Neutral Citation Number: [2017] EWHC 677 (Ch)

Case No: HC13A05471 and others

IN THE STAMP TAXES GROUP LITIGATION

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2017

Before :

THE HONOURABLE MR. JUSTICE MARCUS SMITH

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Between:

JAZZTEL PLC	**Claimant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

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Mr. Sam Grodzinski, Q.C. and Mr. Michael Jones (instructed by PricewaterhouseCoopers Legal LLP) for the **Claimant**
Mr. Rupert Baldry, Q.C. and Mr. David Yates (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the **Defendant**

Hearing dates: 24, 25, 26 and 27 January 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....
MR. JUSTICE MARCUS SMITH

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Mr. Justice Marcus Smith:

A. INTRODUCTION

(1) Stamp duty reserve tax

1. At the times relevant for the purposes of this Judgment, which is the period 2000 to 2009, stamp duty reserve tax ("SDRT"[1]) was, as a general rule, charged at 0.5% on an agreement to transfer chargeable securities.

2. In two cases, however, and subject to certain exceptions and qualifications which do not matter for present purposes, SDRT at a higher rate of 1.5% was charged. This was where:

    i) Chargeable securities were transferred or issued to a clearance house: section 96 of the Finance Act 1986; and

    ii) Chargeable securities were issued or transferred in exchange for a depositary receipt or appropriated towards satisfaction of a depositary receipt holder's right to obtain chargeable securities under a depositary receipt arrangement: section 93 of the Finance Act 1986.

3. Under the 1986 Act, "chargeable securities" is a defined term (defined in section 99) and it covers shares issued by companies incorporated in the United Kingdom.

4. A "clearance service" – operated by a "clearance house", running a "clearance system" – is an arrangement for settling transactions in securities. Securities within the system are held in the name of a nominee acting for the clearance system. Once in the system, securities can be traded without the need for a transfer document, and no SDRT is then payable (even at 0.5%).

5. The higher 1.5% charge was applied to the transfer or issue into the clearance system precisely because no SDRT was chargeable on subsequent transfers within that system.

6. In this Judgment, and save where the contrary is stated or the context otherwise requires, all references to SDRT are to SDRT payable at the higher rate of 1.5% pursuant to sections 93 and 96 of the Finance Act 1986.

7. The person in law liable to pay the SDRT is the clearance house or the depositary. As a matter of practice, however, the company issuing the shares would often pay the tax directly and/or agree to indemnify the clearance house or depositary in respect of any SDRT it paid.

[1] The Annex hereto lists the terms and abbreviations used in this Judgment, together with the paragraph in which that term or abbreviation was first used.

(2) Incompatibility of SDRT with Community law

8. There was no dispute before me that the SDRT charge under section 96 of the Finance Act 1986 (issue of shares to a clearance service) and section 93 (issue of shares to a depositary receipts issuer) was incompatible with Community law. Nevertheless, it is important to be clear about the history:

   i) In Case C-569/07, HSBC Holdings plc and Vidacos Nominees Ltd v. HMRC [2010] S.T.C. 58 ("HSBC Holdings No. 1"), the taxpayer challenged the imposition of SDRT on the issue of shares into a clearance service as contrary to Community law. The taxpayer had paid SDRT on such a transaction on the occasion of a public offer in 2000 and, in October 2002, made a statutory repayment claim on the basis that the charge was unlawful.

   ii) That issue was referred by a Special Commissioner to the Court of Justice of the European Union (the "CJEU"[2]), which ruled that the levying of a duty such as the SDRT on the issue of shares into a clearance service was prohibited by Article 11(a) of EC Council Directive 69/335 of 17 July 1969 concerning indirect taxes on the raising of capital (the "Capital Duties Directive"). The CJEU delivered judgment on 1 October 2009.

   iii) The judgment of the CJEU in HSBC Holdings No. 1 followed the conclusion expressed in the opinion of Advocate General Mengozzi in that case, which was delivered a few months before the CJEU's judgment, on 18 March 2009.

   iv) HSBC Holdings plc and Bank of New York Mellon v. HMRC [2012] UKFTT 163 (TC) ("HSBC Holdings No. 2") held that – following HSBC Holdings No. 1 – it was *acte clair* that the SDRT charge on the issue of shares by a UK incorporated company to a depositary receipts issuer outside the Community or on the transfer of newly issued shares to such a depositary in a transaction forming an integral part of a raising of capital was likewise prohibited by the Capital Duties Directive and by Article 56 of the EC Treaty (as it then was) on the free movement of capital.

(3) Remedies of payers of SDRT

9. The claimant in these proceedings – Jazztel plc ("Jazztel", albeit now known as Orange Spain plc) – is one of, no doubt, many companies who paid the SDRT charge prior to its having been declared unenforceable under Community law. Jazztel's claim is designated as the test claim for the purposes of resolving some of the remaining issues in the Stamp Taxes Group

[2] Previously the European Court of Justice or "ECJ". In this Judgment, references to the CJEU include references to the ECJ.

Litigation, these issues having been identified in the Group Litigation Order dated 27 October 2010, as amended on 5 December 2014.

10. Various remedies exist to enable a taxpayer to recover – to a greater or lesser extent – such payments. They are as follow:

i) A statutory repayment claim under Regulation 14 of the Stamp Duty Reserve Tax Regulations 1986, S.I. 1986/1711 (the "SDRT Regulations"):

a) A claim under Regulation 14 shall be made within a period of 6 years beginning with the later of the date on which the payment was made or the relevant accountable date (Regulation 14(2)).

b) Although interest is paid on overpaid tax, this is only simple interest.

c) Jazztel made a claim under Regulation 14 in the amount of £3,327,078.84 in respect of SDRT paid on issues of shares to clearance services for the period December 2003 to May 2008. All those payments were within the limitation period then applicable (as set out in paragraph 10(i)(a) above). HMRC[3] repaid this amount to Jazztel, together with simple interest (as provided in the SDRT Regulations) on or about 28 January 2010.

ii) A claim in restitution for recovery of unlawful tax under the principle established in Woolwich Equitable Building Society v. IRC [1993] A.C. 70 (a "Woolwich claim").

a) Woolwich claims have a 6 year limitation period from the date of payment of the unlawful tax.

b) Jazztel commenced these proceedings on 19 December 2013. The applicable Woolwich limitation period would thus preclude recovery of any SDRT paid before 19 December 2007.

c) This would rule out almost all of the payments made by Jazztel (which are set out and considered further below).

iii) A claim in restitution for money paid or other enrichment conferred under a mistake (a "mistake claim"):

a) Although – as was common ground – the ordinary limitation period for mistake claims (as with Woolwich claims) is 6 years from the date of payment, in the case of mistake claims the limitation period can be extended by the operation of section 32(1)(c) of the Limitation Act 1980.

[3] The relevant predecessors to HMRC were the Commissioners of Inland Revenue (for periods April 2005). References to HMRC in this Judgment shall also be taken to include references to Commissioners of Inland Revenue as appropriate.

b) Section 32(1)(c) provides that, in a case of mistake, "the period of limitation shall not begin to run until the plaintiff has discovered the…mistake…or could with reasonable diligence have discovered it".

iv) A damages claim for a breach of Community law (a "damages" claim). Such a claim has been pleaded by Jazztel in these proceedings, but that claim has been stayed.

11. The hearing before me was concerned only with Jazztel's mistake claim. Paragraph 20 of HMRC's written submissions explain why its restitutionary claims included a mistake claim:

> "Since the Claimant has already been repaid a substantial amount of the SDRT in question, the Claimant's claim has three motives (i) to recover SDRT time-barred under the prior statutory scheme [i.e. under the SDRT Regulations] (ii) to recover SDRT which it could have claimed under the statutory claim but did not (possibly due to an oversight) and (iii) to obtain an award of compound interest in respect of *all* the SDRT overpaid, on the basis that the simple interest the Claimant has already obtained does not satisfy its rights under domestic and/or EU law…the issue as to the availability of compound interest has been stayed in the present case (pending the outcome of the Supreme Court in the appeals in *Littlewoods Ltd v HMRC* [2015] EWCA Civ 515, [2016] Ch 373 and *Prudential v HMRC* [2016] EWCA Civ 376, [2016] STC 1798). In order, however, to obtain any compound interest the Claimant must first show that it has a valid restitutionary claim for the principal amount (the SDRT itself). That is the purpose of dealing with the "mistake" issue generally in the present hearing."

12. In order to establish its mistake claim, Jazztel must show – the burden being on it – that:

i) HMRC has been enriched at Jazztel's expense. In this case, Jazztel alleges that a series of payments of SDRT were made to HMRC (the "Payments"). In some cases, it is admitted by HMRC that a Payment was made; in other cases, HMRC makes no admission, and Jazztel is put to proof.

ii) Any enrichment of HMRC was "unjust". In this case, the "unjust" factor relied upon by Jazztel and pleaded by it at paragraph 39 of its Amended Particulars of Claim is the fact that, at the time the Payments were made, Jazztel mistakenly believed that:

a) The provisions obliging Jazztel to pay the SDRT were lawful;

b) These provisions lawfully and effectively imposed a liability on the clearance house or the depositary;

c) By reason of (a) and (b) and its contract with the clearance house/depositary, Jazztel was obliged to make each of the Payments.

iii) That the "unjust" factor – the mistake – caused Jazztel to make the payment.

HMRC, for its part, denies that Jazztel made any Payment under a mistake. It follows, of course, that HMRC denies that mistake caused the Payments.

13. If Jazztel can establish on the evidence that it has a *prima facie* valid mistake claim, then HMRC contends:

i) That it has a limitation defence based upon section 320 of the Finance Act 2004. Section 320 purports to abrogate section 32(1)(c) of the Limitation Act 1980 in certain cases. Section 320 provides insofar as is material that:

> "(1) Section 32(1)(c) of the Limitation Act 1980…does not apply in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners of Inland Revenue.
>
> This subsection has effect in relation to actions brought on or after 8th September 2003."

In response, Jazztel contends that this provision is rendered ineffective by Community law.

ii) That it has the potential of a change of position defence such that, to the extent that it has changed its position, it does not have to make repayment of any Payments for which restitution would otherwise have to be made. As to this:

a) It is important to note that HMRC, quite properly, does not assert before me that it actually has, as a matter of law, a change of position defence. That is because, in The Test Claimants in the Franked Investment Income Group Litigation v. HMRC [2016] EWCA Civ 1180 ("FII(CA) No. 2"), the Court of Appeal held that HMRC was, as a matter of law, not entitled to rely on a change of position defence against a claim (including a mistake claim) seeking to recover tax levied contrary to Community law.

b) However, this is a matter on which HMRC has sought permission to appeal to the Supreme Court. It was not known at the time of the hearing, and is not known at the time of this Judgment, whether permission to appeal will be granted, still less what determination the Supreme Court may make, should it decide to hear the appeal.

c) In addition to its problem on the law, HMRC had a further difficulty, relating to the factual basis on which its change of

position defence rested. HMRC's factual case on change of position was very similar to that advanced by it in the Franked Investment Income Group Litigation. The facts were considered by Henderson J., and the defence rejected on the facts, in the decision of Henderson J. in The Test Claimants in the FII Group Litigation v. HMRC, [2014] EWHC 4302 (Ch) ("FII(HC) No. 2") at [342] to [399]. In FII(CA) No. 2, before the Court of Appeal, HMRC did not seek to challenge the findings of fact made by Henderson J. in FII(HC) No. 2.

d) It was in these unpromising circumstances that HMRC sought to maintain its change of position defence, pending a hoped-for change in the law that might result were the Supreme Court *(i)* to decide to hear its appeal on change of position; and *(ii)* having so decided, to decide that the change of position defence hitherto articulated by the courts was wrong.

e) With some reluctance, I have decided to allow HMRC to preserve its position, pending any change in the law. Although the most appropriate course would, as it seems to me, be to stay this particular issue pending any decision of the Supreme Court, it was decided at an earlier case management conference that change of position should be dealt with at this hearing. The relevant witnesses were present in court and ready to give evidence. In those circumstances, I heard the evidence and will determine the facts as they seem to me to be relevant to change of position. I will review these facts, and make any final determination (including, if necessary, of any additional factual matters) when the Supreme Court has made a decision about the appeal to it.

14. This Judgment deals with the following issues in the following order:

i) Section B describes the evidence that was adduced before me.

ii) Section C identifies the Payments said to have been made by Jazztel to HMRC, and determines whether – to the extent they are disputed – the Payments were made and HMRC thereby enriched.

iii) Section D considers whether the Payments found to have been made by Jazztel to HMRC were made by mistake. This Section considers both whether there was a mistake and whether that mistake was causative of the Payment.

iv) Section E considers the extent to which section 320 of the Finance Act 2004 is effective in abrogating the limitation period under section 32(1)(c) of the Limitation Act 1980.

v) Section F considers the change of position defence.

B. THE EVIDENCE

(1) Factual evidence

15. The factual evidence before me comprised the evidence of Mr. Antonio Garcia on behalf of Jazztel and Dr. Paul Mathews on behalf of HMRC.

16. Mr. Garcia is the Head of Legal for Businesses by Orange Espagne, SAU, a wholly owned subsidiary of Jazztel. He has been employed by Orange Espagne since March 2009. He gave one statement in these proceedings ("Garcia 1"). Paragraph 1 of Garcia 1 states:

> "…Due to the passage of time since many of the payments of SDRT in question, [Jazztel] is unable to locate an employee or officer who was involved in the various decisions that were made at the time that most of the transactions which are the subject of this claim took place. However, assisted by PwC Legal LLP, Jazztel has conducted a search for documents and records on its files and also documents held by Linklaters LLP (formerly Linklaters & Alliance (hereafter "Linklaters")), who were Jazztel's UK solicitors in connection with the issue of shares in the period 1999 to 2009. I therefore make this statement based on a review of these documents…".

17. In view of the inevitably "second-hand" nature of Mr. Garcia's evidence, Mr. Baldry, Q.C., for HMRC, indicated that he would not be minded to cross-examine Mr. Garcia, provided he could draw to the Court's attention materials in the chronological run of documents that supported HMRC's case and could rely upon these documents as evidence of how and why the payments of SDRT had been made. Mr. Grodzinski Q.C., for Jazztel, did not object to this course. Given that Mr. Garcia could add nothing by way of personal recollection to the documentary evidence, this was obviously a sensible course to take, and we proceeded on this basis.

18. Dr. Mathews is employed by HMRC at grade 7 rank in the civil service. He was called to give evidence solely on the change of position defence. He currently works as the head of stamp duty and property analysis in the Knowledge, Analysis and Intelligence Directorate of HMRC. He gave one witness statement in these proceedings dated 24 March 2016 ("Mathews 1") and gave evidence on Day 2 (25 January 2017). Dr. Mathews was a straightforward witness doing his best to assist the Court. He was very frank about the limits of his knowledge in terms of how tax receipts, central government expenditure and central government borrowing correlated: such decisions were, as he freely acknowledged, well-above his grade. He could speak with authority as to how HMRC sought to predict future revenue deriving from stamp duty generally, but in terms of the broader picture he was essentially unable to help. For this reason – and it is certainly not intended as a criticism, for Dr. Mathews was clearly highly able and highly competent at his job – I found his evidence of limited assistance.

(2) Expert evidence

19. Mr. Garcia and Dr. Mathews were the only witnesses of fact. Additionally, I heard evidence from two experts, Professor Gareth Myles, an economist specialising in public economics and taxation and a professor at the University of Adelaide in Australia, and Dr. Andrew Sentance, currently the senior economic adviser at the UK firm of PricewaterhouseCoopers LLP and a part-time professor at Warwick Business School. The evidence of Professor Myles and Dr. Sentance was confined to the change of position defence.

20. Professor Myles was called to give evidence on behalf of HMRC. He provided one report, dated 10 April 2016 ("Myles 1"), which was confined to the question of change of position. He was called to give evidence on Days 2 and 3 (25 and 26 January 2017). Whilst Professor Myles was obviously doing his best to assist the court, the subject-matter of his evidence (namely that there was a correlation between tax receipts and central government expenditure such that, if the revenue from the SDRT had not been received, government expenditure would have been different and lower) was an intensely practical – real-world – subject rather than one susceptible of great theoretical analysis. I found Professor Myles' approach was overly dependent upon a somewhat abstract and rather unworldly view of government finance and spending. I also found him to be quite dogmatic in his defence of this view. Whilst Professor Myles was clearly a gentleman of great learning, I found his analysis uncompelling.

21. By contrast, Dr. Sentance was a remarkably impressive expert. He answered questions precisely and clearly; was entirely willing to make concessions when appropriate; and had no agenda beyond seeking to provide the court with his expertise. He gave one report, dated 3 June 2016 ("Sentance 1"), and was called to give evidence on Day 3 (26 January 2017). In contrast to Professor Myles, Dr. Sentance's evidence was firmly rooted in the facts and practicalities of government income and expenditure.

22. In addition to their reports, Professor Myles and Dr. Sentance submitted a joint statement of issues of agreement and disagreement dated 7 July 2016 (the "Joint Statement").

C. THE PAYMENTS

23. Jazztel contends that the following Payments of SDRT were made by or on behalf of it to HMRC. The table below ("Table 1") sets out:

    i) The number of each (alleged) Payment (Column 1).

    ii) The date on which each (alleged) Payment is said to have been made (Column 2). Table 1 is in chronological order of Payment.

    iii) The amount of that (alleged) Payment (Column 3).

    iv) A brief description of the (alleged) Payment (Column 4).

v) Whether HMRC has admitted or not admitted the Payment (Column 5).

(1) No.	(2) Date	(3) Amount of Payment	(4) Description	(5) Admitted by HMRC? (Y/N)
1	2000	£2,488.00	Exercise of warrants.	N
2	7 Jan 2000	£1,819,060	Initial Public Offering on 14 Dec 1999.	Y
3	Jul 2000	£4,547.06	Further issue of ordinary shares.	N
4	3 Aug 2000	£393,755	Share issue of 1,553,747 to Banco Sabadell.	Y
5	2001	£195.75	Exercise of warrants.	N
6	13 Mar 2001	£43,176.50	Share issue on the acquisition of Adatel Telecommunications.	Y
7	20 Jul 2001	£20,376	Share issue on the acquisition of Adatel Telecommunications.[4]	Y
8	2002	£173.00	Exercise of warrants.	N
9	2003	£113.44	Exercise of warrants.	N
10	17 Dec 2003	£45,318.81	Issue of shares in respect of acquisition of Sertram Networks	Y
11	2004	£2.73	Exercise of warrants.	N
12	5 Jan 2004	£97,766.16	Issue of 25 million shares under Capital Line financing scheme.	Y
13	5 Jan 2004	£13,665.60	Issue of shares in respect of acquisition of Netvoice.	Y
14	5 Nov 2004	£501,853.22	Issue of shares in connection with investment by Prepsa Traders SA.	Y
15	Mar 2005	£142,813.28	Conversion of 3.75% bonds	N
16	2006	£1.22	Exercise of warrants.	N
17	6 Mar 2006	£162,963	Issue of shares in connection with an equity financing agreement with Société Général known as "PACEO"	Y
18	7 Jun 2006	£498,071	PACEO financing.	Y
19	27 Jul 2006	£1,227,580	Capital increase.	Y
20	8 Mar 2007	£485,790	PACEO financing.	Y
21	13 Jul 2007	£47,574	PACEO financing.	Y
22	3 Aug 2007	£78,310	PACEO financing.	Y
23	7 May 2008	£168,187	Bond conversion.	Y

[4] There was a third alleged Payment in the amount of £33,051.80, which Jazztel did not pursue before me, and which I therefore do not deal with.

24. I should be clear that Table 1 does not record where SDRT was repaid by HMRC pursuant to the statutory scheme under the SDRT Regulations. That is because, even where this has occurred, the Payment still must be considered for the purposes of compound interest: see paragraph 11 above.

25. Of the 23 Payments, HMRC has made non-admissions and put Jazztel to proof in respect of Payments 1, 3, 5, 8, 9, 11, 15 and 16. No issue arises in relation to the other Payments (i.e. Payments 2, 4, 6, 7, 10, 12, 13 14 and 17 to 23). As regards these (uncontroverted) Payments, I find that HMRC has been enriched at Jazztel's expense.

