



Neutral Citation Number: [2021] EWHC 1095 (Ch)

Case No: BL-2010-000004

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/04/2021

Before :

MR JUSTICE MILES

Between :

BRITISH TELECOMMUNICATIONS PLC **Claimant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS **Defendant**

Roderick Cordara QC and Lyndsey Frawley (instructed by DWF Law LLP) for the
Claimant
Eleni Mitrophanous QC (instructed by HMRC) for the Defendants

Hearing dates: 11 & 12 March 2021

JUDGMENT

(revised version 13 May 2021)

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii at 10.30 am on 28 April 2021.

Mr Justice Miles :

Introduction

1. British Telecommunications Plc (“BT”) issued this claim on 30 June 2010 against the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”, which I shall use also to cover the earlier incarnations of the UK VAT authorities). The claim was stayed until 2020, pending a statutory appeal by BT described further below.
2. BT’s case in a nutshell is that it overpaid VAT to HMRC in the 1970s and 1980s. BT provided phone services to its customers. Under domestic VAT legislation, BT had to account for output VAT on those services when it billed its customers. BT contends that, under directly applicable European law, where its customers failed to pay their bills it automatically became entitled to refunds of tax, including by a right of set-off against its subsequent output tax liabilities. BT says that the applicable UK VAT legislation failed to give effect to that entitlement and that it thus overpaid HMRC (by paying output tax without deductions). BT contends that it made the overpayments in the mistaken belief that it did not have a right to such refunds or deductions.
3. In its claim form BT claimed (a) restitution of about £8 million for unjust enrichment for the periods 1 April 1973 to 31 December 1977; (b) restitution of about £65.2 million for unjust enrichment for the period 1 January 1978 to 31 March 1989; (c) damages for breach of EU law for each of these periods; and (d) compound interest for each of these periods.
4. HMRC served a defence denying the claims. In its reply BT dropped claim (a). HMRC then issued an application seeking to strike out or summary judgment in respect of the remaining part of BT’s claim. After that BT dropped claims (c) and (d).
5. So the present application concerns part (b) of BT’s claim: for unjust enrichment for the period 1 January 1978 to 31 March 1989.
6. As explained in more detail below, since 1 October 1978 there has been domestic legislation allowing taxpayers to claim bad debt relief (“BDR”) where their customers have failed to pay for goods or services. There was no UK statutory scheme for BDR for the first nine months of the claim period, 1 January 1978 to 30 September 1978 (“the nine-month period”). From 1 October 1978, there was a statutory scheme (which became known as “the Old Scheme”) which entitled a taxable person who had suffered a bad debt to claim a refund from HMRC. The Old Scheme was in place in relation to supplies made between 1 October 1978 and 26 July 1990. It was finally repealed on 19 March 1997.
7. I have mentioned that the current action was stayed pending a statutory appeal. BT claimed in the statutory proceedings that it was entitled to a refund under the Old Scheme or that it could claim the same amounts under s. 80 of the Value Added Tax Act 1994 (“VATA 1994”) as overpaid tax. The proceedings reached the Court of Appeal where they were reported as *British Telecommunications plc v Revenue and Customs Commissioners* [2014] EWCA Civ 433 (“BT”). The Court of Appeal dismissed BT’s claim for bad debt relief under the Old Scheme and its alternative claim under s. 80 VATA 1994.

