end of any of the relevant accounting periods.

*The validity of the self-assessment claims*

34. The provisions relating to the making of group relief claims for the self-assessment years are as follows:

68—(1) A claim for group relief must specify—

- (a) the amount of relief claimed, and
- (b) the name of the surrendering company.

(2) The amount specified must be an amount which is quantified at the time the claim is made....

69—(1) A claim for group relief may be made for less than the amount available for surrender at the time the claim is made.

(2) A claim is ineffective if the amount claimed exceeds the amount available for surrender at the time the claim is made.

(3) For these purposes the amount available for surrender at any time is calculated as follows.

First step

Determine the total amount available for surrender under section 403 of the Taxes Act 1988—

- (a) on the basis of the information in the company's company tax return, and
- (b) disregarding any amendments whose effect is deferred under paragraph 31(3).

Second step

Then deduct the total of all amounts for which notices of consent have been given by the company and not withdrawn....

70—(1) A claim for group relief requires the consent of the surrendering company.

(2) A consortium claim also requires the consent of each member of the consortium.

(3) The necessary consent or consents must be given—

(a) by notice in writing,

(b) to the officer of the Board to whom the surrendering company makes its company tax returns,

(c) at or before the time the claim is made.

Otherwise the claim is ineffective.

(4) A claim for group relief is ineffective unless it is accompanied by a copy of the notice of consent to surrender given by the surrendering company....

71—(1) Notice of consent by the surrendering company must contain all the following details—

(a) the name of the surrendering company;

(b) the name of the company to which relief is being surrendered;

(c) the amount of relief being surrendered;

(d) the accounting period of the surrendering company to which the surrender relates;

(e) the tax district references of the surrendering company and the company to which relief is being surrendered.

Otherwise the notice is ineffective.

(2) Notice of consent may not be amended, but it may be withdrawn and replaced by another notice of consent.

(3) Notice of consent may be withdrawn by notice to the officer of the Board to whom the notice of consent was given.

(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.

35. This code was not designed for non-resident surrendering companies and we have to make necessary modifications to comply with the ECJ decision before we can consider the validity of the claims made. We must also bear in mind that at the time of the first claims the Appellant did not know what the law was in relation to group relief for non-resident subsidiaries. It may also be relevant that when the law was changed in 2006 in the light of the ECJ decision certain

amendments to the procedure were made, in particular requiring that the consent to the surrender be given by the claimant company and not by the surrendering company. Mr Ewart did not consider that these were relevant to us on the basis that Parliament was starting from scratch in setting out a new framework and our task is to adapt the existing provisions. It is common ground that the time limits are still open for the remaining years covered by the self-assessment rules since there is an enquiry into the relevant returns and the time limit extends to the 30 days after the appeal is finally determined: para 74, Sch 18, Finance Act 1998.

36. We have found that at the time the first claims were made MSG and MSB could not satisfy the no-possibilities test. Accordingly, no valid claim for group relief could be made at that time. Mr Ewart was contending at the same time that it was a valid claim but that the Appellant was not entitled to any group relief. We think this is illogical. If the no-possibilities test is not satisfied there can be no entitlement to group relief and so the claim did not validly claim anything. By para 69(2) “A claim is ineffective if the amount claimed exceeds the amount available for surrender at the time the claim is made.” In a domestic context the amount available for surrender is that shown in the surrendering company’s tax return. The closest modification to give effect to European law is that the claim is ineffective if it exceeds the amount of the loss that satisfies the no-possibilities test (which will be a figure computed under local law). Mr Ewart suggested that a claim that exceeded that amount would be a valid claim, just as it would still be valid in a domestic context if it transpired that the surrendering company did not have any loss. However, we consider that we should try to modify para 69(2) to apply if the claim exceeded the amount of the maximum possible claim, rather than say that it was inapplicable. Here the maximum claim is one that satisfies the no-possibilities test, which at the date of the first claim is nil. Accordingly, we find that the first claims were not valid claims at all. If we are wrong and they had some validity, the Appellant has undertaken to withdraw them and we proceed on that basis.
37. Since we have decided that at the time of the second claims the no-possibilities test was satisfied it follows that these were valid claims, and we so decide. We also find that the second claims are different from the first claims because they are in different figures.
38. It is unnecessary for us to deal with subsequent claims but if we are wrong about the application of the no-possibilities test at the time of the second claims but right at the time of the third claims we would have found the third claims to be valid on the basis that the Appellant has undertaken to withdraw the earlier claims.
39. The same applies to the fourth claim by MSB but Mr Ewart also contended that no surrender was possible once the company was dissolved. We can see his point although we think it is without merit. We approach the case on the basis that where the no-possibilities test is shown to be satisfied and the time for claiming remains open, the ECJ’s judgment should if possible be given some,