26. As regards the other (controverted) Payments:

    i) The latest of these Payments (Payment 16) is said to have taken place over 10 years ago. HMRC keeps no records beyond six years. Jazztel has produced what relevant documents it has, and invites me to find, on the basis of these documents and on the balance of probabilities, that the controverted Payments were in fact made. HMRC simply contends that such a case has not, as regards these Payments, been made out. HMRC advances no positive case.

    ii) Mr. Jones, junior counsel for Jazztel, explained the extent of the dispute between Jazztel and HMRC regarding the controverted Payments:[5]

    > "…the Commissioners' reasons for not accepting the items that remain in dispute, or their reason, is that they are not satisfied that Jazztel paid the relevant sums of SDRT. Now, by that I mean that they are not disputing that the underlying transaction took place, they are not disputing that the underlying transaction involved the issue of shares by Jazztel to a clearing system, and they are not disputing that the issue of shares would have given rise to a charge to SDRT on the face of the domestic legislation. What they dispute is the final link in that chain, which is that Jazztel paid the SDRT that would have arisen on that share issue."

    The extent of the issue is therefore the rather narrow one of whether Jazztel paid the charge to SDRT or whether someone else, like the clearance house, did.

    iii) I must determine the answer to this narrow question on the basis of limited evidence. One point that is important by way of background is this. As I observed in paragraph 7 above, the person in law liable to pay the SDRT is the clearance house or the depositary. As a matter of practice, however, the company issuing the shares would often pay the tax, either directly or by way of an indemnity to the clearance house or depositary. Again, this was a point emphasised by Mr. Jones:[6]

    Q (Marcus Smith J.) …Who are the other candidates for paying tax?

[5] Transcript Day 3, pp.104 to 105.
[6] Transcript Day 3, p.105.

A (Mr. Jones) Often it would be the clearing system that would be liable and they would then look directly for an indemnity to various parties, and there may also be contractual indemnities in place. But…there are many instances where Jazztel pay HMRC directly or Linklaters pay on behalf of Jazztel, having been put in funds one would imagine, and HMRC receipt it. There are other mechanisms in place, and I'll show you in particular in relation to the IPO that before that was executed various indemnities were given which show that Jazztel were going to be liable for the SDRT. So there are numerous ways in which it could have happened, but generally it's going to be by way of indemnity or direct payment.

iv) Going through the Payments in contention:

a) Payment No. 3. Jazztel's accounts for the year to 31 December 2000 disclosed the issue of these shares as part of the Jazztel initial public offering. As regards the majority of these shares it is accepted by HMRC that Jazztel paid the tax (see Table 1, Payment No. 2). Payment No. 3 relates to the balance of that share issue. The evidence is that as regards this issue of shares, Jazztel was advised by its solicitors ("Linklaters") that it would be liable to pay the SDRT; that is also stated in the prospectus for the initial public offering; and Jazztel appears to have given an indemnity in this regards to Morgan Guaranty Trust Company of New York as the operator of the clearing house, Euroclear. HMRC made no specific submissions in response, consistent with their non-admission. On the facts, I find that Jazztel did make Payment No. 3.

b) Payment Nos. 1, 5, 8, 9, 11 and 16. These alleged Payments can be taken together. They are share issues arising on the exercise of warrants issued by Jazztel between 2000 and 2006. The amounts involved are just under £3,000, and Mr. Jones quite properly suggested that the proportionate approach was to look at these Payments in the round. In this regard, he referred me to a memorandum dated 7 November 2001 from Linklaters to Jazztel which states at paragraph 3.5 that "[i]n the past, where Jazztel has issued new shares under its warrant programme and in share for share exchanges, Jazztel has paid this liability to SDRT". I find as a fact that this is what occurred in the case of these Payments. Clearly – as the memorandum shows – this was Jazztel's practice, as advised by its solicitors. Had Jazztel not followed this practice, and failed to pay the SDRT due, the very extensive disclosure (there were some 21 files of documents

before me[7]) would have shown traces of HMRC demanding payment of the person liable to tax, and that person raising the issue with Jazztel. There are no such traces in the disclosure in the case of these (or any other) Payments.

c) Payment No. 15. Mr. Jones explained the background to this payment as follows:[8]

> "Item [15] concerns shares issued on the conversion of what are termed 3.75 per cent bonds, which I think is the coupon payable on the bond to the holder of those bonds…the bonds had been issued, …the option to convert had been exercised and…those shares were issued by Jazztel. They were issued into a clearing system…So all of these elements were in place. The question is whether Jazztel paid the SDRT."

In his regard, Mr. Jones showed me an exchange of emails between Jazztel and Linklaters. The original email (at 12:08 on 25 February 2005) states:

> "Leo will send us a conversion notice on Monday or Tuesday. He will be able to convert the entire amount of the Notes, so that 53,786,997 shares will be issued. All of these shares except 10 will be transferred to the clearing systems. I understand that stamp duty of 1.5% of the amount converted will then become due. Please confirm and also when payment should be made (I believe within 7 days of the month in which the conversion was made, i.e. April 7.
>
> Ramon, Miguel Angel: can we set of this amount against the interest the company is due to Leo"

The 53,786,987 shares issued lead to total proceeds of €14,001,303 which, using the average £ sterling / € exchange rate for 2005, gives £9,572,690, which would give rise to a liability to SDRT of £143,590. This is very close to the amount of Payment No. 15. The response from Linklaters was in an email timed at 17:10 on the same day:

> "…fine, yes the duty is 1.5% SDRT and you have the correct date…"

It is plain from this exchange that Jazztel was contemplating the payment of SDRT in an amount close to the amount of Payment No. 15, and I find that this payment was made.

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[7] There was no witness speaking to the documents going to the issue of payment or non-payment. Neither party took any evidential point regarding these documents, and I have proceeded on the basis that all of these materials stand as evidence of the truth of their content: see Transcript Day 3, pages 120 to 121. Had any objection been taken, I would have permitted the party seeking to rely on any of these documents to serve the requisite notice.

[8] Transcript Day 3, p.115.

27. In conclusion, I find that all of the Payments in contention were made by Jazztel, and that HMRC has been enriched by these Payments.

D. PAYMENT BY MISTAKE

(1) Introduction

28. Goff & Jones: The Law of Unjust Enrichment ("Goff & Jones")[9] states at paragraph 9-01 that "[d]evelopments over the last 35 years allow the law governing the operation of mistake as a ground for restitution to be presented more simply than was previously the case. Most notable has been a liberalisation of the ambit of restitution-grounding mistakes. The law's starting point is now that any causative mistake of fact or law, spontaneous or induced, can qualify. The old rule against recovery for mistakes of law has been abandoned, and the courts have eschewed any requirement for the mistake to be a "liability mistake", a "fundamental mistake", or a mistake of any other particular type".

29. In short, in order to establish a *prima facie* claim to restitution of an enrichment, all a claimant need show is that:

    i) At the time the enrichment was conferred, the claimant was mistaken; and

    ii) The mistake caused the enrichment to be conferred (in the sense that, but for the mistake, the enrichment would not have been conferred).

30. Whilst the law may be shortly stated in this way, it leaves some difficulties unstated, which need to be exposed, before considering the facts of the present case:

    i) Mistakes must be distinguished from mispredictions. A misprediction is a present belief or assumption about a future state of affairs, which is subsequently falsified; whereas a mistake involves the vitiation of the claimant's judgment at the time the enrichment is conferred. Put another way, a mistake operates only as regards the present or the past, whereas a prediction, by definition, involves the future. Whereas mistake constitutes a ground for restitution, misprediction does not.[10]

    ii) Mistakes can co-exist with an element of doubt. By "doubt" is meant the claimant's conscious appreciation that the facts or law may not be as he or she believes them to be.[11] For example, a claimant may (wrongly) believe that he or she is legally obliged to make a payment, whilst at the same time appreciating that there is an argument that he or she is not in fact obliged to make the payment at all. Such doubts are

[9] Mitchell, C., Mitchell, P. and Watterson, S., Goff & Jones: The Law of Unjust Enrichment, 9th ed. (2016).

[10] See: Goff & Jones, paras. 9-06 to 9-09; Burrows, A., A Restatement of the English Law of Unjust Enrichment, 1st ed. (2012) ("Restatement"), pp.67 to 68; Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica, [2001] UKPC 50.

[11] See Goff & Jones, paras. 9-18, 9-21 and 9-24 to 9-25; Restatement, p.68.

not inconsistent with mistake, provided the doubt does not overwhelm the mistake. In Marine Trade SA v. Pioneer Freight Futures Co. Ltd BVI, [2009] EWHC 2656 (Comm), a payment of US$5,030,242.50 was made in circumstances where (so the court found) the payer thought that it was more likely than not that he was not liable to pay. Flaux J. considered what subjective state of mind in an individual could or could not amount to a mistake:

> "67. Mr. Baker [counsel for the payer] submitted that the case raised the issue of what degree of doubt on the part of the paying party will negative mistake, an issue on which there was no authority binding on the court. However, Mr. Baker conceded that if the law was that the "mistake" argument was only available where the degree of doubt in the payer's mind was such that he thought he was probably liable to pay, Marine Trade could not satisfy that test. This was because Mr. Baker accepted, realistically in my view, that the highest he could put Mr. Arnese's evidence was that Mr. Arnese thought, at the time of payment, that Marine Trade was probably not liable to pay. However, Mr. Baker submitted that the law did not require the paying party to demonstrate that, notwithstanding any doubt, he still thought he was liable to pay and that, as a matter of principle, there was no maximum amount of permissible doubt.
>
> 68. Mr. Ashcroft [junior counsel for the payee]…submitted that the law was that any substantial degree of doubt was inconsistent with mistake and, if he was wrong about this, his fallback position was that the payer could not establish payment by mistake if he paid thinking that payment was probably not due.
>
> 76. In my judgment, the furthest that a court of first instance could or should go as to the current state of law is that there may be cases in which a payer can still be said to be under a mistake, even if he has doubts, provided that he paid concluding that it was more likely than not that he was liable to pay…
>
> 77. However, as Mr. Baker has to accept, that is not the present case. I consider that a case where the payer makes the payment thinking that it is more likely than not that he is *not* liable to pay, such as the present case, cannot properly be described as a case of mistake at all. I agree with Mr. Ashcroft that there was no mistake…"

In my judgment, provided the level of subjective doubt remains below the 50% threshold, a mistake can still exist.

iii) Mistakes by corporations. It can be particularly difficult to ascertain whether a mistake made within a legal person, like a corporation, constitutes a ground for restitution, as where one employee or agent of the corporation pays under a mistake, in circumstances where another employee or agent knows the true position. Goff & Jones suggest (at para. 9-79) that such cases are to be resolved by the rules relating to the attribution of knowledge within a corporation, albeit that this statement

of the law was doubted by Andrew Smith J. in B.P. International Ltd v. Target Shipping Ltd, The "Target" [2012] EWHC 1590 (Comm) at [235] to [246].

31. It will be necessary to consider the distinction between mistakes and mispredictions and the ability of mistake to co-exist with doubt in the context of the precise facts of this case. However, although Jazztel is a legal and not a natural person, and although Jazztel acted through multiple different persons when making the Payments and when receiving (as shall be seen) advice as to whether those Payments should be made, it is not necessary, for the purposes of this Judgment, to consider the correct approach to the mistake of a corporation. That is because, in this case, even though Jazztel acted through multiple natural persons, there is nothing in the evidence that I have seen to suggest any material difference in the subjective states of mind of these different actors.

32. For the purpose of setting out the factual history, and unless the context otherwise requires, I refer to all letters, faxes, notes, etc. as "communications". Most of these took place between Jazztel and Jazztel's solicitors, Linklaters. Since nothing turns on the individual states of mind of the specific natural persons sending/receiving such communications, I shall not differentiate between them and shall generally simply refer to Jazztel and to Linklaters.

(2) The facts

(i) Overview of the history

33. The relevant factual history can be divided into four periods:

i) "Period 1". The period between August 1999 and early December 1999, when Jazztel was planning an initial public offering of its shares, and Linklaters was advising it on the SDRT payable.

ii) "Period 2". The period between early December 1999 and May 2000, when Linklaters wrote their 22 December 1999 communication to Jazztel regarding liability to pay SDRT (the "22 December 1999 SDRT Advice"). HMRC relied upon this communication – and the events surrounding it – in support of its contention that Jazztel did not make the Payments under a mistake that the SDRT was due.

iii) "Period 3". The period following Linklaters' 22 December 1999 SDRT Advice. This period overlaps somewhat with Period 2, and describes Jazztel's payments of SDRT and the communications in relation to SDRT from late-January 2000 onwards.

iv) "Period 4". The period commencing with the delivery of Advocate General Mengozzi's opinion in HSBC Holdings No. 1 on 18 March 2009.

(ii) *Period 1*

34. On 19 August 1999, Linklaters wrote to Jazztel in relation to a liability to SDRT that needed to be addressed:

> "As I am sure you are aware, there is a 0.5 per cent UK stamp duty/SDRT on transfers and agreements to transfer shares in UK companies, as a matter of course. That 0.5 per cent charge does not apply when the shares of the UK company are held in either depositary receipt form or within a clearance system. However, the *quid pro quo* for the exemption from duty within those environments is that there is a 1.5 per cent charge (colloquially termed a "season ticket" charge) when UK shares are either issued or transferred into a depositary receipt or clearance service."

The communication was simply to "flag that point", and although there was mention of the need to "address whether it will be possible in some way or other to mitigate the duty", no mitigation strategy was suggested. Indeed, the communication concluded:[12]

> "If the shares do have to be placed within the system there is not an immediately obvious way of avoiding the charge. Last year, while acting for [Company A] in relation to its merger with [Company B], we did manage to avoid a charge when [Company A] shares were issued into the American Depositary Receipt system. However, the planning we used there has now been counteracted in the UK 1999 Finance Act, and the rules surrounding this charge have been considerably tightened up generally. That said, we could look at this further if necessary."

35. On 27 August 1999, Linklaters wrote to Jazztel, confirming that:

> "…we believe that it is likely that at 1.5% charge to SDRT would arise on the issue of new shares and transfer of existing shares to the UK depositary. As stated below, however, given that this would be that first time that a UK incorporated company has traded its shares through SCLV,[13] we would advise Jazztel that it should seek confirmation of the correct treatment of the share issue and transfer from the Inland Revenue to give Jazztel certainty that it was dealing with this issue in the correct manner. In order to do this on your behalf, we would require greater detail about the proposed structure for the transaction…"

The communication went on to note:

> "It is unclear to us which would be the preferred treatment from Jazztel's point of view, although we assume that the initial 1.5% charge would be the preferred treatment to avoid a 0.5% charge arising on all subsequent trades in the Spanish secondary market. The initial 1.5% charge would, obviously, present a significant expense for the new issue, which would have to be borne by Jazztel in respect of the new shares and by Jazztel and/or the existing shareholders in respect of the existing shares. We presume, however, that it would not be commercially acceptable for every transfer of shares effected through SCLV in the future to attract a 0.5% SDRT in the context of the Spanish secondary market.
>
> In any event, it is our view that the more likely treatment is that the transfer and issue of the shares to the Depositary would attract a single 1.5% charge to SDRT."

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[12] The entities referred to this paragraph have been anonymised. Nothing turns on their precise identity.

[13] The Spanish clearing house, Servicio de Compensacion y Liquidacion de Valores SA.

In terms of possible mitigation of SDRT, there was again reference to the (now closed) loophole referenced in the 19 August 1999 communication (paragraph 34 above): beyond that, all Linklaters had to say was that "SDRT will arise in one form or another in respect of the transfer of registered shares issued by a company incorporated in the UK".

The summary at the end of the communication noted:

"6.1 We believe that a 1.5% charge to SDRT will arise on the issue or transfer of Jazztel shares to the Depositary.

6.2 This liability would technically be the liability of SCLV or the Depositary. In practice, however, each of them would require Jazztel and/or the existing shareholders to indemnify them against and bear the liability."

36. There was an appendix to the 27 August 1999 communications entitled "Potential SDRT Charges on Transactions in Jazztel Shares". Although setting out the position in greater detail, this appendix did not suggest that the charge to SDRT would not be due or could be mitigated.

37. By 24 September 1999, Linklaters was "writing in respect of the UK stamp duty reserve tax ("SDRT") that will be chargeable on the issue of the new and the transfer of the existing Jazztel shares to a UK trustee in preparation for those shares being listed in Spain…we believe that a 1.5% charge to SDRT will arise on the issue and transfer of the shares to the UK trustee as a clearance service entry charge…".

38. Shortly thereafter, on 27 September 1999, Linklaters wrote to the Stamp Office (a part of HMRC) in the following terms:

"I refer to our conversation of 24 September relating to the correct treatment for SDRT purposes of the proposal by our client Jazztel…to enter into the arrangements set out below in order to allow its ordinary shares to be listed in Spain and traded through [SCLV]. The Company intends to commence trading in these shares in Spain on 28 October 1999, but needs to clarify the position by 5 October in order to file the Prospectus relating to the offer in Spain on that date."

There is no record of Jazztel requesting that Linklaters approach the Stamp Office, but it is to be inferred and I so find that the request was made by Jazztel pursuant to the suggestion to this effect in the communication of 27 August 1999.

The communication described the proposed transaction and concluded with the following request:

"We would be grateful if you would confirm that:

(a) The issue of the Company's shares to the Trustee as part of the arrangements described above to allow the shares to be traded through SCLV shall give rise to a 1.5% charge to SDRT under the provisions of Section 96 FA 1986 (except for those shares that are represented by ADSs);

(b) The person liable for paying such 1.5% charge to SDRT shall be the Trustee;

…

(d) The transfer and issue of the Company's shares to the Trustee as part of the arrangement for the issue of ADSs by Morgan Guaranty shall give rise to a 1.5% charge to SDRT under the provisions of Section 93 FA 1986 and shall give rise to no charge under Section 96 FA 1986…"

39. On 4 October 1999, Linklaters wrote again to the Stamp Office, further to their communication of 27 September 1999 and a telephone conversation that had taken place on 1 October 1999, raising an additional point in relation to SDRT.

40. The Stamp Office responded on 7 October 1999, responding to the various points as follows:

"This is in reply to your letters of 27 September…and 4 October and is in confirmation of our telephone conversation of this afternoon..

…

…my answers to your direct questions would be:

…

(a) A Section 96(1) charge will arise on the issue of shares to the nominee of the clearance service.

(b) The liable person shall be the Trustee (under Sections 96(7) and 93(9)).

…

(d) A Section 93(1) charge will arise on the issue of shares to the non-trading account as part of the arrangement for Morgan Guaranty to issue ADSs.

You also told me that there are share warrants in issue which, as such, have already borne 1.5% Stamp Duty on the value of the shares to which the warrants relate. Exercising these warrants, at a nominal price, will bring new shares into being. I can confirm that if these new shares are then transferred into the clearance service nominee account then a Section 96(1) charge will result on the value of the shares at the time of transfer…

I understand that the SDRT on the shares to be issued to the clearance service account will be funded by the company but that the SDRT on the transfer of the existing shareholding will probably be met by shareholders."

41. Linklaters responded on 21 October 1999, raising a point that arose out of the Stamp Office's letter of 7 October 1999 that "gives us concern". This was responded to on 26 October 1999. The detail of the discussion on this point is not material for present purposes.

42. Jazztel's plans for listing shares developed, and this resulted in a further communication from Linklaters to the Stamp Office on 11 November 1999:

"Further to our previous correspondence in relation to the correct SDRT treatment arising from proposals of Jazztel plc (the "Company") to issue and list ordinary shares on the Spanish Stock Exchange ("CNMV"), the Company has recently changed its plans so that it now proposes to issue and list shares on EASDAQ in the first instance with a possible later secondary listing on CNMV."

The letter then set out Jazztel's proposals, which (so far as material) were as follows:

"The Company is a UK incorporated public listed company whose principal activities are the construction of telecommunication networks and provision of telecommunication services in Spain and Portugal.

The Company at present has euro 850m worth of ordinary shares issued and fully paid. These shares are owned by a number of managers of the Company and various institutional investors…

The Company now proposes to issue a further euro 150m worth of ordinary shares under a public offer and to list these shares on EASDAQ.