Relevant legislation and guidance

8. Rimer LJ surveyed the legislation and guidance at [10] to [39] of *BT*. In this section I shall largely repeat his summary.
9. The Finance Act 1972 introduced VAT to the UK. The 1972 Act came into force on 1 April 1973.
10. In 1977 the European Community introduced Directive 77/388/EEC (“the Sixth Directive”). The provisions have since been consolidated into the Principal VAT Directive (2006/112/EC), but it was the Sixth Directive which was in force at the material times.
11. Art. 1 of the Sixth Directive required Member States to modify their VAT systems so that the systems as modified entered into force by 1 January 1978 at the latest.
12. VAT was chargeable on the “taxable amount” of relevant supplies. Art. 11A(1)(a) stated (materially) that “the taxable amount” shall be:

“(a) in respect of supplies of goods and services ... everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies”
13. Art. 11C(1) stated that:

“In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

However, in the case of total or partial non-payment, Member States may derogate from this rule.”
14. The present case is concerned with total or partial non-payment by customers.
15. For the period 1 January 1978 to 30 September 1978, there was no domestic implementation of Art. 11C(1) in respect of cases of non-payment.
16. The UK first introduced a scheme intended to cover cases of non-payment by way of s. 12 of the Finance Act 1978 (“FA 1978”). It was re-enacted in s. 22 of the Value Added Tax Act 1983 (“VATA 1983”) from 26 October 1983. This was the BDR scheme which came later to be known as the Old Scheme.
17. The material provisions of s. 12 were as follows:

“(1) Where—

 - (a) a person has supplied goods or services for a consideration in money and has accounted for and paid tax on that supply; and
 - (b) the person liable to pay any outstanding amount of the consideration has become insolvent,

then, subject to subsection (2) and to regulations under subsection (3) below, the first-mentioned person shall be entitled, on making a claim to the Commissioners, to a refund of the amount of tax chargeable by reference to the outstanding amount.

(2) A person shall not be entitled to a refund under this section unless—

(a) he has proved in the insolvency and the amount for which he has proved is the outstanding amount of the consideration less the amount of his claim;

(b) the value of the supply does not exceed its open market value; and

(c) in the case of a supply of goods, the property in the goods has passed to the person to whom they were supplied.

(3) Regulations under this section may—

(a) require a claim to be made at such time and in such form and manner as may be specified by or under the regulations ...

(4) For the purposes of this section—

(a) an individual becomes insolvent if—

(i) In England, Wales, Northern Ireland or the Isle of Man, he is adjudged bankrupt or the court makes an order for the administration in bankruptcy of his estate; or ...

(b) a company becomes insolvent if, in the United Kingdom or the Isle of Man, it is the subject of a creditors' voluntary winding up or the court makes an order for its winding up and the circumstances are such that it is unable to pay its debts ...

(5) In section 40(1) of the Finance Act 1972 (appeal to VAT tribunal) after paragraph (k) there shall be inserted—

“(l) a claim for a refund under section 12 of the Finance Act 1978.”

(6) This section applies where the person liable to pay the outstanding amount of the consideration becomes insolvent after 1st October 1978.”

18. Several things may be noted here. First, the Old Scheme gave the taxpayer an option to claim bad debt relief. BDR was not automatic. Second, it only applied where the debtor had entered insolvency (“the insolvency condition”). Third, the scheme did not apply to tax paid under barter transactions. Fourth, where relief was claimed for a supply of goods the taxpayer had to show that title had passed (“the property condition”). Fifth, there was power to make regulations governing the timing, form and manner of claims. Sixth, there was a right of appeal in respect of rejected claims to the VAT tribunal. Such appeals were subject to their time limits running from the date of the decision of HMRC rejecting the taxpayer’s claim.