rather than no, effect. Mr Ewart's point also overlooks the fact that after the dissolution on 27 December 2007 the court approved the closure of the liquidation on 17 January 2008 and the assets were distributed on 26 February 2008 and 17 March 2008. The liquidator also made a Belgian tax return on "9.6.2008" (which we deduce is the English rather than the American order of the day and month because the return is for "01/04/2007 au 27/12/2007" which had to be filed by 30/06/2008). We had no evidence on the powers of a liquidator following dissolution but we infer from these actions that it cannot be said that the liquidator ceased to have any power to do anything at the moment of dissolution. On that basis there is no reason why the liquidator should not have made a valid surrender on 11 June 2008. Furthermore, consent to the surrender is a requirement in the domestic context because it will mean that the losses are no longer available to the surrendering company, which may increase its tax liability in future. Since the no-possibilities test ensures that the losses cannot be used elsewhere and the surrender of the losses can have no bearing on the surrendering company's tax liability in Belgium, the surrender is something of a formality, as is demonstrated by the 2006 legislation providing for the claimant company to make the surrender.

40. Accordingly, we think that there are strong reasons to say that the liquidator of MSB could make a surrender after the dissolution of the company should this be relevant. Had this point been critical to our decision we would have allowed the Appellant to call further evidence of the powers of a liquidator in Belgium after dissolution of the company, and we hope that they would be permitted to do so if the point becomes critical as a result of an appeal. Otherwise, we would conclude that by analogy with the 2006 legislation the Appellant could have consented to the surrender on behalf of MSB even after that company had been dissolved or, alternatively, that the Appellant must demonstrate satisfaction of the no-possibilities test on making its claim whether it does so in the form of a "consent to surrender" or in some other manner. The essential point, as we see it, is that the Appellant's claim is in time and that it can demonstrate at that time that the losses claimed satisfy the no-possibilities test. It follows that even if, contrary to our conclusion, the first self-assessment claims were validly made and the second, third and fourth claims were a nullity, we think that the Appellant can put the matter right by withdrawing its existing claims under paragraph 74 of Schedule 18 and making new claims within 30 days of the completion of the enquiry into the self-assessment period in question.

*The validity of the MSG claims for the years ended 31 March 1998 and 1999*

41. The time limits for making group relief claims in the pay and file period relating to MSG for the years ended 31 March 1998 and 1999 are found in Schedule 17A to the Taxes Act 1988 (added by the Finance Act 1990) which provides:

"3(1) No claim for an accounting period of a company may be made after the end of 6 years from the end of the period, except under paragraph 5 below.

(2) This paragraph applies to the withdrawal of a claim as it applies to the making of a claim.

4. Where under paragraph 2 or 3 above a claim may not be made after a certain time, it may be made within such further time as the Board may allow.

5(1) A claim for an accounting period of a company may be made after the end of 6 years from the end of the period if—

- (a) the company has been assessed to corporation tax for the period before the end of 6 years from the end of the period,
- (b) the company has appealed against the assessment, and
- (c) the assessment has not become final and conclusive.

(2) No claim for an accounting period of a company may be made under this paragraph after the end of 6 years and 3 months from the end of the period.

...

7. A claim may be made for less than the full amount available.

8. A claim, other than one under paragraph 5 above, shall be for an amount which is quantified at the time the claim is made.”