As you are no doubt aware, EASDAQ is a European stock exchange on which shares are traded in book entry form. EASDAQ uses Euroclear and Cedelbank (together "Euroclear") as the clearance service through which the book entries are traded.

In addition, the Company intends that a proportion of the shares that it issues will be represented in American depositary receipt ("ADR") form with the ADRs listed and traded on NASDAQ in the US.

The Company proposes that all of the listed shares will be transferred to the legal ownership of a Citibank entity who will act as common depositary for Euroclear in respect of the shares and for Morgan Guaranty (the issuer of the ADRs) in respect of the ADRs."

The communication then requested the following confirmations:

"Could you please confirm that the issue of the shares to Citibank as common depositary for Euroclear and for Morgan Guaranty as Issuer of the ADRs will give rise to:

(a) a 1.5% charge to SDRT based on the issue price of the shares that are to be traded on EASDAQ under section 96 FA 1986; and

(b) a 1.5% charge to SDRT based on the issue price of the ADRs in respect of those shares that are to be traded in ADR form on NASDAQ under section 93 FA 1986."

43. In an internal communication dated 16 November 1999 (but also copied in to other of Jazztel's external advisers), Linklaters described a conversation with HMRC (it is to be inferred the Stamp Office). It was noted that HMRC's position was that "[a] 1.5% charge to SDRT will arise on the issue of any new shares (and transfer of existing shares) to Citibank (or whatever entity acts as common depositary for Euroclear and Morgan Guaranty)."

44. In a communication dated 12 November 1999, Jazztel confirmed to Morgan Guaranty (as operator of the Euroclear system) that it "agrees to indemnify the Euroclear Operator, upon demand, against any loss, claim, liability or expense asserted against or incurred by it in connection with any stamp duty and/or stamp duty reserve tax or duty arising as a result of any deposit or issue by [Jazztel] in respect of any issue of new Securities."

45. In a communication dated 6 December 1999, Linklaters circulated internally to itself and to various of Jazztel's external advisers "a revised note setting out proposals for the collection and payment of SDRT". That was followed by a communication to HMRC by Linklaters attaching a "copy of a letter setting out the proposals for the collection and payment of SDRT arising from Jazztel's listing of its shares on EASDAQ and listing ADRs representing its shares on NASDAQ". That letter described the manner in which Jazztel proposed to issue "up to 11,500,000 new ordinary shares", and sought "final confirmation of the SDRT treatment of the various transactions that are envisaged". At the end of the letter, under "Summary", the letter stated:

> "Could you please provide the confirmation sought above relating to:
>
> (a) the transactions that give rise to a liability to SDRT and stamp duty;
>
> (b) the manner in which that liability will be calculated;
>
> (c) the adequacy of the proposed notification and payment mechanics that will be operated;
>
> (d) the adequacy of the amount of SDRT and stamp duty that it is proposed will be paid; and
>
> (e) the transactions that will not give rise to any liability to SDRT."

The Stamp Office responded by return, stating that it was "pleased to hereby provide the confirmations requested".

46. On 8 December 1999, Jazztel published a prospectus regarding the initial public offering of 10,125,000 ordinary shares, with an option to purchase an additional 1,375,000 shares – a total of 11.5 million shares. The prospectus is a long and detailed document, obviously compiled with care and with the input of multiple professional advisers. At page 128 of the prospectus is the following statement:

> "**Stamp Duty and Stamp Duty Reserve Tax ("SDRT").** Where ordinary shares of Jazztel p.l.c. are issued or transferred (1) to, or to a nominee or agent for, a person whose business is or includes the provision of clearance services or (2) to, or to a nominee or agent for, a person whose business is or includes issuing depositary receipts (such as the ADSs), stamp duty or SDRT will generally be payable. The stamp duty and/or SDRT is generally payable at the aggregate rate of 1.5 percent of the consideration payable or, in certain circumstances, the value of the shares. Such a charge to stamp duty or SDRT will arise on the issue of ordinary shares of Jazztel p.l.c. to the nominee for Euroclear or Cedelbank, as the clearing system for EASDAQ, and to the custodian for Morgan Guaranty Trust Company as issuer of the

ADSs. Jazztel p.l.c. has undertaken to pay any such stamp duty or SDRT that arises from the initial issuance of the ordinary shares or ADSs in this offering…"

(iii) *Period 2*

47. On 22 December 1999, Linklaters wrote the 22 December 1999 SDRT Advice to Jazztel. This stated:

"As you know, the company is liable to pay SDRT at a rate of 1.5% on the 11,500,000 new shares issued for listing on EASDAQ/NASDAQ.

Bearing in mind the exchange rate on the date of issue of the shares we calculate that the company's liability is £1,819,060.

This amount should be paid to the tax authorities by 7 January 2000 to avoid any penalties being incurred.

If you would like us to deal with payment please transfer the amount of £1,819,060 to Linklaters client account as detailed below **TO ARRIVE NO LATER THAN 4 January 2000**:

…

On receipt of the funds we will send a cheque to the relevant authorities plus a letter of explanation.

Alternatively you may wish to send the monies directly to the relevant authorities with the letter of explanation. In this case please let us know so that we can provide you with all the necessary details.

In view of the rather complex arrangements for SDRT, I attach a note setting out the definitive position for the different charges. As I mentioned to you a while ago, there is some criticism of the application of SDRT to transactions with a European dimension. This is a very complex issue, but I thought it important to write to you to clarify the arguments before you make the payment. The attached note therefore also goes into some detail on this, all of which I think you need to have the full picture. I would, however, briefly summarise the position as follows:

There are good arguments that the operation of SDRT **in some circumstances** is against European law, particularly that relating to the freedom of movement of goods. In the context of Project Saxo, we think the arguments are weak in relation to the SDRT payable on transfers by existing shareholders and on the issue of ADR's, and stronger in relation to the issue of new shares into Euroclear. In relation to the latter the position is not free from doubt, but any attack on the duty would be very strongly resisted by the UK Inland Revenue as this would have wide implications for stamp duty generally, which brings in significant revenue for the government. In view of the fact that the duty is likely to be payable on the shares issued in ADR form in any event, we are looking at an amount of about £700k at stake. There must be doubts about whether this is worth pursuing in the case of Project Saxo, but this is one for the Company to decide. The note does raise the possibility of paying the duty but trying to preserve a subsequent claim. Let me know if you would like me to discuss the feasibility of this with a litigating colleague.

In view of the fact that the note refers also to the position of individual shareholders, you may want to forward this note to the existing shareholders for completeness

(although the note is not optimistic about current chances of a successful attack by them). I am happy for you to do so."

48. It is not known what provoked the sending of this communication. It makes reference to an earlier conversation: nothing, beyond what is said in the 22 December 1999 SDRT Advice, is known about that conversation. Nor is there any evidence of a reply from Jazztel to Linklaters in response to the 22 December 1999 SDRT Advice.

49. The note referenced in the 22 December 1999 SDRT Advice has survived. The material parts of that note – entitled "JAZZTEL – MEMORANDUM ON SDRT/STAMP DUTY" – are as follow:

"Now that the issue of new shares has closed, we thought it would be worthwhile to summarise the UK SDRT and stamp duty position in relation to the various transactions likely to occur in Jazztel shares. The following summarises the SDRT/stamp duty that will arise and how it is to be dealt with:

(a) **Issue of New Shares** – a 1.5% charge to SDRT arises. This is technically the liability of Euroclear (or Morgan Guaranty Trust Company of New York as operator of the Euroclear system) but Jazztel has indemnified Euroclear against the charge and will be paying it directly to the Inland Revenue. Payment is due by 7 January 2000. We shall let you know the exact liability arising from the issue of new shares and can draft a letter to the Revenue explaining the amount being paid to be sent with the payment.

…

As you are aware, the liabilities to SDRT and stamp duty referred to above arise because Jazztel plc is a UK incorporated company and would not arise if it were incorporated in a different country. This may appear illogical and unfair, but is, unfortunately, the state of UK legislation. For completeness, however, we thought we should mention that it appears to us that there may be grounds for questioning the validity of some or all of these charges on the basis of EU law. We summarise the grounds for the possible invalidity of these charges below. It may be, however, that as a practical matter, and having regard to the sums of money involved for which Jazztel is liable and the length and complexity of any potential litigation that would be required to successfully challenge the charges, you may well conclude that it would not be worthwhile taking the matter any further and that the prudent action is simply to pay the 1.5% SDRT charge arising to Jazztel on the issue of its new shares.

The grounds for considering that the SDRT charge levied on the issue of new shares to a clearance system may not be valid under EU law are, broadly, that the charges are contrary to:

(a) Article 58 of the Treaty of Rome, relating to the freedom of movement of capital throughout the EU;

(b) Article 49 of the Treaty of Rome, relating to the prohibition of restrictions on the freedom to provide services within the EU; and

(c) the provisions of Article 11 of Council Directive 69/335, prohibiting member states from subjecting any form of taxation whatsoever the creation, issue,

admission to quotation on the stock exchange, making available on the market or dealing in shares or other securities.

In the context of a UK incorporated company acquiring the shares in a target company incorporated in another EU member state in circumstances where the shares in the target company are held within an EU clearance service and the acquisition is effected by means of a share for share exchange under which the shares in the UK incorporated company are put into such clearance service, we consider that there are very strong grounds for questioning the validity of a specific exemption from the 1.5% charge which exempts such acquisition by one UK incorporated of another UK incorporated company but not the acquisition by a UK incorporated company of a company incorporated in another EU member state.

While the grounds for questioning the validity of the 1.5% charges arising on the issue and transfer of shares into a clearance service referred to above remain, they become less clear cut as one moves away from the scenario of a UK incorporated company acquiring a company incorporated in another EU member state. The difficulties in attempting to question the validity of the charge include…"

Various difficulties were then set out. The note then went on to say:

"You should also be aware that any attack on the 1.5% SDRT charge on the issue of shares into a clearance service could fundamentally undermine the UK SDRT regime, which raises a significant amount of money for the UK Inland Revenue. It is almost certain, therefore, that any attack on this charge would lead to strenuous opposition from the Inland Revenue that would be most likely to result in litigation that would not be decided without referral to the European Court of Justice. This would obviously require lengthy and expensive litigation with no guarantee of success or that the existing charge would not be replaced by an equivalent, but valid, tax. On this basis we would consider that there are two options available to Jazztel in relation to the 1.5% charge arising on the issue of their new shares:

(a) to pay the charge on the basis that it is not large in the context of the funds raised by the issue as a whole and that the time and expense that is likely to be involved in challenging it does not, in practice, make any challenge against such shares feasible or desirable; or

(b) to pay the charge, but with the lodgement of some sort of protective claim stating the grounds under which it is considered that the charge is invalid and as a result of which it may be possible to reclaim the SDRT paid if a successful challenge were mounted against such charge in the future.

As far as (a) is concerned, you may well consider that the amount of money that is likely to be open to challenge, being the proportion of €2.5-3m (based on the share issue price of €1 each) that equates to the proportion of the issue to be listed on EASDAQ compared to that to be listed on NASDAQ and EASDAQ in total, means that the potential time and expense involved in challenging the charge and the fact that the Inland Revenue is likely to fight extremely strenuously against any such challenge, may lead you to consider that the prudent approach would simply be to pay the SDRT.

As far as (b) is concerned, in order to be in a position to lodge a considered case for questioning the validity of the charge, it would be necessary for us to undertake a detailed analysis of the position under EU law and of the structure of the clearance systems involved and, probably, to seek Counsel's advice on the question of the validity of the charge. In addition, since the party technically liable for the SDRT on the issue of your shares into Euroclear is Euroclear (or Morgan Guaranty Trust Company of New York as the operator of Euroclear), it would be necessary to involve them closely in any attempt to attack the validity of the charge. They may consider that, since the tax does not ultimately rest with them but with Jazztel, who will pay the SDRT, they would not want to enter into arguments about the validity of the charge with the Inland Revenue. It may be, of course, that they would consider that the challenge to the validity of the charge would be to their long term benefit, since it would remove one of the disadvantages for UK incorporated companies to issue their shares into Euroclear and may, therefore, be happy to put their name to any challenge made to the Inland Revenue.

As stated above, we should emphasise that we do not feel that the grounds for challenging the validity of the charge in relation to the transfer by **existing shareholders** of their shares into an EU clearance service or on the issue of ADRs by a non-EU resident are anywhere near as clear as those relating to the issue of new shares into an EU clearance service and, even in the latter case, the complexity of the structure under which Euroclear operates makes it unclear exactly how the charge relating to the issue of new shares to Euroclear would be analysed under EU law.

We would, of course, be happy to pursue this matter for you if you consider that it is worth taking further at this point and in relation to the present issue of shares."

50. On 7 January 2000, Linklaters wrote to the Stamp Office in the following terms:

"We act for Jazztel plc (the "Company") and have been instructed to send you a cheque for £1,819,060 relating to SDRT which, subject to the European Law point noted below, would arise under Sections 96 and 93 FA 1986 on the 11,500,000 new ordinary shares issued by the Company on 14 December 1999 at an issue price of euro 17 each to Bankers Trust London Branch as common depositary for Euroclear and Cedelbank for 4,711,500 of the shares and as custodian for Morgan Guaranty Trust Company of New York who issued American depositary receipts in respect of 6,788,500 of the shares.

…

We enclose a copy of a letter seeking confirmation of the correct SDRT treatment for the transaction from Mr. Halsey at the London Stamp Office and a copy of his confirmation that the above analysis of the SDRT due is correct. You should note, however, that since that earlier correspondence it has occurred to us that the UK SDRT provisions and related regulations that purport to apply in this case are very probably inapplicable under European law. We are accordingly writing to Mr. Halsey regarding those issues, and will forward you a copy of our letter to Mr. Halsey for your information as soon as we can.

Accordingly, you should understand that the purpose of our payment today is merely to avoid any interest or penalties if, notwithstanding our view on the European Law issues, these SDRT charges were ultimately found to be applicable. Payment does not therefore involve any admission by our client that the charges are applicable and is

made without prejudice to their rights under European law, which they specifically and fully reserve."

51. It is to be inferred that there was some communication between Linklaters and Jazztel regarding Linklaters' 22 December 1999 SDRT Advice, and that Jazztel authorised this "reservation of rights approach".

52. The communication to the Stamp Office that the 7 January 2000 communication foreshadowed was dated 11 January 2000. The 11 January 2000 communication purported to provide "a summary of the reasoning behind our view that the charges to SDRT and stamp duty referred to above should be considered to be inapplicable under the relevant provisions of EU law." After setting out Linklaters' views, the letter concluded:

> "…As you will see from the enclosed copies of our letters to the Worthing and London Stamp Offices, the payments of SDRT and stamp duty have been made by the Company and the existing shareholders purely to avoid the risk of interest and penalties arising under the relevant provisions if we are, in fact, wrong in our views as to the invalidity of the charges under EU law and, specifically, the payments are made without prejudice to the rights of our clients under EU law.
>
> Accordingly, we would request that you instruct the Stamp Offices in Worthing and London to return to us the money paid to them relating to the Issue and the Transfers if you agree with our analysis set out above, so that we may remit such sums to our client.
>
> In the event that you are not able to agree with our arguments set out above, we would request that you would write to us setting out the basis for your conclusions, so that we may discuss your position further with our client. In addition, we would of course be happy to meet with you to discuss these issues further in the light of your considered view on the matter if you feel that this would be helpful."

53. A response from the Stamp Office only came on 6 March 2000. The response was that "[y]ou are complaining on behalf of your client that certain Stamp Duty or Stamp Duty Reserve Tax liabilities are contrary to Community law. We do not accept that this is the case for the following reasons", which were then set out. Mr. Baldry, Q.C., suggested in submissions that this was not a "blockbuster" answer. Perhaps that is fair: but it was a firm and unequivocal rejection by HMRC of Linklaters' position.

54. Linklaters reverted on 16 March 2000:

> "You will not be surprised to hear that we are not convinced by the arguments that you put forward and continue to consider that the charges are inapplicable as set forth in my letter dated 11 January.
>
> We are reverting to our client on this matter and will contact you in due course if and when we have instructions to do so."

55. No doubt Linklaters communicated with Jazztel: again, no such communication, or evidence of such communication, has been found. On 19 May 2000, the Stamp Office requested an update on the position. Linklaters responded on 24 May 2000:

"I refer to your letter dated 19 May addressed to my colleague…requesting an update on the question of whether the SDRT paid by our client might be inapplicable under European law.

I attach a copy of the letter written to us by Mr. Halsey and a copy of his reply.

Our client is not, at present, proceeding with this matter any further."

(iv) *Period 3*

56. In the meantime, the following communications took place regarding the payment of SDRT:

i) In a communication dated 31 January 2000 from Linklaters to Jazztel:

"UK stamp duty reserve tax ("SDRT") of 1.5 per cent of the market value on the deposit of shares in Euroclear via BT Globenet Nominees Ltd will be payable. Javier Espinosa has confirmed that the employees will bear the SDRT. We assume that Jazztel will co-ordinate this payment on behalf of the employees, but let us know whether you would like Linklaters to assist."

ii) In a communication dated 27 June 2000 from Linklaters to Jazztel:

"Further to the conference call that we had yesterday, the following sets out the capital gains tax ("CGT") and stamp duty reserve tax ("SDRT") issues arising on the issue of the Warrants for your consideration. Could anyone please let me know if any of the assumptions set out below are incorrect.

…

2 SDRT

(a) The issue of the Warrants into Euroclear will give rise to a SDRT charge calculated on 1.5% of the value attributed to the Warrants payable at the time of issue."

iii) In a communication dated 3 August 2000 from Linklaters to the Stamp Office:

"We act for the Company and have been instructed to send you the enclosed cheque for £393,755 in respect of SDRT arising under Sections 93 and 96 FA 1986 on the issue of 1,553,747 ordinary shares in the Company to BT Globenet Nominees Limited as common depositary for Euroclear and Clearstream and custodian for the Morgan Guaranty Trust Company of New York (the issuer of ADRs relating to the ordinary shares of the Company) on behalf of Banco Babadell, the beneficial owner of such shares.

The Company issued the 1,553,747 shares referred to above on 11 July 2000 at the price of €26.83 per share. Given the €:£ exchange rate…the issue of the shares gave rise to an SDRT liability of £393,755.

Could you please confirm receipt of the enclosed cheque and that it fully satisfies the liability to SDRT arising on the issue by the Company of 1,553,747 of its ordinary shares to Banco Sabadell as referred to above."

It will be noted that this communication contained no "reservation of rights".

iv) In a communication dated 7 November 2001, possibly in draft, from Linklaters to Jazztel:

"**3.5 SDRT arising on issue of Jazztel shares to Euroclear/Clearstream/ADR depository**

…

In the past, where Jazztel has issued new shares under its warrant programme and in share for share exchanges, Jazztel has paid this liability to SDRT."

v) In a communication dated 15 August 2002 from Linklaters to Jazztel, a note was attached regarding "two outstanding tax-related issues". One of these concerned SDRT:

"7. [Jazztel] now has two choices. It may either:-

- issue the New Shares and Convertible Bonds to the Escrow Agent for onward transmission to the Scheme Creditros, at a cost to the latter of £10 each in Stamp Duty per tranche of released New Shares and Convertible Bonds; or

- issue the New Shares and Convertible Bonds to the Escrow Agent for onward transmission to into a Euroclear account, at a cost of 1.5% of the market value at that time of the New Shares and Convertible Bonds.

8. [Jazztel] has historically agreed, when issuing shares or warrants, to pay the Stamp Duty which would arise as a result of placing the relevant shares into a clearing system. The question is whether, in this case, it would be willing/able to pay the Stamp Duty which would otherwise be payable by the Scheme Creditors on putting the New Shares and/or Convertible Bonds released by the Escrow Agent into a clearing system.

9. If [Jazztel] were to agree to meet the 1.5% Stamp Duty charge, on the basis that shares and bonds in a clearing system are likely to be more liquid, and will be more attractive to purchasers given the absence of any Stamp Duty on transfers within the clearing system, it would have to pay Stamp Duty based on the market value of its listed shares (in respect of the New Shares) and of the Convertible Bonds (in respect of the Convertible Bonds) at the time of the transfer."

There was no mention of Jazztel protecting its position in respect of SDRT.

vi) In a communication dated 24 September 2002 from Linklaters to Jazztel:

"We have received a number of communications from the Bondholder Communications Group concerning the question of whether it is correct/fair

that Stamp Duty/SDRT should be payable on transferring the new shares and bonds into Euroclear. From our perspective, the law and practice are quite clear on this point. We could, of course, challenge the established position on the basis that the Treasury would not have intended this result, although we would not be at all optimistic as to the prospects of such a challenge succeeding."

vii) In restructuring proposals regarding certain senior notes due April 2009 – a long and formal document dated 20 September 2002 – the following statement was made:

"**Stamp Duty and SDRT**

…

Where New Shares or Convertible Bonds are issued or transferred, or, in certain circumstances Ordinary Shares issued on conversion of Convertible Bonds are transferred, to (a) a person whose business is or includes the provision of clearance services or a nominee for such a person or (b) a person whose business is or includes issuing depositary receipts or a nominee or agent for such person, stamp duty or SDRT will be payable at the higher rate of 1.5 per cent of the amount or value of the consideration given or, in certain circumstances, the value of the New Shares or Convertible Bonds or Ordinary Shares. This liability for Stamp Duty or SDRT will strictly be accountable by the clearance service or depositary receipt operator or their nominee, as the case may be, but will, in practice, be payable by the participants in the clearance service or depositary receipt scheme.

The above statements in this section are intended as a general guide to the current Stamp Duty and SDRT position. Certain categories of person, including market makers, brokers and persons connected with clearance services and depositary receipt arrangements, are not liable to Stamp Duty or SDRT and others may be liable at a higher rate or may, although not primarily liable for tax, may be required to notify and account for it under the Stamp Duty Reserve Tax Regulations 1986."

viii) In a communication dated 27 February 2007 from Linklaters to Jazztel:

"My colleague Bill Warner has asked me to contact you regarding the Jazztel share allotment of 9 February 2006 and the amount of stamp duty reserve tax ("SDRT") to be paid to [HMRC]. As Bill mentioned this amount is due by 7 March…

I understand that in the past you have forwarded the money to us and we have arranged payment to HMRC on your behalf…

As we have mentioned in the past to your colleagues, there are, in fact, questions as to the validity of the UK SDRT charge to clearing systems under EU law. Given the increase in the number of cases that have recently been brought contesting UK tax law on the basis of being incompatible with EU law it is conceivable that the charge to SDRT may be challenged before too long. With this in mind, when we forward your payment to HMRC, we would propose making clear that it is being paid without prejudice to Jazztel's rights to contest the validity of the charge at any time in the future. I would be grateful if you could confirm that you are agreeable to us doing this."

ix) It is to be inferred that Jazztel indicated that it was happy for such a reservation of rights to be made, for on 8 March 2006, Linklaters wrote a letter to HMRC's SDRT Operations, stating:

> "We would be grateful if you could confirm receipt of this amount. We wish to make clear, however, that the Company has been advised that the charge under Section 96(2)(a)(FA 1986 may be contrary to the terms of Council Directive 69/335/EEC and therefore not lawfully levied. The above amount is, therefore, being paid without prejudice to the Company's right to contest the validity of the charge at any time in the future and/or its right to reclaim payment of the SDRT, with any relevant repayment supplement, in the event that it is determined that it was not due and payable at any time in the future."

x) A similar reservation was included in Linklaters' communication of 27 July 2006 to HMRC's SDRT Operations.

(v) Period 4

57. Advocate General Mengozzi's opinion was delivered on 18 March 2009. Unsurprisingly, this is something which Linklaters and Jazztel took note of. A communication from Linklaters that was sent both internally within Linklaters and to Jazztel stated:

> "I have also given some thought as to whether there is scope for Jazztel plc to take the view that it does not need to account for SDRT on issue of new shares into a clearing system (given the EC law developments referred to in my email to Miles). That is not absolutely straightforward since we only have an [Advocate General's][14] opinion suggesting that the UK's 1.5% SDRT charge is contrary to Community law, and not a full decision of the ECJ. However, there might be some options in this regard subject, of course, to the views of the clearing systems involved."

The "email to Miles" referred to in this communication said no more than this:

> "SDRT at the rate of 1.5% will also arise on any issue of the warrants or Jazztel plc shares into a clearing system (although a recent ECJ decision has suggested this charge is contrary to Community law)."

Given the timing of this email (22 April 2009), the reference to "a recent ECJ decision" must have been a reference to the opinion of Advocate General Mengozzi, rather than to the later decision of the CJEU.

58. Jazztel responded, noting the emails and suggesting a call. Matters were brought to a head by the fact of a further issue of shares by Jazztel, which would attract SDRT. In an email from Linklaters to Jazztel dated 1 May 2009, Linklaters stated:

> "…the total SDRT (ignoring arguments based on Community law) is £190,351.20.
>
> As mentioned in my email yesterday, the recent Advocate General's opinion in the HSBC case suggests that the SDRT charge is contrary to EU law. We should advise you that if you pay SDRT now, and try to reclaim the payments at a later date, (once the final decision in the HSBC case is known) it could take a long time to receive any

[14] The email incorrectly refers to an "Attorney-General", but it is clear what is meant.

payments back from HMRC. It may be open to you to consider not paying the amounts of SDRT due now and notifying HMRC accordingly. However, this may need input from other potentially interested parties, such as the clearing system, which is primarily liable for the charge to SDRT."

59. The history concludes with a communication from Linklaters to HMRC on 7 May 2009:

"We act for Jazztel plc (the "Company").

Over the past few years, the Company has issued ordinary shares to nominees for various clearing systems in order to permit those shares to be admitted to trading on the Madrid Stock Exchange. The Company has paid, on behalf of the clearing systems concerned, substantial amounts of stamp duty reserve tax ("SDRT") that is purported to be chargeable under section 96(2)(a) FA 1986.

The Company has now instructed us to submit a notification under Regulation 4 of the Stamp Duty Reserve Tax Regulations 1986 in relation to two issues of ordinary shares to nominees for Euroclear y Clearstream, a Spanish clearing system.

…

The Company notes the opinion of the Advocate General in C-569/07 *HSBC Holdings plc, Vidacos Nominees Limited v The Commissioners of Her Majesty's Revenue and Customs* to the effect that the purported 1.5% charge under section 96 FA 1986 infringes Community Law. Pending the final decision by the European Court of Justice on this issue, the Company is not proposing to pay any SDRT in relation to the above share issues. The notification under Regulation 4 is, accordingly, submitted without prejudice to the Company's assertion that no SDRT arises in relation to these share issues and without prejudice to the Company's rights to seek refunds of SDRT previously paid."

60. It is worth noting that this letter dealt rather obliquely with Jazztel's obligations under Regulation 4 of the Stamp Duty Reserve Tax Regulations, S.I. 1985/1688. Regulation 4 obliges both the notification of each charge to tax <u>and</u> its payment. This letter made clear Jazztel's determination to notify, but <u>not</u> to pay in breach of its obligations under the law as it then stood.

(3) Analysis

61. Jazztel's case on mistake is described in paragraph 12(ii) above. Essentially, it is said that Jazztel believed that the liability to pay SDRT was a lawful one and that, although Jazztel was not the person in law liable to pay SDRT (see paragraph 7 above), this was an obligation Jazztel (as the issuer of the shares) had in practice to assume (see paragraph 7 above). This was the basis, so it is said, on which the Payments were made, and it was a mistaken one.

62. During the course of Period 1, which culminated in the publication of the prospectus for the initial public offering of 11.5 million shares in Jazztel (see paragraph 46 above), there can be no doubt that Jazztel considered that it was liable to pay SDRT. That is what Jazztel was repeatedly told by Linklaters – in terms that were unqualified – and that is what it told investors in the prospectus for the initial public offering of its shares.

63. During this period, there were communications between Linklaters and HMRC, pursuant to which Linklaters sought confirmation that the share issue, as from time-to-time structured, would attract a charge to SDRT. There was no suggestion at this stage that the tax might be unlawful or susceptible of legal challenge by either Linklaters or HMRC.

64. I conclude that as at the end of Period 1, Jazztel's corporate state of mind was that the liability to pay SDRT was a lawful one and that, although Jazztel was not the person in law liable to pay SDRT, this was an obligation Jazztel (as the issuer of the shares) had to assume. Of course, by the end of Period 1, no Payment had actually been made.

65. The communications that occurred during the course of Period 2 obviously qualified this state of mind. Essentially:

    i) Linklaters wrote the 22 December 1999 SDRT Advice to Jazztel (paragraph 47 above).

    ii) That communication, including its attachment (paragraph 49 above), was noted and taken on board by Jazztel, because Linklaters thereafter began communicating with HMRC about Jazztel's liability to pay SDRT (see the communications at paragraphs 50 to 55 above). I find Linklaters would not have communicated in these terms with HMRC without instructions from Jazztel, which I therefore infer took place.

66. Jazztel was, therefore, plainly aware of the advice it had been given by Linklaters, and it modified its position as a result, in terms of the communications it authorised Linklaters to write. But it still paid the SDRT, albeit under a reservation (see paragraph 50 above).

67. In my judgment, Jazztel's predominant state of mind after the 22 December 1999 SDRT Advice remained that the liability to pay SDRT was a lawful one and that, although Jazztel was not the person in law liable to pay SDRT, this was an obligation Jazztel (as the issuer of the shares) had to assume. That, I conclude, is why the Payments were made.

68. I accept that the 22 December 1999 SDRT Advice must have injected an element of doubt into what was Jazztel's state of mind prior to this communication, which (as noted in paragraph 64 above) was an unqualified belief that SDRT was payable. In short, the monolithic state of Jazztel's belief came to be qualified, but did not otherwise change or crumble. My reasons for reaching this conclusion are as follows:

    i) The 22 December 1999 SDRT Advice amounted to no more than a responsible solicitor identifying to his client a potential argument that might be taken which, if successful, might result in the SDRT being found to be unlawful under Community law. It was precisely the sort of "big picture" advice that a client would expect before paying over a significant sum of money.

ii) The 22 December 1999 SDRT Advice was neither substantive, nor conclusive nor robust. This is no criticism: the point of the Advice was not to be substantive, conclusive or robust, but to identify to Jazztel a potential issue and the manner in which that issue might be approached. The advice was less about Jazztel's present legal position ("you are not liable to pay this tax, and you should challenge it") and more an attempt to identify potential future courses of action for Jazztel to take in light of the point that had been identified ("if you or someone else were minded to challenge the tax, that challenge might succeed, in which case there are certain steps you can take to protect your position now"). The options identified by Linklaters were:

a) Do nothing (on grounds that the sums are too small to worry about).

b) Pay, but under cover of a protest, seek further legal advice and discuss the SDRT issue with those directly liable to pay it.

(See the options identified in the note at paragraph 49 above.)

iii) In the event, Jazztel actually followed neither course, but took a middle way. Payment was made under a reservation of rights (paragraph 50 above), and Linklaters pressed the argument with HMRC that SDRT was an unlawful tax (paragraphs 52 to 55 above) above. But Linklaters did not press very hard, and once HMRC stuck to its guns, Jazztel dropped the matter ("Our client is not, at present, proceeding with this matter any further", paragraph 55 above). Jazztel certainly did not go any further than this and seek specialist counsel's advice (or any further advice) as to whether SDRT could successfully be challenged.

iv) In these circumstances there are two possibilities:

a) Jazztel's state of mind continued to be that SDRT was due and payable, notwithstanding the 22 December 1999 SDRT Advice. In short, Jazztel's corporate state of mind remained predominantly as I have described it in paragraph 64 above.

b) Linklaters' 22 December 1999 SDRT Advice so affected Jazztel's corporate state of mind that the state of mind as described in paragraph 64 was overwhelmed by the new information received by Jazztel, such that Jazztel's predominant state of mind was that SDRT was <u>not</u> due or that Jazztel was prepared to take the risk of paying SDRT in circumstances where its predominant view was that the tax might not be due.

Whilst I consider that Jazztel must have had some doubt as to whether the tax was lawfully due because of the 22 December 1999 SDRT Advice, my conclusion is that this doubt was a marginal one and that Jazztel's state of mind was predominantly as it had been prior to the 22 December 1999 SDRT Advice – namely that the tax was due. As I have said, prior to the 22 December 1999 SDRT Advice, the advice to

Jazztel had been that the tax was payable, and this was Jazztel's corporate view. Jazztel's public position, as stated in the prospectus, was that the tax was due. The 22 December 1999 SDRT Advice was not conclusive, and did not purport to be. It was received only very shortly before the first (substantial) payment of SDRT was due. This was Payment 2 in Table 1 above. I do not consider that an organisation like Jazztel would so fundamentally alter its view as to its liability to SDRT simply on the basis of such a communication without obtaining further legal advice so as to establish greater certainty as to the true legal position. The fact that Jazztel did not request further advice from Linklaters strongly suggests that Jazztel's state of mind regarding the liability to pay SDRT had not changed.

v) During the course of Period 3, Jazztel received further notifications from Linklaters that SDRT was due, and it paid that SDRT, sometimes without any reservation of rights, sometimes with a reservation. But that is all Jazztel did. To my mind, this indicates not an indifference as to whether SDRT was payable, but a firm view that the tax was due. Had Jazztel harboured serious doubts about the liablity to pay SDRT, it would, as I have said, have taken further advice.

vi) Essentially, Jazztel was prepared to "play the angles". If Linklaters' suggestion (and that is how I would characterise the 22 December 1999 SDRT Advice) that the SDRT could successfully be challenged came to pass, Jazztel wanted to do what it could to protect its future position, provided that cost was *de minimis*. Thus, it was quite prepared to have Linklaters write and to qualify its payments, and suggest to HMRC that the tax was not lawful. But it did not instruct a full-fledged investigation into the tax, and did not seek even a very clear formal advice. It did something that cost it nothing, and paid the tax.

vii) Jazztel's approach in Period 4 – after the delivery of Advocate General Mengozzi's opinion – is instructive. It notified the charge to tax, but it did not pay, no doubt running a risk of penalties if wrong. At this stage, I consider, Jazztel doubted that the tax was lawfully due: but not before.

E. SECTION 320 OF THE FINANCE ACT 2004

(1) Legislative history

69. Section 320 of the Finance Act 2004 provides:

"**320 Exclusion of extended limitation period in England, Wales and Northern Ireland**

(1) Section 32(1)(c) of the Limitation Act 1980…(extended period for bringing an action in case of mistake) does not apply in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners of Inland Revenue.

This subsection has effect in relation to actions brought on or after 8th September 2003."

70. This provision came into force on 22 July 2004 and so – given that it purports to have effect in relation to actions brought on or after 8 September 2003 – it is obviously retrospective in effect.

71. The background to this provision is helpfully set out by Henderson J. in Test Claimants in the FII Group Litigation v. Revenue and Customs Commissioners [2008] EWHC 2893 (Ch):

"405. The effect of section 32(1)(c) of the Limitation Act 1980, as I have already pointed out, is that a mistake-based restitution claim may be brought up to six years after the date on which the mistake either was, or could with reasonable diligence have been, discovered by the claimant. On 18 July 2008 Park J. held in DMG (see [2003] S.T.C. 1017, [2003] 4 All E.R. 645) that this cause of action was in principle available to a person who wished to recover tax paid by mistake, and dismissed the argument (apparently supported by a passage in the speech of Lord Goff in Kleinwort Benson) that overpaid tax could be recovered only by a Woolwich claim or under the relevant statutory regimes…Woolwich claims are subject to the usual limitation period of six years…The statutory provisions for repayment of tax are likewise subject to a time limit of approximately six years.

406. Against this background, the potential exposure to the public purse to mistake-based restitution claims for wrongly paid tax was obviously huge, once the cause of action had been recognised by the court. The potential exposure was particularly great in cases where the claimant had a San Giorgio claim to repayment of unlawfully levied tax under Community law, since in such cases the claim could (and often did) go back as far as 1973, with compound interest (the right to recover which was confirmed by the House of Lords in Sempra Metals) on top. Moreover, the Community law principle of effectiveness would apply in its full rigour to such claims. The Revenue appealed against the judgment of Park J. (see [2003] S.T.C. 1017, [2003] 4 All E.R. 645), and were in fact successful in the Court of Appeal in February 2005 (see [2005] S.T.C. 329, [2006] Ch. 243) before ultimately losing in the House of Lords in October 2006 (see [2007] S.T.C. 1, [2007] 1 A.C. 558). However, the outcome of those appeals was, at the time, impossible to predict with any confidence.

407. It is therefore hardly surprising that on 8 September 2003 the Paymaster General (Ms. Dawn Primarolo) announced that legislation would be included in the Finance Bill 2004 with the object of limiting the period for claiming repayments of overpaid tax to six years from the date of the original payment. In a written ministerial statement released on the following day, she said:

'…For many years there has been symmetry within the direct tax system: the Inland Revenue normally has the right to go back six years to assess outstanding tax and those who have overpaid tax have the right to make claims to repayment for a similar period. A recent High Court case has the potential to upset this balance.

Yesterday I announced that legislation will be included in Finance Bill 2004 to restore this balance. The period for claiming repayments of overpaid tax will be generally limited to six years…from the date of the original payment. The

legislation will apply to proceedings commenced on or after 8 September 2008.'

Draft clauses were published at the same time…"

72. The draft clauses did not deal with amendments to existing proceedings commenced before 8 September 2008, and this resulted in amended draft clauses, which were published on 20 November 2003, together with a further statement by the Paymaster General. As I have said, the provisions were enacted into law on receiving the Royal Assent on 22 July 2004.

(2) Retrospectivity: the law

73. It is necessary to consider two cases of the CJEU, one decision of the House of Lords and one decision of the Court of Appeal in order to understand the current law on retrospectivity.

(i) Marks & Spencer No. 2

74. In Case C-62/00, Marks & Spencer plc v. Customs and Excise Commissioners, [2003] Q.B. 866 ("Marks & Spencer No. 2"), the CJEU considered questions of retrospectivity and the compatibility of retrospective legislation with Community law:

"34. It should be recalled at the outset that in the absence of Community rules on the repayment of national charges wrongly levied it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)…

35. As regards the latter principle, the court has held that in the interests of legal certainty, which protects both the taxpayer and the administration, it is compatible with Community law to lay down reasonable time limits for bringing proceedings…Such time limits are not liable to render virtually impossible or excessively difficult the exercise of the rights conferred by Community law. In that context, a national limitation period of three years which runs from the date of the contested payment appears to be reasonable…

36. Moreover, it is clear…that national legislation curtailing the period within which recovery may be sought of sums charged in breach of Community law is, subject to certain conditions, compatible with Community law. First, it must not be intended specifically to limit the consequences of a judgment of the court to the effect that national legislation concerning a specific tax is incompatible with Community law. Secondly, the time set for its application must be sufficient to ensure that the right to repayment is effective. In that connection, the court has held that legislation which is not in fact retrospective in scope complies with that condition.

37. It is plain, however, that that condition is not satisfied by national legislation such as that at issue in the main proceedings which reduces from six years to

threes years the period within which repayment may be sought of VAT wrongly paid, by providing that the new time limit is to apply immediately to all claims made after the date of enactment of that legislation and to claims made between that date and an earlier date, being that of the entry into force of the legislation, as well as to claims for repayment made before the date of entry into force which are still pending on that date.

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."

(ii) Grundig No. 2

75. In Case C-255/00, Grundig Italiana SpA v. Ministerio Delle Finanze, [2003] 1 C.M.L.R. 36 ("Grundig No. 2"), the CJEU said the following:

"36. Given that the detailed rules governing the recovery of national taxes levied though not due are a matter for the national legislature, the question whether such rules may apply retroactively is equally a question of national law, provided that any such retroactive application does not contravene the principle of effectiveness.

37. In that regard, 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, this 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 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.

38 Thus, the transitional period must be sufficient to allow taxpayers who initially thought that the old period for bringing proceedings was available to them a reasonable period of time to assert their right of recovery in the event that, under the new rules, they would already be out of time. In any event, they must not be compelled to prepare their action with the haste imposed by an obligation to act in circumstances of urgency unrelated to the time limit on which they could initially count.