42. Schedule 17A does not include an equivalent provision to paragraph 69(2) of Schedule 18 Finance Act 1998. Paragraph 7 of Schedule 17A, however, corresponds to paragraph 69(1) and raises the question whether a claim to group relieve a loss that does not exist is a valid claim. Paragraph 69(2) deals with the point under self-assessment. If the point is relevant to the pay and file system we would also conclude that the first claim was ineffective given that the no-possibilities test was not then satisfied so that there was no Community law right to surrender. The second and subsequent claims for the accounting periods ended 31 March 1998 and 1999 of MSG, however, were made outside the prescribed time limits. HMRC has not responded to a request to extend the time limit pursuant to its power under paragraph 4 pending our decision.

43. The possibility of European law allowing further claims to be made out of time was mentioned by Chadwick LJ in the Court of Appeal in this case as follows:

“[51] As I have said, the submissions advanced by M&S in this court went beyond the issues which had been addressed by the judge. First, it was said that the Community law principle of effectiveness requires that the period during which M&S is permitted to make a claim for group relief and to demonstrate that, at the time when the claim is made, there is no possibility that the losses of the surrendering company will be used in the state of residence be extended so far as necessary to allow a claim for relief to be made within a reasonable time after the date on which its Community right to make group relief claims in respect of non-resident subsidiaries was established. It is accepted, I think, that (prima facie at least) that date would be the date (13 December 2005) on which the judgment of the Court of Justice in Case C-446/03 was handed down; although M&S may seek to argue for a later date—being the date on which ‘it is made aware of the precise nature of [the para 55] requirements’. M&S relied, in support of that submission, on observations in this court in *Condé Nast*

*Publications Ltd v Customs and Excise Comrs* [2006] EWCA Civ 976, [2006] STC 1721, in particular at [49].

[52] It appears from para 9 of the agreed statement of facts appended to the decision of the Special Commissioners that the group relief claims at issue in the present case were made by M&S on 31 March 2000 (for 1998), on 31 March 2001 (for 1999) and on 24 September 2001 (for 2000 and 2001). The claims were rejected by the Revenue by decisions dated 13 August 2001 (for 1998 and 1999) and 2 November 2001 (for 2000 and 2001). M&SG and M&SB had each ceased trading by 31 December 2001 (paras 5 and 7 of the agreed statement of facts).

[53] I have explained, earlier in this judgment, that (both under the Pay and File regime and under the Self Assessment regime) a claim for group relief may be withdrawn and replaced by another claim: para 6 in Sch 17A TA 1988, para 73 in Sch 18 FA 1998. Time limits apply: paras 2 to 5 in Sch 17A, para 74 in Sch 18. But, under both the Pay and File regime and the Self Assessment regime, the Revenue has power to extend time (para 4 in Sch 17A, para 74(2) in Sch 18). It may be that, by the date that the decision of the Court of Justice was handed down on 13 December 2005, M&S was out of time to make new claims for group relief in respect of the accounting periods ending on 31 March 1998 and 1999. But the point has not been argued and I do not decide it. We do not know whether M&S has sought to make new claims in the light of the judgment of the Court of Justice; nor what (if M&S has done so) the Revenue's response has been.

[54] For my part, I would accept that the decision of this court in *Condé Nast* does provide support for the proposition that the Community law principle of effectiveness requires that the period during which M&S is permitted to make new claims for group relief be extended so far as necessary to allow those claims to be made within a reasonable time after 13 December 2005. If M&S is permitted to (and does) make a new claim (or claims) for group relief, then it follows from the conclusion that I have reached earlier in this judgment that M&S will have the opportunity to demonstrate that, on the facts as they are at the date that the new claim (or claims) is or are made, there is no possibility that the losses of the surrendering company will be used in the state of residence.