39 A transitional period of 90 days prior to the retroactive application of a period of three years for initiating proceedings in place of a 10- or five-year period is clearly insufficient. If an initial period of five years is taken as a reference, 90 days leaves taxpayers whose rights accrued approximately three years earlier in

a position of having to act within three months when they had thought that almost another two years were still available.

40. Where a period of 10 or five years for initiating proceedings is reduced to three years, the minimum transitional period required to ensure that rights conferred by Community law can be effectively exercised and that normally diligent taxpayers can familiarise themselves with the new regime and prepare and commence proceedings in circumstances which do not compromise their chances of success can be reasonably assessed at six months.

41. However, the fact that the national court has found that a transitional period fixed by its national legislature such as that in issue in the main proceedings is insufficient does not necessarily mean that the new period for initiating proceedings cannot be applied retroactively at all. The principle of effectiveness merely requires that such retroactive application should not go beyond what is necessary in order to ensure observance of that principle. It must, therefore, be permissible to apply the new period for initiating proceedings to actions brought after expiry of an adequate transitional period, assessed at six months in a case such as the present, even where those actions concern the recovery of sums paid before the entry into force of the legislation laying down the new period.

42. The answer to the national court must therefore be that Community law precludes the retroactive application of a time limit that is shorter and, as the case may be, more restrictive for the claimant than the period for initiating proceedings that was previously applicable to claims for the recovery of national taxes contrary to Community law where no adequate transitional period is provided during which claims relating to sums paid before the entry into force of the legislation introducing the new time limit may still be brought within the old period. Where a limitation period of five years is replaced by a time limit of three years, a transitional period of 90 days must be regarded as insufficient and six months must be regarded as the minimum period required to ensure that the exercise of rights of recovery is not rendered excessively difficult."

(iii) Fleming

76. In Fleming (trading as Bodycraft) v. Revenue and Customs Commissioners, [2008] UKHL 2 ("Fleming"), the House of Lords considered this statement of the law in the context of reduction in the period for reclaiming output and input VAT without transitional provisions in the legislation. There were two claims before their Lordships:

i) A claim by Mr. Fleming for repayment which would have been in time, but for the reduction. The VAT and duties tribunal held that HMRC could not rely on the three year time limit because at the time the taxpayer's right to deduction had arisen there had been no time limit so that the taxpayer had an accrued right under Community law to deduct input tax and that right could not be taken away by legislation which had retrospective effect. On appeal, the judge held that the taxpayer's claim had not been made within a reasonable time after the imposition of the time limit, so that the retrospective effect of the provision could

not be relied upon. The Court of Appeal allowed the taxpayer's appeal, holding that since the new regulation contained no transitional provisions giving an adequate period for making claims after the enactment of the new time limit, it was incompatible with the principle of effectiveness under Community law and the court could not incorporate a reasonable transition period where none had been provided for.

ii) A claim by Condé Nast. In this case, HMRC had taken steps – as here – by means of announcements to introduce a transitional period. The VAT and duties tribunal dismissed the taxpayer's appeal against HMRC's decision not to allow the claim on the ground that it was required by these transitional arrangements to show that it would have made the claim if transitional provisions had been included in the amending legislation, but the taxpayer had not done so. The judge affirmed the tribunal's decisions. The Court of Appeal held it should follow the decision of the Court of Appeal in Fleming and allowed the taxpayer's appeal.

77. The history of the appeals clearly demonstrates the difficulty of the issues arising. In the House of Lords, both appeals were dismissed, but Lord Walker dissented in respect of Condé Nast's appeal. The position was that, although all of their Lordships gave opinions:

i) Lord Hope agreed with Lord Neuberger,[15] as did Lord Scott (subject to one "minor qualification")[16] and Lord Carswell.[17]

ii) Lord Walker differed in the outcome as regards Condé Nast's appeal,[18] but his analysis of the law – if not its application – appears to have been accepted by the other members of the committee.[19]

78. Lord Hope stated:

> "5. There is no doubt that, if the time limit introduced by regulation 29(1A) was to be modified in the light of the decisions in Marks & Spencer II and Grundig by the introduction of a transitional period, the initiative lay with the commissioners and that this initiative was not taken…Whatever the reason may be, it is plain that the unmodified time limit in regulation 29(1A) is incompatible with EU law because it is retrospective and because it makes no provision for any transitional arrangements…
>
> 6. The question which your Lordships must resolve is how to apply the guidance that was given in Marks & Spencer II and Grundig in order to make good the lack of a transitional period for the application of regulation 29 to accrued claims resulting from a failure to deduct input tax. Legislation that is incompatible with EU law must be disapplied. But can the court go further and

[15] See [1] (*per* Lord Hope).
[16] See [13] (*per* Lord Scott).
[17] See[73] to [75] (*per* Lord Carswell).
[18] See [63].
[19] See [1] (*per* Lord Hope), [13] (*per* Lord Scott), [73] (*per* Lord Carswell) and [78] (*per* Lord Neuberger).

make good the defect which has led to its disapplication? The problem is far from easy, as the division of opinion in the courts below and in this House so clearly demonstrates…Where national legislation is defective because it lacks the transitional arrangements that are necessary under EU law, is it for the national court to make good the deficiency by devising such transitional arrangements as it may regard as appropriate? Or must this be left to the legislature or, following the example of what was done in regard to section 80 by means of announcements in business briefs, to the commissioners?

…

10. I would not rule out the possibility, in a suitable case, of the court reaching its own decision as to what would be a reasonable time for the making of claims and rejecting claims that were made after a period which it held to be reasonable. But I do not think that the situation disclosed by these appeals lends itself to that treatment. In my opinion this is a step too far for the court to take. The issue is not one of statutory interpretation, for which the court must accept responsibility. There is a gap in the legislation which is unfilled. The infringement of EU law in this respect cannot be said to have been comparatively minor or inadvertent, such as would enable greater weight to be attached to the state's need for legal certainty in matters of taxation…The primary responsibility for giving a clear indication to taxpayers as to where they stood with regard to the making of claims despite the retrospective introduction of the time limit lay with the legislature and the executive.

11. To be compatible with EU law, taxpayers were entitled to be told in advance of any transitional arrangements that would enable them to submit late accrued claims for the deduction of input tax despite the introduction of the time limit. They were entitled to be given sufficient notice to familiarise themselves with the new regime, including the period of grace that was to be allowed for the submission of accrued claims during a transitional period…This was necessary to give effect to the principle of effectiveness. Not all taxpayers affected by a system whose reach is as wide as VAT can be assumed to have been aware of the development of the relevant case law or, even if they were aware of the case law, to have understood the effect of it. Some may have appreciated that they could claim a period of disapplication, but some might not. Such indications as were available to them through the business briefs suggested that, in most cases, any such claims would be rejected by the commissioners. I do not think that the gap in the legislation can be made good on a case by case basis. The nature of the defect is such that a single solution is required that can reasonably be applied to all taxpayers.

12. For these reasons, and for those explained more fully by Lord Neuberger, I would hold that the period has not yet begun and that it is for Parliament or the commissioners, if they choose to do so by means of an announcement disseminated to all taxpayers, to introduce prospectively an adequate transitional period. Until that is done the three year time limit must be disapplied in the case of all claims for the deduction of input tax that had accrued before the introduction of the time limit. I would apply that reasoning to Mr. Fleming's case as well as that of Condé Nast…"

79. Lord Scott said:

> "15. On 18 July 1996 the Government announced that the time limit for claims under section 80 to recover overpaid VAT would be reduced from six to three years. The amendment was made by section 47 of the Finance Act 1997 with effect from 18 July 1996. There was no transitional provision. Similarly regulation 29 of the 1995 Regulations was amended by the addition of paragraph (1A) which imposed a three year time limit within which claims for the repayment of input tax had to be made: see the Value Added Tax (Amendment) Regulations 1997. The three years would run from the date by which the VAT return for the accounting period in which the claim to deduct the input tax in question ought to have been included had to be made. Regulation 29(1A) came into force on 1 May 1997 and here, too, there was no transitional provision. The effect of this amendment was that, on 1 May 1997, input tax that had been paid earlier than 1 May 1994, and in respect of which valid repayment claims could have been made became immediately irrecoverable and that in respect of claims for the repayment of input tax that had been paid between 1 May 1994 and 1 May 1997 the period within which they could be brought would be, depending on when the input tax had been paid, progressively less than three years from 1 May 1997. There would, for example, be one month only after 1 May 1997 within which a claim for repayment of input tax paid on 1 June 1994 could be claimed.
>
> 16. Challenges to the reduction of the time limit for section 80 claims from six to three years and to the introduction of the three-year time limit for regulation 29 claims followed. The challenges were not to the three year time limits as such but to the absence of any transitional periods…
>
> 17. It is not in dispute that a consequence of the ECJ decision in the Marks & Spencer case…was that in the absence of any transitional provisions neither the reduced time limit applicable to section 80 claims nor the introduction of the time limit for regulation 29 claims could be retrospectively applied to claims for repayments that had accrued before these changes had come into effect….
>
> …
>
> 19. The commissioners' contention on the appeals now before the House, based on para 41 of the ECJ's Grundig judgment, is that "Community law requires only that the time limit be disapplied to claims brought within a reasonable period from the introduction of the time limit". They contend that if a claimant "does not make a claim until several years after the imposition of the time limit, then the time limit can be applied to the claim in the interests of finality and certainty": see para 20 of their written case. These contentions cannot, in my opinion, be accepted. Immediately prior to the addition of paragraph (1A) to regulation 29 both Mr. Fleming and Condé Nast had rights to recover input tax from the commissioners without any time limit for the bringing of their claims. That was part of the VAT regime that United Kingdom national law had put in place. The addition of paragraph (1A) purported to invalidate those claims forthwith, with no prior notice or warning given. At first sight there would seem to be no answer to the contention advanced by Mr. Fleming and Condé Nast that in relation to their respective claims paragraph (1A) must therefore be disapplied. The commissioners accept that, in relation to input tax paid before 1 May 1997, paragraph (1A) must be disapplied to some, but not all, regulation 29 claims. A distinction, they contend, must be drawn between claims made

within a reasonable time after 1 May 1997 and claims not made within that reasonable time. Only in relation to the former must paragraph (1A) be disapplied. Mr. Vajda, counsel for the commissioners, has put before your Lordships two alternatives for the purpose of determining what that reasonable time should be. His first alternative was that the reasonable period should be six months from 1 May 1997. This was based on the six months extra that the two business briefs had allowed for certain section 80 claims. Mr. Vajda's second alternative was that the period should be six months from the date on which a taxpayer could be expected to have become aware of the ECJ's Marks & Spencer judgment.

20. My Lords, I would, for my part, reject the premise on which these two alternatives are based. The UK instituted a VAT scheme for the repayment by the commissioners of input tax that enabled claims for repayment to be made without limit of time. That was a surprising, and perhaps unintended, feature of the scheme but was a lawful feature. There is no suggestion that the scheme failed properly to implement the Sixth Directive. The scheme was then amended by the introduction of a three-year time limit that was to apply not only prospectively but also retrospectively with no transitional period during which those, like Mr Fleming and Condé Nast, who had been sitting on their claims, would be able to take into account the change in the law and bring their claims before they became time barred. Whether a reasonable transitional period for claims to be brought that on 1 May 1997 were already at least three years old should have six months, 12 months or some other period from 1 May 1997 is open to argument but is not in point. The important fact is that there was no transitional period. The VAT regime is not judge-made and is not made by the commissioners. It is a statutory scheme consisting of primary legislation made by Parliament and secondary legislation made by others under powers conferred by Parliament. The commissioners have management powers conferred by Parliament but these powers do not extend to enabling the commissioners to amend the statutory scheme. The business briefs published by the commissioners can properly be regarded as published pursuant to the commissioners' management powers but are not a means enabling the commissioners to amend the VAT regime made by primary and secondary legislation. The two business briefs, to which reference has been made in this opinion, contained provisions purporting to extend the period within which certain section 80 claims which had accrued to the taxpayers before the amendment to section 80(4) came into effect could be brought. These provisions have been described as "concessions". They are, my Lords, nothing of the sort. If European law does not recognise the validity of a UK statutory limitation period in relation to a certain class of VAT claim it is not a "concession" for those charged with the management of the scheme to purport to amend the scheme by allowing some of those whose claims would be barred by the invalid provision to have some additional period to bring their claims. In Commission of the European Communities v. United Kingdom (Case C-33/03) [2005] S.T.C. 582 , another VAT case, the ECJ said, at para 25, that

"it is settled case law that the incompatibility of national legislation with Community provisions can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices cannot be regarded as constituting the proper fulfilment of obligations under Community law…"

The UK's obligation is to put in place a legal scheme for the bringing of claims for repayment of input tax. Regulation 29 constitutes the legal scheme. If, as is

the case, paragraph (1A) cannot, consistently with Community law, be applied against a certain class of taxpayers, into which class both Mr. Fleming and Condé Nast fall, the defect cannot, in my opinion, be cured by "mere administrative practices". The business briefs fall, in my opinion, under that heading.

21 It is argued, alternatively, that the court can and should fix the duration of an extra period, a transitional period, that must be allowed to claimants whose pre 1 May 1997 claims would otherwise be barred by paragraph (1A). It is, to me, a surprising proposition that the court can, by judicial legislation, add a transitional period in order to cure the invalidity of a statutory provision that would not otherwise comply with European law and be enforceable against certain claimants. There are, to my mind, several objections to the proposition. First, it is not the function of judges to legislate. Second, the principle that people must be expected to know the law and conduct their affairs in accordance with the law can hardly apply to a judicial amendment to primary or secondary legislation that, until it is made known in the judge's pronounced judgment, is held *in pectore*. The objection to retrospective legislation would apply here too. Third, the important principle of certainty can hardly be satisfied. The terms of the judicial amendment might change as the case travelled up the appellate chain. And the ability of this House to depart from previous decisions would need to be kept in mind.

22 The notion that a court can add a transitional provision to regulation 29(1A) , and thereby avoid the need to disapply the paragraph in relation to regulation 29 claims based on some pre 1 May 1997 input tax payments, appears to derive from language used by the ECJ in paras 40–43, but particularly para 41, of the judgment in the Grundig case [2002] E.C.R I-8003. These paragraphs are set out in para 44 of Lord Walker's opinion. In para 41 the ECJ said that the fact that a national court had held a transitional period fixed by its national legislature to be insufficient did not necessarily mean that the new limitation period could not be applied retrospectively at all, and continued:

"The principle of effectiveness merely requires that such retroactive application should not go beyond what is necessary in order to ensure observance of that principle. It must, therefore, be permissible to apply the new period for initiating proceedings to actions brought after expiry of an adequate transitional period, assessed at six months in a case such as the present, even where those actions concern the recovery of sums paid before the entry into force of the legislation laying down the new period."

My Lords, the ECJ in this passage was dealing with the principle of effectiveness. But that is not the only principle in play. The principle of certainty, too, must be taken into account. Taxpayers are entitled to know from the statutory scheme what input tax repayment claims they can bring under regulation 29. In the absence of any statutory transitional provision, how are they to know whether pre 1 May 1997 claims that are more than three years old can be brought or, as to claims based on input tax paid between 1 May 1994 and 1 May 1997, within what period they can be brought? It is no answer to the requirement of certainty to be told that the claims can be brought within "an adequate transitional period". There is also the constitutional point, which may or may not apply to judges sitting in Italian courts. It is the function of judges sitting in UK courts to construe primary and secondary legislation. It is the function of judges sitting in UK courts to disapply UK legislation that is inconsistent with Community law. It is not the function of judges sitting in UK

courts to amend UK legislation that is inconsistent with Community law. Moreover, the passage I have already cited from the ECJ judgment in Commission of the European Communities v United Kingdom (Case C-33/03) [2005] S.T.C. 582, para 25 seems to me pertinent here too:

"incompatibility of national legislation with Community provisions can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended."

"Mere administrative practices" cannot do this. Nor can judges.

23 Accordingly, I would dismiss both appeals."

80. Lord Walker said:

"24. My Lords, it is a fundamental principle of the law of the European Union, recognised in section 2(1) of the European Communities Act 1972, that if national legislation infringes directly enforceable Community rights, the national court is obliged to disapply the offending provision. The provision is not made void but it must be treated as being (as Lord Bridge of Harwich put it in R. v. Secretary of State for Transport, *ex parte* Factortame Ltd [1990] 2 A.C. 85, 140) "without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC"…

25 Disapplication is called for only if there is an inconsistency between national law and EU law. In an attempt to avoid an inconsistency the national court will, if at all possible, interpret the national legislation so as to make it conform to the superior order of EU law Pickstone v. Freemans plc [1989] A.C. 66; Litster v. Forth Dry Dock & Engineering Co. Ltd [1990] 1 A.C. 546. Sometimes, however, a conforming construction is not possible, and disapplication cannot be avoided. Disapplication of national legislation is an essentially different process from its interpretation so as to conform with EU law. Only in the most formal sense (because of the terms of section 2(4) of the European Communities Act 1972) can disapplication be described as a process of construction. In these two appeals it is common ground, at least in your Lordships' House, that the national court is concerned with disapplication, not with trying to find a conforming construction. This important distinction has been to some extent overlooked in the Court of Appeal.

…

54 The practicalities of disapplication of national legislation are matters for the national court, subject to guidance from the ECJ as to the principles to be applied. Some guidance can be obtained from the judgments of the ECJ and the opinions of the Advocates General in Marks & Spencer II, Grundig II and Fantask A/S v Industriministeriet (Case C-188/95) [1997] E.C.R. I-6783, but the guidance is limited. Marks & Spencer II [2003] Q.B. 866 (paras 34–36 quoted above, and also paras 37–3 9) shows that limitation periods must be of reasonable duration, and fixed in advance. Any curtailment of existing limitation periods must have an adequate transitional period. Its adequacy must be judged by reference to its purpose, that is (as the ECJ said in Grundig II [2002] E.C.R. I-8003, para 38):

"to allow taxpayers who initially thought that the old period for bringing proceedings was available to them a reasonable period of time to assert their right of recovery in the event that, under the new rules, they would already be out of time. In any event, they must not be compelled to prepare their action with the haste imposed by an obligation to act in circumstances of urgency unrelated to the time-limit on which they could initially count …"

and, at para 40:

"to ensure that rights conferred by Community law can be effectively exercised and that normally diligent taxpayers can familiarise themselves with the new regime and prepare and commence proceedings in circumstances which do not compromise their chances of success…"

The reference to "normally diligent taxpayers" suggests the need for a single objective test. The degree of curtailment of an existing limitation period is also material: paras 39 and 40.

55 In Grundig II the ECJ went on to observe (in para 41, already quoted):

"The principle of effectiveness merely requires that such retroactive application should not go beyond what is necessary in order to ensure observance of that principle. It must, therefore, be permissible to apply the new period for initiating proceedings to actions brought after expiry of an adequate transitional period, assessed at six months in a case such as the present, even where those actions concern the recovery of sums paid before the entry into force of the legislation laying down the new period."

But in paras 40 and 42 the period of six months was qualified as the minimum period. In my opinion the ECJ cannot have been intending to lay down a mandatory rule, or to do more, in these paragraphs, than offer guidance of the most general sort. Advocate General Colomer had in para 27 of his opinion stated:

"It is not possible to determine whether or not a 90-day transitional period, such as that in the present case, complies with the principle of effectiveness without having regard to all the factual and legal requirements, both procedural and substantive, which the domestic legal order imposes for the bringing of actions for recovery. Only with that overview, which the Italian courts alone have, is it possible to give a definitive answer."

That is, with respect, obviously right and the ECJ cannot have intended to contradict it. Nothing is known, your Lordships were told, of the ultimate disposal of the Grundig Italia litigation.

56 In these circumstances Grundig II cannot in my opinion be taken to establish much more than the general proposition that the principle of effectiveness requires that national legislation which curtails a limitation period, and does so in a way that infringes EU law, must be disapplied for an adequate period. It gives little, if any, reliable guidance as to the duration of the period…

57 Fantask A/S v. Industriministeriet (Case C-188/95) [1997] E.C.R. I-6783 was cited at length to your Lordships. For present purposes its main significance is, in my opinion, in showing what factors are not relevant to the national court's task in disapplying national law. The case was concerned with whether official

charges for the registration of Danish companies exceeded what was permitted by EU law (questions one to five referred to the ECJ) and with the consequences of the charges being excessive and unlawful (questions six to eight). The most material question was the seventh, that is whether, when a member state has failed to transpose a Council Directive correctly, EU law prevents that member state from relying on a national limitation period to resist an action for the recovery of charges levied in breach of the Directive, and continues to do so as long as the transposition has not been correctly effected. The ECJ rejected that argument, holding, at para 51, that its earlier decision in Emmott v Minister for Social Welfare (Case C-208/90) [1993] I.C.R. 8 had not laid down any general rule, but depended on its particular (and extreme) facts. The ECJ reaffirmed, in para 52, that the principle of effectiveness was the critical test.

58 Fantask [1997] E.C.R. I-6783 is also notable for a very illuminating general discussion in the opinion of Advocate General Jacobs. It steps back, as it were, and looks at the whole problem in context. The whole opinion merits attention but I restrict quotation to five paragraphs, 68–72:

"68. The Governments' arguments concerning the financial consequences of Emmott also raise an important point of principle. As they correctly observe, the Emmott ruling, if read literally, would expose member states to the risk of claims dating back to the final date for implementing a Directive…

69. Moreover, such liability would arise even in the event of a minor or inadvertent breach. Such a result wholly disregards the balance which must be struck in every legal system between the rights of the individual and the collective interest in providing a degree of legal certainty for the state. That applies particularly to matters of taxation and social security, where the public authorities have the special responsibility of routinely applying tax and social security legislation to vast numbers of cases.

70. The scope for error in applying such legislation is considerable. Regrettably that is particularly so in the case of Community legislation, which is often rather loosely drafted…The recent Argos and Elida Gibbs cases provide a further example of how huge repayment claims can arise from a comparatively minor error in implementing a Community tax directive. In those cases the court found that the fiscal treatment accorded by the United Kingdom to voucher transactions – used extensively in that member state as a business promotion technique – was not in accordance with the Sixth VAT Directive. The resultant repayment claims are reported to be between £200m and £400m.

71. It might be objected that it is not unreasonable to require member states to refund over-paid charges given that they were not entitled to collect them in the first place. However, that view disregards the need for states and public bodies to plan their income and expenditure and to ensure that their budgets are not disrupted by huge unforeseen liabilities. That need was particularly clear in Denkavit, in which repayment was sought of the annual levies imposed by the Netherlands Chambers of Trade and Industry in order to finance their activities. As was noted in my opinion in that case, retrospective claims of up to 20 years would have had catastrophic effects on their finances.

72. In short, therefore, my main reservations about a broad view of the Emmott ruling are that it disregards the need, recognised by all legal systems, for a degree of legal certainty for the state, particularly where infringements are

comparatively minor or inadvertent; it goes further than is necessary to give effective protection to Directives; and it places rights under Directives in an unduly privileged position by comparison with other Community rights. Moreover a broad view cannot be reconciled with the court's subsequent case-law on time-limits."

The Advocate General also noted, at paras 73-75, that there are different types of time limit in national legislation, and that they may call for different treatment. The ECJ did not comment expressly on these parts of the Advocate General's opinion, but its judgment was not inconsistent with the Advocate General's thinking. The importance of maintaining stability in public finances was acknowledged by the ECJ in Marks & Spencer II [2003] Q.B. 866, para. 41.

59 Three other points of EU jurisprudence were raised and relied on by counsel for the respondents (Mr. Southern for Mr. Fleming and Mr. Peacock for Condé Nast)…

…

61 The second point is the general principle that if a member state is in breach of a Council Directive, its breach must be remedied by proper legislation, and not merely by administrative action. The ECJ said in Commission of the European Communities v United Kingdom (Case C-33/03), [2005] S.T.C. 582, para. 25:

"it is settled case law that the incompatibility of national legislation with Community provisions can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices cannot be regarded as constituting the proper fulfilment of obligations under Community law…"

However that principle does not in my opinion apply here, for similar reasons to those mentioned in the last paragraph. The issue in this case is not the continuing non-transposition (or incorrect transposition) of a Council Directive; neither counsel put his case that way. Any action to be taken by the United Kingdom Government to define a deferred transitional period for claims under regulation 29 (whether in the form of legislation, or the announcement of an official administrative policy) is relevant, not as a transposition of any part of the Sixth Directive, but as bearing on the duration of the "adequate transitional period" referred to in Grundig II.

62 The third point, closely associated with the second, is whether the definition of an adequate transitional period is properly a matter for the national court (that is, in these appeals, for your Lordships' House in its judicial capacity) and not for the legislature. My Lords, in my opinion that task is not merely within your Lordships' power but is your Lordships' plain duty under EU law. The disapplication of offending legislation is the duty of the national court, even if it involves action which would otherwise be alien to the strong judicial instinct not to intrude on the province of the legislature…"

81. Lord Carswell said:

"76. In order to comply with the principle of effectiveness, it was necessary for taxpayers to have sufficient information for them to know that they could submit claims for deduction of input after the introduction of the time limit. No transitional period was afforded by the legislature when regulation 29(1A) was passed into law. The commissioners could not properly have refused to accept such claims if a reasonable transitional period had not elapsed after regulation 29(1A) came into operation on 1 May 1997. They had notified taxpayers in a series of business briefs that they would until 30 June 2003 accept claims under section 80 of the Value Added Tax Act 1994 for repayment of overpaid VAT. They maintained that late claims for refund of under-deducted input tax were governed by section 80 of the 1994 Act. Neuberger J. ruled in a judgment given on 10 October 2001 in University of Sussex v Customs and Excise Comrs [2001] S.T.C. 1495 that this contention was incorrect and that they were governed by regulation 29 of the 1997 Regulations. The commissioners appealed, still contending that section 80 applied to such claims, but their appeal was eventually dismissed by the Court of Appeal on 21 October 2003 [2004] S.T.C 1. Until the last-mentioned date a taxpayer in the situation of Condé Nast was faced with the commissioners' insistence that his claim fell not within regulation 29 but within section 80, in respect of which claims were to be accepted up to 30 June 2003. No doubt with an eye to this date, Condé Nast's advisers lodged their claim on 27 June 2003. In my opinion it would have been wholly unreasonable to expect a taxpayer to have to divine that the commissioners' appeal would be dismissed and that he should submit his claim on some earlier date than 30 June 2003, such as six months after 11 July 2002, the date on which the European Court of Justice gave its decision in Marks & Spencer plc v. Customs and Excise Comrs (Case C-62/00) [2003] Q.B. 866, or 24 September 2002, the date on which that court gave its decision in Grundig Italiana SpA v Ministero delle Finanze (Case C-255/00) [2002] ECR I-8003. If the case were to be decided on this issue, I should have been prepared to hold that a reasonable transitional period extended later than 27 June 2003.

77 For the reasons given by Lord Hope and Lord Neuberger, I do not consider that this is the determinative issue. I agree with them that it is for Parliament or for the commissioners – who must disseminate the information sufficiently to all value added taxpayers – to introduce prospectively an adequate transitional period which will apply to all claims for the deduction of input tax that had accrued before the introduction of the time limit. That was not done before 27 June 2003 and indeed has not yet been effected. When such a step is taken, the time limit applied by regulation 29(1A) of the 1995 Regulations must be disapplied. Like Lord Hope, I would apply that reasoning to Mr Fleming's appeal as well as to that of Condé Nast. I would dismiss both appeals."

82. Lord Neuberger said:

"79. It appears to me that the following relevant propositions can be derived from well-established principles of Community law and, more specifically, from the reasoning of the European Court of Justice ("the ECJ") in Marks & Spencer plc v. Customs and Excise Comrs (Case C-62/00) [2003] Q.B. 866 (known as

"Marks & Spencer II") and Grundig Italiana SpA v Ministero delle Finanze (Case C-255/00) [2002] ECR I-8003 (known as "Grundig II"):

(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 bought: 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 Holdings plc v. Inland Revenue Comrs [2006] 1 A.C. 118, paras 16–17.

(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 "virtually 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 v. Inland Revenue Comrs (Joined Cases C-397/98 and C-410/98) [2001] Ch. 620, 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 34–41, and Grundig II, paras 38–40 and especially (with regard to temporary disapplication) para 41.

80 On the basis of the arguments addressed to your Lordships' House and the reasoning of the courts below, I believe the only controversial aspect of the above analysis centres on propositions (h) and (j). The issue is whether it is open to the court to disapply the retrospective limitation for a limited period (as opposed to permanently) in cases where the legislation imposing a retrospective time limit contains no transitional period (as in the present case and as in Marks & Spencer II). In the Court of Appeal in the Fleming case [2006] S.T.C. 864, Ward and Hallett LJJ concluded that the relevant part of the reasoning (and in particular the last sentence) in para 41 of Grundig II, quoted in Lord Walker's opinion, only applies where there is an inadequate transitional period: see at paras 73–81 and paras 60 and 61. This view appears to have been based on (a) the fact that the ECJ's judgment in Marks & Spencer II resulted in a declaration that the absence of any transitional period rendered the retrospective effect of the relevant legislation "incompatible" with Community law, (b) the fact that that judgment had no equivalent to para 41 of the judgment in Grundig II, and (c) the belief that there is a difference in principle between the two types of case.

81 Despite the arguments on behalf of Mr Fleming in support of this view, I am unpersuaded by any of these three factors. The question for the ECJ in Marks & Spencer II was admittedly relatively widely expressed, and concerned the enforceability of a retrospective time limit introduced without any transitional provisions; the ECJ held that such a time limit was "incompatible with the principles of effectiveness and of the protection of legitimate expectations". However, nothing was said either way as to whether the unlawfulness of not providing for a transitional period was, as it were, permanently fatal to the efficacy of the retrospective time limit. That was a topic on which the ECJ did express a view, albeit that it did not strictly arise from the specific question referred, in Grundig II, at para 41. As I understand it, the ECJ was there seeking to give guidance to tax authorities, courts, and taxpayers in member states as to the practical consequences where retrospective time limits were imposed without adequate transitional provisions.

82 At least for present purposes, I can see no difference in principle or in practice between a case where there is an inadequate transitional period and one where there is no transitional period. In each case, there is "no adequate transitional period" to use the ECJ's words in para 42 of Grundig II. In each case, the failure goes to the enforceability of the retrospective time limit. In each case, a person with an accrued right would be equally likely to be unaware of the court's obligation to disapply the new retrospective time limit, or for how long the period of disapplication might run. In each case, the legislature (or, indeed, in appropriate circumstances, the executive or the courts) could put the position right by effectively creating (or extending an unduly short transitional period into) a valid transitional period. Further, it would seem odd if there was a completely different rule in a case where there was a very short (say, three day) inadequate transitional period and one where there was no such period.

83 In the light of these considerations, it follows from the retrospective effect of regulation 29(1A) and the absence of any transitional provision, that the duty of

> the United Kingdom courts is to disapply the regulation in relation to claims based on accrued rights made during an appropriate period. Although the commissioners did not accept that proposition for much of the period of this litigation, they now accept that regulation 29(1A) ought to have included a transitional provision in respect of claims based on accrued rights, and that the regulation ought to be disapplied to them by the courts. Accordingly, the issue to be determined is the proper characterisation and duration of the period of disapplication.

83. Lord Neuberger then considered HMRC's principal contention that "the appropriate period of disapplication should be equivalent to the transitional period which the legislature ought to have accorded under Community law, but failed to do so" (at [84]). That Lord Neuberger regarded as a surprising proposition. Although he found it "hard to conceive of circumstances which would require a transitional period of more than a year" (at [85]), he did not accept the contention for this reason:

> "88 …a valid limitation period, must, in order to satisfy Community law, be "fixed in advance": see Marks & Spencer II [2002] Q.B. 866, para 39. In my judgment, the same principle must, as a matter of logic, apply to a transitional period which has to be included when a new retrospective time limit is introduced. After all, the transitional period serves the same function as a limitation period. If that is right, then, as I see it, the period of disapplication envisaged in the last sentence of para 41 of Grundig II [2002] ECR I-8003, must also comply with the principle. Again, it serves precisely the same purpose as a limitation period, namely to enable people with a certain type of claim (in this case a claim based on an accrued right) to know within what period they have to bring their claims. Otherwise, where no transitional period has been provided for, persons with accrued claims will not know, or be able to find out, with any confidence by when they have to make their claims. In other words, the Community law requirement of legal certainty would not be met by the commissioners' primary contention."

84. Lord Neuberger then turned to HMRC's argument that "only those people who could and would have made claims during the transitional period which ought to have been, but was not, accorded in May 1997, should be entitled to raise claims during the period of disapplication, whatever it is determined to be" (at [96]). He rejected this argument as "both wrong in principle and inconvenient in practice" (at [96]), saying:

> "97. The "could have" point goes to whether the person concerned has an accrued right, and is therefore entitled to complain of the absence of a sufficient transitional provision. Accordingly, it appears to me to take matters no further. The "would have" point is in my view simply wrong. A period, whether of transition or disapplication, is intended to be for the benefit of anyone who could take advantage of it. If the legislation fails to accord an effective transitional period, then the member state, through the legislature the executive or the courts, must do so. Quite apart from this, arguments and evidence as to the hypothetical question of whether a particular claim would have been made during a notional transitional period would very often be expensive and time-consuming and likely to lead to uncertainty. While not decisive, such a consideration is not irrelevant. Accordingly, again in agreement with Lord

Walker, and also in agreement with the Court of Appeal in the Condé Nast case [2006] S.T.C. 1721, para 48, I would reject the commissioners' contention that a person with an accrued right can only take advantage of a period of disapplication if he or she would have made a claim during the transitional period (if there had been one)."

85. Lord Neuberger concluded in relation to the "period of disapplication" in this case as follows:

"104 In my opinion, the period of disapplication (or, to be strictly accurate, the beginning of the end of the period of disapplication) has not yet arisen. Subject to one point, I would have thought that it would be a matter for Parliament to legislate prospectively for a specific transitional period, or for the commissioners to communicate in clear terms, a final period during which claims for input tax arising before 1 May 1997 could be made. The possibility of legislation speaks for itself. The possibility of the commissioners giving what amounts to an extra-statutory concession was said on behalf of the taxpayers to be insufficient. I do not agree. Provided that the commissioners allow a sufficiently long period, which is effectively communicated in sufficiently clear terms to those registered for VAT, that would suffice.

…

107 If, however, a period of disapplication was accorded by way of concession by the commissioners, it would, in my judgment, only be effective if it was properly communicated to those with accrued rights. In this connection, it seems to me that, as already mentioned, communication through the medium of business briefs alone may well not be sufficient, as they may come to the attention of only a limited number of taxpayers. However, that should not present problems for the commissioners. Each quarter, every person registered for VAT receives a VAT form, which he or she is, of course, bound to complete and return; normally included with the form is a pamphlet with information about recent developments in the law and practice relating to VAT. It would, it seems to me, be only too easy for such a pamphlet to include information about any period of disapplication accorded by the commissioners, and, provided the period was of a proper duration, that, in my opinion, would be quite sufficient…It may also (or, even conceivably, alternatively) be appropriate for the commissioners to include this information on their website."

(iv) Leeds City Council

86. In Leeds City Council v. HMRC [2015] EWCA Civ 1293 ("Leeds City Council"), Lewison L.J., (giving the judgment of the Court of Appeal) noted Lord Neuberger's distillation of the relevant principles at [79] of Fleming and continued:

"22 The expression "transitional period" may be misleading in some circumstances. What is really in issue is a prospective period from the date of the legislative change in which a valid claim may be made. In Test Claimants in the FII Group Litigation v HMRC [2012] UKSC 19, [2012] 2 A.C. 337 ("FII") at [153] Lord Sumption put it thus:

"EU law might have taken an absolute line on national legislation retrospectively extinguishing the possibility of enforcing existing rights to recover money charged contrary to EU law. In fact, it has taken a more flexible and nuanced position. It follows from the liberty given to Member States to devise their own domestic law means of giving effect to EU rights, that national legislatures are in principle entitled to change their laws. Because they are not obliged to provide more than the minimum level of protection for EU rights necessary to make them effective, the changes may adversely affect claims to assert EU rights, provided that the new law still provides an effective means of doing so. The compromise which EU law has adopted between these conflicting considerations is to allow the retrospective curtailment of limitation periods within limits set by the principle of the protection of legitimate expectations. Legislation curtailing limitation periods is in principle consistent with the principle of effectiveness provided that a period of grace, which may be quite short, is allowed, either by giving sufficient advance notice of the change or by including transitional provisions in the legislation."

23 From this extract it can be seen that a short period of advance notice is an acceptable alternative to transitional provisions.

24 Fleming was principally concerned with regulation 29 (1A) of the VAT Regulations 1995 which concerned claims to repayments of input tax (rather than claims to repayments of overpaid output tax). Like the changes made to section 80 of the VAT Act by the Finance Act 1997 it curtailed a limitation period retrospectively and was introduced without any transitional provisions. As mentioned, in the wake of the decision of the CJEU in Marks & Spencer HMRC promulgated a number of extra-statutory concessions inviting claims which, on the face of it, were not permitted by the legislation. One of the questions before the House was whether the invalidity under EU law of the impugned provision meant that the court could itself disapply the offending provision for a limited period. By a majority the House decided that it could not; and that the period of disapplication was still running. The main reason was that a decision of the court would itself be retrospective and that would infringe the principle of legal certainty which requires any such period to be "fixed in advance". As Lord Neuberger put it at [88] the purpose of a period of grace (or transitional period) is:

"… to enable people with a certain type of claim (in this case a claim based on an accrued right) to know what period they have to bring their claims."

25 The vice of a retrospective period of limitation is that a person who has a valid claim on Day 1 sees it disappear on Day 2 in a puff of smoke.

26 At bottom, therefore, it seems to me that in the first instance the dispute in our case boils down to a relatively narrow issue. Has Leeds been given a readily ascertainable prospective opportunity of a reasonable length within which to bring the claims that it makes (assuming them to be well-founded in law)? If it has, then in the absence of special circumstances, none of the applicable principles of EU law will have been breached. If it has not, they will have been.

27 We must remind ourselves that all the live claims relate to payments on or after 4 December 1996. By 4 December 1996 the House of Commons had passed its resolution shortening the applicable limitation period to three years and removing the extended limitation period in cases of mistake. A reader of that resolution would have known that as regards any overpayment of VAT made

on, say, 5 December 1996 he had until 4 December 1999 within which to make a claim. On the face of it that is a readily ascertainable prospective period of a reasonable length. Since the live claims all relate to VAT in accounting periods after 4 December 1996, those claims have never had the benefit of any longer limitation period than the three years allowed under the House of Commons' resolution. In short, therefore, there has been no retrospective alteration of the limitation period applicable to these claims.

28 In essence this was the reasoning of the Upper Tribunal at [98]:

"It must have been clear to Leeds on 18 July 1996 (and if it was not, should have been) that the then government intended to implement a three-year limitation period for s 80 claims. From that day on, Leeds could have had no more than a hope that Parliament might not enact the necessary legislation; it could certainly not assume that it would not. In fact, on 3 December 1996 Parliament passed a resolution, as we have said, which brought the three-year cap into effect; and from the passing of that resolution the only possible expectation which Leeds could have held, in respect of claims arising thereafter, was that they would be affected by a three-year time limit, and that Parliament would in due course pass (as it did) the legislation which provided for it."

29 That reasoning is, in my judgment, on the face of it impeccable. Are there any special factors which should lead to a contrary conclusion?"

Lewison L.J. concluded that there were not.

(3) Analysis

(i) What is a retrospective law?

87. The key dates, set out in reverse chronological order, are in the table below ("Table 2"):

1.	**19 December 2013**	Claim Form issued by Jazztel in these proceedings.
2.	**18 March 2009**	Advocate General Mengozzi delivers his opinion. For present purposes, this is assumed to be the date on which Jazztel discovered its mistake or could with reasonable diligence have discovered that mistake.[20]
3.	**19 December 2007**	The period ending 6 years before Jazztel's

[20] The precise date of discoverability was not a matter in issue in relation to Jazztel's claims, and I have taken this date for the sake of argument. It must be stressed that the point did not arise in this case, and was not argued before me. I am not, in using this date, making any kind of ruling as regards "discoverability" for the purposes of the Limitation Act 1980. It might equally be argued – given that the opinion of an Advocate General is advisory only – that the date is the CJEU's judgment is the better date for limitation purposes.