[55] We were invited to vary the order made on 11 April 2006 so as to direct that 'as a minimum Marks and Spencer must be given a reasonable period following the time it is made aware of the precise nature of the [para 55] requirements in which to meet them'. I do not think it appropriate to include a direction in those terms. First, as I have said, we do not know whether M&S has sought to make new claims in the light of the judgment of the Court of Justice; nor what (if M&S has done so) the Revenue's response has been in relation to time limits. Second, we were informed that the decision of this court in *Condé Nast* was the subject of an appeal to the House of Lords. And third, we do not know whether or not the Special Commissioners will take the view that, on the facts as they were when the claims which are in issue were made, the para 55 conditions are satisfied. It seems to me more sensible to leave the matter on the basis that the Special

Commissioners will decide the appeal (when remitted to them)—and any application by M&S to bring in new claims on the appeal—on the facts which are then before them and with such guidance as they may obtain from the judgments in this court and (of course) the decision of the House of Lords in the *Condé Nast* appeal.”

44. Mr Ewart told us that this point was raised by the Appellant in the Court of Appeal at the last minute and in any case these remarks were obiter as the second and subsequent claims had not then been made.
45. There are two clear lines of cases. First, where a person has a Community right but does not know it and fails to take the necessary action to assert it within a reasonable domestic law time limit. The principle of legal certainty means that he loses the right, see for example *Aprile*, Case C-228/96:

“19. As regards the latter principle [the principle of effectiveness], the Court has held that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the administration concerned (Case 33/76 *Rewe v Landwirtschaftskammer Saarland*, cited above, paragraph 5, and Case 45/76 *Comet v Produktschap voor Siergewassen*, cited above, paragraphs 17 and 18; *Denkavit Italiana*, cited above, paragraph 23; see also Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025, paragraph 28, and Case C-90/94 *Haahr Petroleum v Åbenrå Havn and Others* [1997] ECR I-4085, paragraph 48). Such time-limits are not liable to render virtually impossible or excessively difficult the exercise of rights conferred by Community law. In that regard, a time-limit of three years under national law, reckoned from the date of the contested payment, appears reasonable (see *Edis* and *SPAC*, cited above, paragraphs 35 and 19 respectively).”

The principle applies even though the result is to deprive the claimant of his rights, see, for example, *Haahr Petroleum Ltd*, Case C-90/94:

48. It is apparent from the case-law, in particular from the *Rewe* and *Comet* judgments, that the laying down of reasonable limitation periods, which is an application of the fundamental principle of legal certainty, satisfies the two conditions referred to above and, in particular, cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought.

46. A possible qualification to this principle is found in *Emmott*, Case C-33/76 that there are circumstances in which time does not start to run, but this was explained in *Haahr Petroleum* to be a special case concerned with the non-implementation of a directive:

52. In paragraph 17 of that judgment [*Emmott*], the Court expressly recounted the principle that the fixing of reasonable time-limits which, if unobserved, bar proceedings, satisfies the conditions laid down in the decisions referred to. It was only because of the particular nature of directives and having regard to the specific circumstances of that case

that the Court held, in paragraph 23, that until such time as a directive has been properly transposed into domestic law, a Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.

47. A second line of cases applies where a person has a Community right for which he is in time to assert but, before he can do so, the right is taken away without any transitional provision. This contravenes the principle of legitimate expectation. As the ECJ said in *Marks & Spencer*, Case C-62/00 [referred to as *Marks & Spencer II* in the next paragraph] in relation to the introduction of the three-year cap for VAT:

38. Whilst national legislation reducing the period within which repayment of sums collected in breach of Community law may be sought is not incompatible with the principle of effectiveness, it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.

48. The European jurisprudence has recently been analysed in detail by the House of Lords in *Fleming v HMRC* and *Condé Nast v HMRC* [2008] 1 WLR 195 from which Lord Neuberger derived the following propositions:

“a) It is open to the legislature of a Member State to impose a time limit within which a claim for input tax must be brought: *Marks & Spencer II* para 35;

b) It is further open to the legislature to introduce a new time limit, or to shorten an existing time limit, within which such a claim must be brought, even where the right to claim has already arisen (an “accrued right”) when the new time limit (a ‘retrospective time limit’) is introduced: *Marks & Spencer II* paras 37 and 38;

c) Any such time limits must, however, be ‘fixed in advance’ if they are to ‘serve their purpose of legal certainty’: *Marks & Spencer II* para 39;

d) Where a retrospective time limit is introduced, the legislation must include transitional provisions to accord those with accrued rights a reasonable time within which to make their claims before the new retrospective time limit applies: *Marks & Spencer II* para 38 and *Grundig II* para 38;

e) In so far as the legislature introduces a retrospective time limit without a reasonable transitional provision (as in *Grundig II*) or

without any transitional provision (as in *Marks & Spencer II*), the national courts cannot enforce the retrospective time limit in relation to accrued right, at least for a reasonable period; otherwise, there would be a breach of Community law: see *Autologic plc v Inland Revenue Commissioners* [2006] 1 AC 118 paras 16 to 17;

f) The adequacy of the period accorded by the transitional provision ('the transitional period') is to be determined by reference, *inter alia*, to the principles of effectiveness and legitimate expectation: *Marks & Spencer II* paras 34 and 46, and *Grundig II* para 40; in particular, it must not be so short as to render it 'practically impossible or excessively difficult' for a person with an accrued right to make a claim: *Marks & Spencer II* para 34, and *Grundig II* para 33;

g) It is primarily a matter for the national courts to decide whether the length of any transitional period is adequate, although the ECJ will give a view if the transitional period is 'clearly' so short as to be inconsistent with Community law: *Grundig II* paras 39 and 40;

h) The absence of a transitional period of adequate length is not, however, automatically fatal to the enforcement of the retrospective time limit: *Grundig II* para 41;

i) Where there is no adequate transitional period, it is for the national court to fashion the remedy necessary to avoid an infringement of Community law: *Marks & Spencer II* para 34, *Grundig II* paras 33, 36, 40, and 41, *Autologic* paras 16 and 17, and the ECJ's decision in *Metallgesellschaft Ltd and ors v Commissioners of Inland Revenue* (Joined Cases C-397/98 and C-410/98) [2001] ECR I-1727, at para 85;

j) That remedy would, at least normally, be to disapply (perhaps only for a period) the operation of, the retrospective application of the new time limit to claims based on accrued rights: *Marks & Spencer II* paras 34 to 41, and *Grundig II* paras 38 to 40 and especially (with regard to temporary disapplication) para 41."

49. Our case is not on all fours with either of these two main lines of cases. First, the Appellant has made a claim in order to assert what it considered to be a Community right, but which domestic legislation said was not, within the reasonable time limit laid down by domestic law. The ECJ held that it had a right but a narrower one than it had claimed, so that the original claim was defective and the same claim made later would have succeeded but for the (reasonable) domestic law time limit, which the legislation gave power to HMRC to extend at its discretion. Would the ECJ say that the principle of effectiveness was breached because that exercise of the right was rendered impossible or excessively difficult if the person was not permitted to re-exercise the right after the ECJ's judgment? We consider that it would. The situation differs from the first line of cases in that the person did assert his right within the reasonable time limit. The case for applying the principle of legal certainty is much weaker because the state knows that the person has exercised the right, and has done so in order to ascertain whether the right exists, so that re-exercising the right will not come as any surprise. This is even more so when the legislation envisages that there will be circumstances in which the time limit

may be extended. And, like the second line of cases, this is solely a transitional problem for the Appellant who raised the issue of whether it had a right. Anyone else will come within the first line of cases and lose the right by failing to assert it even though not knowing about the existence of the right. Chadwick LJ has given us a strong hint, although obiter, that European law would permit the Appellant to re-exercise the right. We do not agree with Mr Ewart that Chadwick LJ had misunderstood the second line of cases when he had decided *Condé Nast* only four months before the hearing in this case. It must have been apparent to him that this case was not the same as the second line of cases but he must have seen similarities in that they were both transitional problems caused by domestic legislation expressly providing that the Community right could not be exercised at the appropriate time. The fact that this case is not on all fours with *Condé Nast* does not mean that what he said was necessarily wrong. Accordingly, we consider that the principle of effectiveness requires that Appellant should be able to make a new claim for group relief in place of the one that we have decided was invalid within a reasonable time after the ECJ judgment, particularly so where the legislation specifically envisaged that there are cases in which the time limit might be extended.