		Claim Form. Payments made after this date are recoverable under the ordinary limitation period. Payments made before this date can only be recovered by relying upon section 32(1)(c) of the Limitation Act 1980 (abrogated by section 320 of the Finance Act 2004).
4.	**22 July 2004**	Section 320 of the Finance Act 2004 comes into force.
5.	**8 September 2003**	Section 320 of the Finance Act 2004 has effect in relation to actions brought after this date.
6.	**8 September 2003**	Legislation, subsequently enacted in the form of section 320 of the Finance Act 2004, is announced by the Paymaster General in the House of Commons.

88. Jowitt's Dictionary of English Law[21] defines retrospective legislation as legislation having effect in relation to a matter arising before it was enacted or made. This, apparently straightforward, definition disguises at least two ways in which legislation may be said to be retrospective:

i) First, legislation may be passed into law having an earlier effective date than the date on which it passed into law. Section 320 of the Finance Act 2004 is retrospective in this sense: it passed into law on 22 July 2004, but had effect in relation to actions brought after 8 September 2003.

ii) Secondly, the legislation may be passed into law with an effective date later than the date of its passage into law, and thus *prima facie* appear not to be retrospective at all, but nevertheless have retrospective effect. Section 320 is retrospective in this second sense also:

a) Provided the action is commenced on or before 8 September 2003, someone with an accrued right to claim restitution for money paid by mistake has the benefit of a longer limitation period than someone bringing the same claim after 8 September 2003. That is because the person claiming on or before 8 September 2003 is entitled to rely upon section 32(1)(c) of the Limitation Act 1980, whereas the person claiming after 8 September 2003 cannot so rely.

b) In many respects, these effects might be said to be prospective rather than retrospective. Assuming, for the sake of argument, that section 320 had passed into law a year earlier, on 22 July 2003 (rather than 22 July 2004) then plainly it would apply prospectively to actions brought after 8 September 2003.

[21] Greenberg, D. (ed.), Jowitt's Dictionary of English Law, 4th ed. (2015), see: under "Retrospection; Retrospectivity".

c) There would, nevertheless, be a retrospective effect in terms of a claimant's ability to vindicate his or her accrued right. Assuming an accrued right older than six years, but discovered more recently, that right can be asserted by a claimant commencing proceedings on or before 8 September 2003, but cannot be asserted after that date. In this way an accrued right is rendered unenforceable by the operation of section 320.

89. It may be a matter for debate whether Jowitt's definition of retrospectivity is too wide, and that the second sense in which I use the term might better be given a different label. I shall differentiate between these two types of retrospectivity by calling the first "express retrospectivity" and the second "hidden retrospectivity". The distinction is an important one, for two reasons:

i) First, although section 320 is retrospective in both of the senses identified in paragraph 88 above, section 320's express retrospectivity could be said not to have affected Jazztel at all. Jazztel's claim (the Claim Form is dated 19 December 2013) was commenced over ten years after section 320 was announced in the House of Commons and nine years after it was enacted into law. It is the hidden retrospectivity of section 320 that has really affected Jazztel. To be clear:

a) The right to recover an enrichment conferred by mistake accrues when that enrichment was conferred. In the case of Jazztel, that was the date on which each of the 23 Payments identified in Table 1 in paragraph 23 above were made.

b) Because the enrichment is *ex hypothesi* conferred by reason of a mistake, the claimant will often not appreciate that he or she has a cause of action until some time after the conferral of the enrichment. In the case of Jazztel, I have found that the Payments were made by mistake: I was not addressed on precisely when the mistake was discovered or could with reasonable diligence have been discovered within the meaning of section 32(1)(c) of the Limitation Act 1980, but will for present purposes take as that date the delivery of the opinion of Advocate General Mengozzi on 18 March 2009.

c) Where the claimant brings his or her claim *(i)* after the expiry of the ordinary limitation period of six years and *(ii)* after 8 September 2003, the claimant's accrued right is lost. The claimant's claim becomes time-barred before he or she even appreciates the fact. (That, indeed, is the mischief that section 32(1)(c) of the Limitation Act 1980 addresses.) This is precisely Jazztel's position. Instead of having a period of six years from 18 March 2009 in which to bring its claim, Jazztel had (as a result of section 320) six years from the date of each Payment.

ii) Secondly, it is worth noting that this detrimental effect occurred without the fault of Jazztel and in circumstances where this detrimental effect could not be ameliorated by the "usual" transitional provisions,

by which I mean a reasonable period of time during which taxpayers are aware that the regime is going to change and have the opportunity to bring such claims vindicating accrued rights as they wish. Such transitional provisions are only effective where the affected party is aware of the effect the legislation will have on him or her, and is able to take protective steps. Here, Jazztel could do nothing to protect itself until it appreciated the mistake it had made. In truth, the only way in which the hidden retrospectivity of section 320 could be ameliorated would be by excluding from its effect all rights accruing on or before 8 September 2003.

(ii) Scope of application of Marks & Spencer No. 2 and Grundig No. 2

90. Neither Marks & Spencer No. 2 (considered in paragraph 74 above) nor Grundig No. 2 (considered in paragraph 75 above) drew the distinction between express retrospectivity and hidden retrospectivity that I have identified in paragraphs 88 to 89 above. It is, therefore, necessary to consider first whether what was said in those cases was limited to express retrospectivity or extended to that and to hidden retrospectivity.

91. In my judgment, the CJEU intended its judgments to extend to both types of retrospectivity. The CJEU's starting point was that whilst it was reasonable for time limits to be laid down for the bringing of proceedings for the recovery of tax wrongly levied (see Marks & Spencer No. 2 at [35]), those time limits needed to be reasonable and should not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see Marks & Spencer No. 2 at [35]).

92. Where a time limit laid down by a Member State was subsequently curtailed, this, too, was permissible (see Marks & Spencer No. 2 at [38]; Grundig No. 2 at [37]) provided:

    i) It met the criterion described in paragraph 91 above (see Marks & Spencer No. 2 at [36]; Grundig No. 2 at [37]); and

    ii) The transition from the old time limit to the new time limit was managed so as to ensure that individuals were not deprived of their right to repayment or given insufficient time to assert that right (see Marks & Spencer No. 2 at [38]; Grundig No. 2 at [37] and [38]).

93. The reasoning in Marks & Spencer No. 2 and Grundig No. 2 is thus directed at the effect of changes in the time limit for the recovery of tax wrongly levied on the taxpayer, rather than any theoretical analysis of retrospectivity. The hidden retrospectivity identified in paragraph**s** 88 to 89 above clearly does affect the taxpayer, and I consider that the CJEU was, in Marks & Spencer No. 2 and Grundig No. 2, concerned that that effect be controlled and regulated, irrespective of how it arose.

(iii) Application of the principles to this case

94. The relevant case-law has been set out in detail in paragraphs 74 to 86 above (Marks & Spencer No. 2 at paragraph 74; Grundig No. 2 at paragraph 75; Fleming at paragraphs 76 to 85; and Leeds City Council at paragraph 86). These cases set out the approach that must be taken:

 i) It is first necessary to ascertain whether and, if so, to what extent, the change in the time limit for making a claim for the recovery of wrongly levied tax infringes Community law. That is a matter for the national courts of the Member States to determine applying principles of Community law (Grundig No. 2 at [41]; Fleming at [25] (*per* Lord Walker), [76] (*per* Lord Carswell) and [79](e)-(g) (*per* Lord Neuberger).

 ii) If it is found that the change in the time limit is such as to infringe Community law, then the new time limit must be disapplied to the extent necessary to ensure that Community law is not infringed (Grundig No. 2 at [41] and [42]; Fleming at [54] to [56] (*per* Lord Walker) and [79](i)-(j) (*per* Lord Neuberger)).

 iii) Although "it is for the national court to fashion the remedy necessary to avoid an infringement of Community law" (Fleming at [79](i) (*per* Lord Neuberger), the national court cannot or at least should not seek to act as a legislator when seeking to remedy the infringement. In practice, the national court should confine itself to declaring the new time limit ineffective for such period of time as to enable those affected taxpayers to submit a claim (Fleming at [10] to [12] (*per* Lord Hope), [19] to [22] (*per* Lord Scott), [56] (*per* Lord Walker), [79](j), [97], [104] and [107] (*per* Lord Neuberger)).

95. This approach needs to be considered in the context of both the express and the hidden retrospectivity of section 320 of the Finance Act 2004 that I have found to exist.

(iv) Whether and if, so, to what extent, section 320 infringes Community law

96. I consider that section 320 of the Finance Act 2004 infringes Community law both in its express retrospectivity and in its hidden retrospectivity:

 i) Express retrospectivity. The effective date of the provision (8 September 2003) precedes by some nine months the date on which it passed into law (22 July 2004). The announcement in Parliament on 8 September 2003 by the Paymaster General cannot have the effect of rendering the provision compliant with Community law, given that the announcement was made on the very date section 320 (retrospectively) became law. Persons affected would thus find, from one day to the next, that their rights had changed for the worse, with no transitional provisions of any sort in place.

ii) <u>Hidden retrospectivity.</u> The hidden retrospectivity of section 320 also infringes Community law, for the reasons given in paragraph 89 above. As regards that class of taxpayer having an accrued right to recover money mistakenly paid pursuant to an unlawfully levied demand for tax, the legal regime changes without notice from one day to the next. Where the taxpayer has commenced proceedings on or before 8 September 2003, the taxpayer can avail him or herself of section 32(1)(c) of the Limitation Act 1980, and (depending on his or her "date of knowledge") recover payments made over six years prior to the issue of the claim form. By contrast, a taxpayer commencing proceedings after 8 September 2003 cannot avail him or herself of section 32(1)(c) and will be restricted to recovering payments made within six years of the issue of proceedings. Thus, by way of example:

a) Taxpayer 1 discovers that in 1985 he or she made a mistaken payment in respect of a tax unlawfully levied. Taxpayer 1 discovers this on 7 September 2003 and, with commendable promptitude, issues proceedings on the same day. The payment can be recovered.

b) Taxpayer 2 makes the same discovery of a mistaken payment in 1985, but does so on 9 September 2003. Even if Taxpayer 2 acts with the same speed as Taxpayer 1, he or she will not be able to recover the payment, due to the intervention of section 320. It is worth noting that this is so, even if section 320 were not also expressly retrospective. Taxpayer 2 would be adversely affected by section 320 even if it had been introduced prospectively with a year's notice.

97. It may be that the Paymaster General's statement in Parliament was intended to be some form of transitional provision. If so, by ensuring that section 320 took effect from the date of its announcement in Parliament, there was no transitional protection for taxpayers in relation to section 320's express retrospectivity.

98. As regards the hidden retrospectivity, there was no transitional provision at all. The issue went unaddressed.

(v) Disapplication and the fashioning of a remedy to avoid an infringement of Community law

99. The question, therefore, is whether a remedy can be fashioned by the court so as to render section 320 Community law compliant or (to put the same question another way) to what extent must section 320 be disapplied in order to provide the necessary transitional protection?

100. I begin with the remedy that needs to be fashioned to ameliorate section 320's express retrospectivity, before considering the question of hidden retrospectivity. However, as will be plain from the consideration below, it is neither possible nor desirable completely to separate these questions. At the end of the day, it is a remedy to avoid section 320's infringement of

Community law – considering section 320's effects in the round – that is required:

i) The remedy that needs to be fashioned to ameliorate the express retrospectivity of section 320 turns on the question of notice of the introduction of the provision. It will be recalled that whilst section 320 was passed into law on 22 July 2004, and was announced in Parliament on 8 September 2003, its effective date is 8 September 2003. There was therefore no prior notice of the introduction of section 320.

ii) It is necessary to differentiate between Payments 1 to 9 (which were all made prior to 8 September 2003 and so concerned rights that had accrued as at 8 September 2003) and Payments 10 to 23 (which were all made after 8 September 2003, and so accrued after that date).

iii) As regards the Payments made after 8 September 2003 (Payments 10 to 23), it is my judgment that – with the possible exception of Payment 10, which I consider separately below – no disapplication is required at all. That is for the reasons given by Lewison L.J. in Leeds City Council at [27] and [28]:

    a) In Leeds City Council, the resolution shortening the applicable limitation period and removing the extended limitation period in cases of mistake applied to payments made on or after 4 December 1996.

    b) The resolution implementing this change was passed by the House of Commons on 3 December 1996. That resolution had been foreshadowed by an earlier announcement made on 18 July 1996.

    c) Lewison L.J. held that because all of claims before him related to payments made on or after 4 December 1996, the payer (Leeds City Council) had a readily ascertainable prospective period of a reasonable length in which to make its claims according to the new time limit as it stood. There was no need for any disapplication of the new time limit.

    This is Jazztel's position. The Paymaster General's announcement was on 8 September 2003 and – with the possible exception of Payment 10, which was made on 17 December 2003 – Jazztel had plenty of time to adjust to the new dispensation.

iv) Payment 10 was made, as I have said, on 17 December 2003, three months after the Paymaster General's announcement. Given the indication in Grundig No. 2 at [42] that a transitional period of six months is the minimum period required when time limits are being changed, there is a strong argument that section 320 should be disapplied for the period 8 September 2003 to 8 March 2004.

v) But this would, as it seems to me, go beyond what Community law requires. It would entail a disapplication of section 320 in circumstances where the express retrospectivity of section 320 has not affected Jazztel at all. When these proceedings were commenced (on 19 December 2013), section 320 had been in force for a number of years. Payment 10 would be irrecoverable even on the basis of a transitional period of several years, let alone six months.

vi) The real mischief, which I consider must be addressed in order to render section 320 compliant with Community law, is the loss of accrued rights of which their owner is ignorant – that is, the hidden retrospectivity of section 320. When fashioning an appropriate remedy to deal with hidden retrospectivity, it is important to note that the mere question of notice of the introduction of section 320 is an insufficient remedy. Where the taxpayer knows he or she has a claim, then a period of adequate notice that the time within which such a claim must be brought is contracting will be sufficient. That is the basis on which Fleming and Leeds City Council proceed. This case is different. Although Jazztel and taxpayers in Jazztel's position have (prior to 8 September 2003) an accrued right to recover overpaid SDRT, they do not know about this right. A transitional provision giving them notice of the introduction of section 320 will not give such taxpayers any notice of the claims that they have.

vii) In my judgment, it is necessary to have regard to this basic fact – that the taxpayer has a claim that he or she knows nothing about – when fashioning a remedy to render section 320 compliant with Community law. The only remedy that will sufficiently protect the rights that have already accrued is to exclude from the section 320 regime those accrued rights. I therefore disapply section 320 in relation to:

    a) Claims accruing on or prior to 8 September 2003, which

    b) Would be time-barred according to the ordinary six-year limitation period, and which can only be vindicated by the taxpayer relying upon section 32(1)(c) of the Limitation Act 1980.

    Put the other way round, section 320 can apply to all claims accruing after 8 September 2003 and to all claims accruing on or prior to 8 September 2003 which do not depend upon section 32(1)(c) for their vindication.

101. I regard this approach as entirely consistent with that adopted by Lewison L.J. in Leeds City Council. That case, it will be recalled from [27], concerned only claims accruing after the coming into effect of the new time-limit. There is obviously no reason why a legal system needs to have a period of limitation (or other time-bar) that is calculated by reference to the claimant's state of mind. I can see nothing wrong in cutting back the scope of section 32(1)(c) provided accrued rights are unaffected. That is obviously the case as regards rights accruing after the entry into force of the new regime.

102. It follows, therefore, that Payments 10 to 23, which are claims accruing after the coming into effect of section 320, are caught by that provision and – unless they fall within the ordinary six-year period of limitation – they are irrecoverable. In this case, proceedings were commenced on 19 December 2013: claims accruing before 19 December 2007 will be time-barred. That precludes recovery in respect of Payments 10 to 22; Payment 23 is brought within the six-year limitation period unaffected by section 320. (As I noted in paragraph 11 above, one of the reasons Jazztel seeks to establish a claim for restitution by reason of mistake is to obtain an award of compound interest in respect of all the SDRT overpaid. The question of compound interest was not before me. I understand that Jazztel will contend that the repayment of monies by HMRC caused the provisions of section 29(5) of the Limitation Act 1980 to be engaged. The Judgment says nothing about this contention (either way) and is confined to the question of whether the principal sums paid by mistake could be recovered.)

103. I therefore hold that:

i) Payments 1 to 9 and 23 are within time and can (subject to HMRC's change of position defence) be recovered.

ii) Payments 10 to 22 are time-barred.

F. CHANGE OF POSITION

(1) Introduction

104. In paragraph 26.3 of its Amended Defence, HMRC contends, as regards the sums Jazztel seeks to claim:

> "…the sums in question formed part of the United Kingdom's tax revenue for the relevant year in which they were paid. Those sums have been irretrievably spent (save for any remaining benefits deriving from capital expenditure), in some cases many years ago, in circumstances where but for any overpayment of SDRT the Crown would, through the process of setting expenditure over the course of several years, have incurred lower amounts of expenditure. For the avoidance of doubt it is not suggested that specific items of expenditure would have been avoided. The Crown have in good faith changed their position in consequence of the payments made by [Jazztel] of the sums in issue and/or the equivalent payments made by other Claimants in the Stamp Taxes GLO such that it would now be inequitable and/or unconscionable to require restitution of those sums."

105. The contention is that there is some form of correlation between tax receipts and central government expenditure such that – if the revenue from the SDRT had not been received – government expenditure would have been different and, inferentially, lower.

106. Whether this would, as a matter of law, be sufficient to trigger a change of position defence were such a defence found to exist is not a matter for this Judgment. This Judgment confines itself to the purely factual question of whether such a correlation can be shown to exist.

(2) FII(HC) No. 2

107. In addition to the oddity of deciding the facts of the change of position defence in a legal vacuum, I am conscious that in deciding the facts of this case I am following a path well-trodden by Henderson J. in FII(HC) No. 2. The facts alleged before Henderson J. on which HMRC based its change of position defence were very similar to those alleged in this case, the principal difference being that the SDRT in this case was raised during the operation of Mr. Gordon Brown's so-called "golden rule", which Professor Myles described as follows in paragraph 11 of Myles 1:

> "The golden rule required that over the economic cycle the UK government borrowed only to invest and not to fund current spending. In turn, this necessitated the categorisation of expenditures as either resource (or current) expenditures or capital expenditures. This ensures that there is comprehensive and credible data on the level of capital expenditures over the relevant period."

108. Not only were the factual contentions similar, but Henderson J. heard evidence from Professor Myles and Dr. Sentance[22] – whose reports were similar in content to Myles 1 and Sentance 1 before me. Thus, whilst I am conscious of the need to reach my own conclusions on questions of fact, I have paid careful attention to Henderson J.'s judgment in FII(HC) No. 2.

(3) Factual findings

109. I accept and adopt Henderson J.'s nomenclature as defined by him in FII(HC) No. 2 at [351]:

> "…it is very easy to refer interchangeably to the Revenue (or HMRC), the Treasury, the government, or even the state. This looseness of language is natural enough, because the Commissioners for Her Majesty's Revenue and Customs (to give them their full title) are a non- ministerial department closely linked to HM Treasury, which is itself an executive ministry of the government, which under our unwritten constitution is a component part, or arm, of the state. The use of these differing terms also reflects the fact that tax revenues are not hypothecated for particular purposes, or paid into a separate account. Like most other public revenues, they are paid into the Consolidated Fund. It is important, however, not to lose sight of the fact that the defendants to the present claims, who have to make good the defence, are the Revenue, which is part of the executive, not part of the legislature. Government has to be financed, and it raises the money which it needs through a combination of taxation and public borrowing. The main focus of the change of position defence therefore has to be on the part played by the overpayments of tax in the government's finances, and in particular on the nature of the relationship between the overpayments and government expenditure."