50. If we had decided that European law did not permit the Appellant to make a new group relief claim within a reasonable time after the ECJ judgment we would have adjourned the appeal to give HMRC time to decide whether to extend the time limit. We hope that should we be found to be wrong about the effect of European law this would still be permitted.

*The quantum of the losses*

51. With regard to Miss Shaw's contention that whatever method of computing losses is adopted this should be applied consistently, we do not consider that this is possible. The no-possibilities test can be applied only to losses as computed under the company's local law (Method A). Local law must determine whether any particular amount of loss as so computed can be used. Once the no-possibilities test is satisfied one may be left with the remaining losses as so computed. We agree with Mr Ewart that these should then be converted into sterling and recomputed in accordance with UK tax principles. If this were not done a non-resident subsidiary could obtain a greater amount of relief for losses than a UK subsidiary in the same circumstances, which goes further than necessary to give effect to the no-possibilities test.
52. It seems that although the Appellant has made such computations as set out in Schedules 4 and 5 of the Agreed Statement of Facts HMRC have not finally decided whether to accept the figures. In spite of Miss Shaw's suggestion that they should not be given any more time we consider that we should make this decision in principle and leave it to the parties to agree the figures, failing which we shall determine them.

*Result*

53. Accordingly for the pay and file years (up to and including 31 March 1999)

(1) We dismiss the appeals of MSG in relation to the claims for the years to 31 March 1996 and 1997 (see paragraph 8);

(2) In respect of the years to 31 March 1998 and 1999 we allow the appeals of MSG in principle against refusal of the claims made on 20 March 2007, and in the alternative 12 December 2007 (see paragraph 49), and dismiss the appeals against refusal of the claims made on 31 March 2000 and 30 March 2001 (see paragraph 42).

(3) We dismiss the appeals for MSB in relation to the claims for the years to 31 March 1998 and 1999 (see paragraph 8).

With regard to the notices of referral made on 31 July 2002 in relation to the claims made on 24 September 2001 for the accounting periods ended 31 March 2000 and 2001 that were the subject of our previous decision, the decision of the ECJ and the appeals to Park J and the Court of Appeal, the question and our answer is:

Whether article 12 (ex article 6) and/or article 43 (ex article 52) of the EC Treaty enables the losses incurred by the Appellant's French, German and Belgian subsidiaries to be offset or utilised against the Appellant's profits chargeable to UK corporation tax either by way of group relief under the provisions of Part X Chapter IV ICTA 1988 or otherwise

Our answer is no.

54. With regard to the notices of referral made on 26 February 2009 in respect of MSG and MSB for the accounting periods ended 31 March 2000, 2001 and 2002 the questions and our answers are

(1) At any of the dates on which those claims for group relief were made, did the Appellant meet all requirements, both substantive and procedural, to enable any claimed losses to be surrendered and if so in what amount? In particular, has the Appellant met those requirements and made those claims within the time period required to do so taking into account the effect of Community law?

Our answers are: in respect of MSG for the accounting periods ended 31 March 2000, 2001 and 2002 and for MSB for the accounting periods ended 31 March 2001 and 2002, the Appellant did meet all requirements, both substantive and procedural to enable any claimed losses to be surrendered at 20 March 2007, 12 December 2007 and, in respect of MSB, also on 11 June 2008. In particular, the Appellant met those requirements and made those claims within the time period required taking into account the effect of Community law. The amount of the losses is to be agreed between the parties or, in the absence of agreement, to be referred back to this Tribunal for determination.

(2) Which of the claims should be allowed and in what amount?

Our answers are: the claims made on 20 March 2007 in principle and in amounts to be determined.

55. Miss Shaw warned us that some details given to us were commercially sensitive. If the Appellant informs the Tribunal within 10 days of the date of release of this decision whether there is anything in it that they would not like to be published we will endeavour to meet their request.