110. I also refer to paragraph 1 of the Joint Statement, which helpfully sets out the areas of common ground between the experts. Again, it is worth pointing out

[22] Henderson J. also heard from Sir Jonathan Stephens, a second expert called by HMRC, who was not called to give evidence before me. On the other hand, I heard from Dr. Mathews, who did not give evidence before Henderson J.

that a similar, albeit not absolutely identically worded, statement was before Henderson J.[23]:

"Professor Myles and Dr. Sentance agree on the following issues:

a) It is not possible to know with certainty either how the Government deployed the overpayments in question, or what it would have done had the overpayments not occurred;

b) The UK Government does not normally hypothecate revenue to particular uses and did not hypothecate the overpayments of [SDRT] to a particular use;

c) There are a wide range of factors which the Government takes into account in setting its borrowing, tax and spending plans;

d) In the long-run, tax receipts and spending are related to each other and are both influenced by the growth of the economy;

e) In the short-run, tax receipts, spending and borrowing can all fluctuate significantly and there are often variations from forecasts and plans;

f) In response to large external shocks, the Government relies on borrowing to take some of the strain in the short term, with spending and/or taxes adjusting over time;

g) In the relevant period (1999-2009), the government operated a set of fiscal rules which influenced spending and tax decisions;

h) The overpayments by Jazztel plc were extremely small in relation to total government revenues or spending, averaging 0.00015% of receipts over the relevant period;

i) The Jazztel plc overpayments were part of total SDRT revenues which made up 0.79% of total tax and National Insurance receipts over the relevant period."

111. In light of the evidence that I have heard, I make the following findings of fact:

i) <u>The question of the relationship between tax receipts, spending and borrowing must necessarily be considered at a high level of generality.</u> This was Henderson J.'s conclusion at [356] of <u>FII(HC) No. 2</u>, where he stated that "given the very long period covered by the claims, and the absence of hypothecation, the question inevitably has to be considered at a fairly high level of generality, and by reference to aggregated cash flows rather than the tracing of individual receipts".

ii) <u>The overpayments of SDRT represented a miniscule proportion of total government receipts, even when considering the overpayments of taxpayers in general and not simply those of Jazztel.</u> This is evident from paragraphs 1(h) and 1(i) of the Joint Statement. Indeed, the

[23] See <u>FII(HC) No. 2</u> at [365].

overpayments of SDRT are significantly smaller even than those overpayments considered by Henderson J. (see [359] of FII(HC) No. 2).

iii) HMRC's estimates or projections for the future revenue to be derived from stamp duty were extremely granular and were contained in revenue and spending plans of similar granularity. However, despite their granularity, these estimates or projections were just that – estimates or projections – and would generally be proved wrong (one way or the other). Even if actual revenue fell short of the estimated or projected revenue, this would not affect spending. Rather, the slack would be taken up with borrowing.

a) HMRC placed a great deal of weight on the "granular" nature of the government's spending plans. The position is clearly stated at [366] of FII(HC) No. 2:

"Against this background, the thesis developed by Sir Jonathan Stephens, and endorsed by Professor Myles, was in essence as follows. The analysis begins by considering the materiality of the ACT overpayments. Although minute as a proportion of total government receipts or expenditure, the overpayments were individually of a similar size to the majority of government taxation receipts, and as such were fully factored into the government's spending plans, which are prepared and submitted to Parliament on a "very granular level", with estimates rounded to the nearest £1,000 through most of the period under review (and to the nearest £1 in the earliest years). For the purposes of submissions on budgeting to ministers, for review and the taking of policy decisions, amounts were rounded to the nearest £5 million, and would only be recorded as negligible where the cost or yield in the relevant year was below £3 million. Thus relatively small amounts were accounted for and taken into consideration by ministers when making budget decisions."

b) I obviously accept this evidence, but it is important to appreciate that this "granularity" disguises massive uncertainty:[24]

Q (Marcus Smith J.) "…You say to yourself, well, I have to try and predict what it's going to be next year or in five year's time or whenever I'm being asked to make the forecast for, I need to build in margin for error. How – no?

A (Dr. Mathews) So, in terms of the margin of error, it's – so if you had every single tax revenue stream and you built in, say, a 5 percent margin or error or a ten per cent margin of error and then you did exactly the same on the spending side, whilst each of those judgments justifiable at the

[24] Transcript Day 2, pp.74 to 75.

	individual level would add up to a fiscal position which is just so – the confidence would be so wide to be effectively meaningless. So the key was always to produce a central forecast, a forecast which had a 50 per cent chance of being under or over.
Q (Marcus Smith J.)	I see. So you are trying to plot a middle line?
A (Dr. Mathews)	Exactly.”

c) The granularity of the figures is, therefore, not an indication of the accuracy of the figures, but an indication of their inaccuracy. If a sensible margin of error could be built in, without rendering the figures effectively meaningless, then no doubt it would be. But because the margin of error is so great, none is stated.[25] I have no doubt that this is a sensible course, and one that reflects the extreme difficulty of the job that Dr. Mathews and others like him do. But I would be astonished if policy-makers took the granularity of revenue and spending figures as an indication of their correctness. As Dr. Mathews accepted, the figures provided in the estimates will almost certainly be wrong.[26] Of course I did not hear from any policy-makers, but the suggestion that the people taking spending decisions would be unaware of the margin for error in the figures only has to be stated to be rejected.

d) It is difficult to put figures on individual revenue and spending items. The job is rendered significantly more difficult by the existence of “feedback loops”. Thus, a change in policy in one area, which affects spending, may also have effects on revenue:[27]

Q (Mr. Grodzinski, Q.C.)	“And all of these forecasts of future GDP, growing or shrinking, future employment rates, growing or shrinking, whatever it may be, are all subject of big – or margins of error, would you agree?
A (Dr. Mathews)	Potentially very large ones. An important point to make on this sort of forecasting is it’s not just in one direction. We have to break it at some

[25] Essentially, the figures in the forecasts are those figures where the probability of error is equal as to whether the figure is too high or too low: it represents a middle course in terms of probability: Transcript Day 2, p.120 (cross-examination of Dr. Mathews).

[26] Transcript Day 2, p.120.

[27] Transcript Day 2, pp.96 to 97.

	point. But if you are going to say change unemployment benefits, that would then feed back to the macroeconomic forecast by potentially changing the level of employment. If you have made unemployment more or less generous, it could have effects on the incentives. So this is one of the reasons there are many rounds of, sort of taking the direct forecast and thinking about policy change, thinking how this influences the macroeconomic position and then back round again, until an equilibrium that was broadly happy with and the proximity of the budget almost, forces a kind of end point in that analytical process.
Q (Marcus Smith J.)	Dr. Mathews, if I understand you right, is the scorecard the device that is used for articulating potential changes, whether it be to spending policy or taxing policy?
A (Dr. Mathews)	Yes.
Q (Marcus Smith J.)	So, you have your scorecard and you say: well, let us hypothesise a change in unemployment benefits, an increase. So you make that alteration in the spreadsheet, and certain consequential changes are made in other cells in the spreadsheet. You then export that data for the implications of that policy change to be worked through, and the process – to starts again? So you can, essentially, measure what will be the effects of a mooted change, in this case, in expenditure?
A (Dr. Mathews)	That – broadly, yes. There would probably be other analysis that would accompany it. That would be quite a large impact potentially on labour markets, so potentially feeding back into income tax and lots of other things as well. There's lots of measures on the scorecard which are more straightforward…"

iv) Apart from in the very long run (and even then this is ultimately dependent upon political will in relation to the economy), there is no particular correlation between tax revenue and expenditure. To the extent that tax revenues are insufficient to fund expenditure, the government may borrow.

a) As I have noted there is, in general, no hypothecation of revenues in the United Kingdom. No doubt one of the reasons for this is the fundamental inaccuracy of spending and revenue projections.

b) Quite how these inaccuracies are dealt with is, ultimately, a political question. No doubt, to some extent, inaccuracies will cancel-out, in that a fall in revenue in one tax will be off-set by an increase in revenue in another tax. But, generally speaking, taxes rise during economic up-turns and falls during downturns. Spending, broadly speaking, remains in accordance with planned expenditure, but will generally rise (because, e.g., of welfare payments) during downturns.[28]

c) To the extent they are not, spending will have to be constrained, additional taxes contemplated for the future, or money borrowed. What course will be taken, depends on all the circumstances:[29]

Q (Mr. Grodzinski, Q.C.)	"…So you are not saying that you can be confident that for every £10 reduction in tax there would be £10 less spending, can you?
A (Dr. Mathews)	No. No, I can't say that. Hence the overspend is [in] inverted commas. It could be "would be required to overborrow", if that makes sense, as well. So it could be spending or borrowing.
Q (Mr. Grodzinski, Q.C.)	Could be spending, could be borrowing, could be raising taxes elsewhere?
A (Dr. Mathews)	Yes.
Q (Mr. Grodzinski, Q.C.)	And you have no way of knowing which of the three?
A (Dr. Mathews)	It would presumably vary by each sort of fiscal event, each different minister and their priorities at that time."

And also:[30]

Q (Marcus Smith J.)	So, if you are at the level of making policy decisions and spending decisions, is this a fair statement?

[28] See the evidence of Professor Myles at Transcript Day 3, pp.5 to 8.
[29] Transcript Day 2, pp.85 to 86.
[30] Transcript Day 2, p.122.

	And, again, if you don't feel able to comment, do say so. You get the projected revenue; you know that it is an estimate or forecast. You predicate your spending on the basis of the estimate, but knowing that it could be wrong?
A (Dr. Mathews)	[Witness nodded.]
Q (Marcus Smith J.)	What does the policy-maker do if it is wrong, if there is a shortfall?
A (Dr. Mathews)	I don't know. I've not been a policy-maker or briefing policy-makers.

d) The "golden rule" is – or was – no more than a manifestation of an attempt to impose a degree of political control on spending. I am sure that – under different guises – Chancellors of the Exchequer and Prime Ministers have sought to do the same in the past, and will continue to seek to do so in the future. But to regard the "golden rule" as anything other than a political control would be an error.[31]

e) Dr. Sentance's position was that provided the U.K. Government maintained a credible economic policy, it had a considerable discretion (certainly in the short and medium term and – subject to the overarching requirement of a credible economic policy – even in the long-term) as to how to balance spending as against tax revenues and borrowing. Quoting from Sentance 1:

"15. Like other governments around the world, the UK raises money through taxation and borrowing to fund its expenditure…

16. …these fluctuations in spending and taxation as a share of the economy have not been synchronised. There have been significant and large deviations of spending from revenue which have persisted for many years. The UK government benefits from the ability to access the bond markets to fund the gap between spending and receipts…

17. Unlike a household, a country can sustain a substantial level of debt indefinitely – as long as the economy and public finances are being soundly managed so that the confidence of financial markets and bondholders is maintained and the debt interest can be serviced…

…

[31] See Transcript Day 2, pp170 to 175 (cross-examination of Professor Myles); Transcript Day 3, pp.34 to 40 (cross-examination of Dr. Sentance).

21. The flexibility afforded by access to bond markets is an important underpinning of the way in which the UK government manages its public finances. Government spending is not narrowly constrained by the level of government tax revenues in a single year or even over a period of years. Spending can be financed by borrowing as well as by tax receipts…

22. The ability to borrow on bond markets and to vary the level of national debt provides the UK government with considerable flexibility in setting its expenditure plans when there are fluctuations in revenue. Public spending involves making commitments to provide services and cash payments which reflect the needs of society and the economy, as well as political decisions on the appropriate level of public service provisions in key areas like law and order, education, health and defence. These commitments have a medium to long-term nature. Schools, hospitals, and other public services require a high degree of planning and continuity of funding, so that the skilled personnel, buildings and other resources necessary to provide these services can be available and the general population can rely on the services provided."

v) The benefit to government of its expenditure cannot sensibly be calculated by reference to the current market value of the capital assets purchased by government. Significant benefit derives to government from its non-capital expenditure.

a) At [352] of FII(HC) No. 2, Henderson J. noted:

"…At various times in their submissions, counsel for the claimants suggested that the concept of being "worse off" cannot sensibly be applied to the Revenue, because all government expenditure is intended to promote the public interest and is thus incurred for the public benefit. How then, it is asked, can the government be regarded as impoverished by the expenditure which it undertakes? The answer to this submission, in my judgment, is that it confuses the object or purpose of government expenditure with its cost. All government expenditure has to be funded, and if the government incurs expenditure which it would not have incurred but for the receipts of overpaid tax, and which does not confer a direct financial benefit on the government, I consider that the government is at least *prima facie* relevantly worse off. Mr. Ewart drew the apt analogy of a charity, which would not be prevented from relying on the defence merely because the extraordinary expenditure in question was undertaken in furtherance of its charitable objects."

b) I accept this distinction between the purpose of expenditure and the extent to which a defendant's change of position as a consequence of receiving a benefit makes the defendant worse off if the benefit must be restored.

c) That led Professor Myles to suggest that the only benefit that the government derived from the tax revenues received by it

was the capital assets it purchased with those revenues. Such capital assets constituted, in Professor Myles' view, "retrievable" spending, in that the asset could be sold.

d) I do not accept this contention. In Sentance 1, Dr. Sentance responded to this point as follows:

"64. …Professor Myles presents a classification of public spending into two categories: retrievable and irretrievable expenditure. In his view, current expenditure, or resource expenditure, is "irretrievably spent" and the only portion of an excess payment of tax which can be retrieved is the part which was used to fund capital expenditure – though he argues that capital will depreciate over time. The practical effect of this distinction on the claim at dispute is that Professor Myles considers that the bulk of the SDRT revenue has already been spent, and the amount that has been devoted to capital spending will depreciate over time. It is clear that these assumptions would effectively disregard the bulk of the claim…

65. This classification into retrievable and irretrievable spending attributes very little lasting economic value to the bulk of government expenditure. Gross capital spending (before depreciation) accounted for just 9.6% of total public expenditure on average since 1973/74, with current public spending (excluding depreciation), making up the remaining 90%. Even taking a narrow view of the benefits to the government, some of the money spent as current public spending flows back to support public finances through the income tax, VAT and other taxes paid by government employees, businesses working on public contracts and recipients of pensions and other social benefits. But there is also a broader benefit to the economy and society from current government expenditures. This benefit may be less tangible and visible than a bridge, motorway, school or hospital, but is no less real."

e) There are two points:

i) First, where the government spends money, a substantial portion of the money comes back to it in the form of taxes paid on that money by the recipient:[32]

"…I think generally speaking something that boosts government spending, that boosts GDP, would then – about 40% of that would flow back through the various taxes that are paid in relation to that spending. That's the sort of rule of thumb that you might use…"

[32] Transcript Day 3, pp.82 to 83 (cross-examination of Dr. Sentance).

ii) Secondly, there is the question of direct benefit (in the form of additional tax receipts) to government of its spending:[33]

Q (Marcus Smith J.)	…if one accepts that one of the consequences of a National Health Service is that of the general population, the people who are ill are out of work for less time and therefore are earning more and subject to income tax, is that, in your view, something which is going to be factored in or ought to be factored in in projections of -
A (Professor Myles)	Yes.
Q (Marcus Smith J.)	- revenue to the government?
A (Professor Myles)	You should calculate the net wealth that that is generating from the government. So you would take account of the cost of providing the healthcare, measured against the economic benefits arising from the healthcare, the difference between the two is the net wealth of the government, essentially. It's creating a potential source of tax revenues for the government and it's that we would want to evaluate.

G. DISPOSITION

112. For the reasons I have given, I find that:

i) Jazztel made the Payments under a mistake.

ii) Jazztel is precluded from recovering Payments 10 to 22 as they are time-barred by reason of section 320 of the Finance Act 2004. Payment 23 is unaffected by section 320, and is recoverable under the ordinary six-year period.

iii) Section 320 is declared to be ineffective as regards Payments 1 to 9, and these can be recovered by Jazztel.

113. I have made various findings of fact in relation to change of position. I make no determinations of law. It follows that, to this extent, the matters at issue

[33] Transcript Day 2, pp.187 to 189.

between the parties remain open and undetermined. If and to the extent that the Supreme Court gives HMRC permission to appeal on change of position, and the law, as presently stated, is changed, then the question of the change of position defence will have to be revisited, on the basis of the facts that I have found and subject to any further factual determinations it is necessary to make. Should the matter have to be revisited, I reserve it to myself.

114. At the hearing, it was agreed by the parties that to the extent that Jazztel was successful, the fact that the change of position defence remained undetermined in these proceedings should not preclude restitution of the Payments that I have found Jazztel is entitled to recover, subject to a condition subsequent that Jazztel will repay these monies should HMRC ultimately establish a change of position defence.

115. I will leave it to the parties to draw an appropriate form of order.

ANNEX

(footnote 1 of the Judgment)

TERMS AND ABBREVIATIONS USED

Term/Abbreviation	Meaning	First reference in Judgment
clearance house clearance service clearance system	A clearance service is operated by a clearance house running a clearance system and is an arrangement for settling transactions in securities.	Para. 4
express retrospectivity	The term defined in para. 89 of the Judgment.	Para. 89
FII(CA) No. 2	The Test Claimants in the Franked Investment Income Group Litigation v. HMRC [2016] EWCA Civ 1180.	Para. 13(ii)(a)
FII(HC) No. 2	The Test Claimants in the Franked Investment Income Group Litigation v. HMRC [2014] EWHC 4302 (Ch).	Para. 13(ii)(c)
Fleming	Fleming (trading as Bodycraft) v. Revenue and Customers Commissioners, [2008] UKHL 2.	Para. 76
Garcia 1	The first witness statement of Mr. Garcia.	Para. 16.
Goff & Jones	Mitchell,C., Mitchell, P. and Watterson, S., Goff & Jones: The Law of Unjust Enrichment, 9th ed. (2016).	Para. 28
Grundig No. 2	Case C-255/00, Grundig Italiana SpA v. Minsterio Delle Finanze, [2003] 1 C.M.L.R. 36	Para. 75
hidden retrospectivity	The term defined in para. 89 of the Judgment.	Para. 89
HSBC Holdings No. 1	Case C-569/07, HSBC Holdings plc and Vidacos Nominees Ltd v. HMRC [2010] S.T.C. 58	Para. 8(i)
HSBC Holdings No. 2	HSBC Holdings plc and Bank of New York Mellon v. HMRC [2012] UKFTT 163 (TC).	Para. 8(iv)
Jazztel	The claimant, Jazztel plc.	Para. 9
Joint Statement	The joint statement of Professor Myles and Dr. Sentance.	Para. 22
Leeds City Council	Leeds City Council v. HMRC, [2015] EWCA Civ 1293.	Para. 86
Linklaters	Jazztel's solicitors at the material times.	Para. 26(iii)(a)
Mathews 1	The first witness statement of Dr. Mathews.	Para. 18
Marks & Spencer No. 2	Case C-62/00, Marks & Spencer plc v. Customs and Excise Commissioners, [2003] Q.B. 866.	Para. 74
mistake claim	A claim in restitution for money paid or other enrichment conferred under a mistake.	Para. 10(iii)
Myles 1	The first report of Professor Myles.	Para. 20
Payments	A series of SDRT payments alleged to have been made by or on behalf of Jazztel to HMRC and	Para. 12(i)

	listed in Table 1.	
Period 1	The period defined in para. 33(i) of the Judgment.	Para. 33(i)
Period 2	The period defined in para. 33(ii) of the Judgment.	Para. 33(ii)
Period 3	The period defined in para. 33(iii) of the Judgment.	Para. 33(iii)
Period 4	The period defined in para. 33(iv) of the Judgment.	Para. 33(iv)
Restatement	Burrows, A., A Restatement of the English Law of Unjust Enrichment, 1st ed. (2012).	Para. 30(i), fn. 9
SDRT	Stamp Duty Reserve Tax.	Para. 1
SDRT Regulations	The Stamp Duty Reserve Tax Regulations 1986, S.I. 1986/1711.	Para. 10(i)
Sentance 1	The first report of Dr. Sentance.	Para. 21
Table 1	The table at para. 23 of the Judgment.	Para. 23
Table 2	The table at para. 87 of the Judgment.	Para. 87
Woolwich claim	A claim in restitution under the principle established in Woolwich Equitable Building Society v. IRC, [1993] A.C. 70.	Para. 10(ii)
22 December 1999 SDRT Advice	Linklaters' 22 December 1999 communication to Jazztel.	Para. 33(ii)