19. The insolvency condition meant that BT could only claim bad debt relief where its customer (if an individual) had been adjudicated bankrupt (or, if dead, his estate was being administered in bankruptcy); or (if a company) was in a creditors' voluntary or compulsory winding up "and the circumstances are such that it is unable to pay its debts". BT also had to have proved in the insolvency. As the Court of Appeal explained in *BT*, these requirements gave rise to practical difficulties for companies like BT, where supplies are typically high volume and low value. The bad debts that were likely to arise in practice for BT were below the minimum bankruptcy level for the presentation of a bankruptcy petition against the defaulting customer; and, in any event, it would not have been worth BT's incurring the costs of insolvency proceedings to seek to recover its debts.
20. Regulations were made under s. 12(3) of the 1978 Act. The Value Added Tax (Bad Debt Relief) Regulations 1978, SI 1978/1129, came into force on 2 October 1978. Reg. 2 defined a "claimant" as a person making a claim for a tax refund to which he was entitled by virtue of s. 12 of the 1978 Act. Reg. 3 provided that "save as the Commissioners may otherwise allow," the claim for a VAT refund was to be made by including the amount in box 8 of the claimant's VAT return for the accounting period during which he received the "document" prescribed by reg. 4(a). Reg. 4(a) described this as a document issued to the claimant "by the person with whom he proves in the insolvency of the debtor" (either a trustee in bankruptcy or a liquidator), specifying the total amount for which the claimant had proved. Reg. 5 required the claimant to keep that document and the others referred to in reg. 4 for a period of three years. The Regulations imposed no time limit for making the refund claim save by reference to the accounting period during which the reg. 4(a) document was received.
21. HMRC produced guidance (Leaflet No 8/78/VAT) on claiming relief from VAT on bad debts. Para 2 summarised the entitlement to make a claim for relief under the 1978 Act and explained that if the claimant received any dividend in the insolvency, he did not have to pay any part of it back to HMRC. Para 6 set out the procedure for claiming relief and relaxed the requirements of reg. 3 of the 1978 Regulations: sub-para (b) permitted the claim to be made either in the return specified in reg. 3 or else in the return for any subsequent accounting period.
22. On 1 October 1981 the Value Added (General and Bad Debt Relief) (Amendment) Regulations 1981, SI 1981/1080, came into force. Reg. 4(1) made a slight change to the way in which the refund claim was to be made on the claimant's VAT return, by requiring it to be included in box 6, ("*Over declarations of tax made on previous returns ...*"), and the claimant also had to tick another box that explained that box 6 included bad debt relief.
23. On 1 September 1983 HMRC published more guidance on "Relief from VAT on bad debts" (VAT Leaflet No 700/18/83). It did not include any materially new guidance.
24. The next relevant enactment was VATA 1983, which came into force on 26 October 1983. It repealed s. 12 of the Finance Act 1978 and replaced it with its own s. 22, which was in material respects identical.
25. The Insolvency Act 1985 made some relevant changes to insolvency laws. These led to amendments to s.22 of VATA 1983. It is not necessary to go into the details of these changes for present purposes.

26. On 1 April 1986 the Value Added Tax (Bad Debt Relief) Regulations 1986, SI 1986/335, came into force. Reg. 4 maintained the same procedure as before for making a claim in the VAT return but, save as the Commissioners might allow or direct, it prescribed that the return had to be that for the accounting period during which the claimant had received the prescribed document required to make good that he had proved in the insolvency; which (a) by reg. 5, was a document issued to him “by the person with whom he proves in the insolvency”, and (b) by reg. 6, an appropriate certificate, as defined, from the administrator or administrative receiver of a company.
27. More guidance was issued in 1986 by VAT Leaflet 700/18/86, “Relief from VAT on bad debts”. Para 7 provided that the claim for the refund had to be made in the return for the accounting period referred to in reg. 3 of the 1986 Regulations, but also provided that it could be made in any subsequent return, as was the case under the prior regulations and guidance.
28. It is helpful at this stage to mention s. 24 of the Finance Act 1989, as this featured in some of the arguments. This became s. 80 of VATA 1994. Section 24 provided (materially) as follows:

“24 Recovery of overpaid VAT

- (1) Where a person has paid an amount to the Commissioners by way of value added tax which was not tax due to them, they shall be liable to repay the amount to him.
- (2) The Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose ...
- (4) No amount may be claimed under this section after the expiry of 6 years from the date on which it was paid, except where subsection (5) below applies.
- (5) Where an amount has been paid to the Commissioners by reason of a mistake, a claim for the repayment of the amount under this section may be made at any time before the expiry of 6 years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.
- (6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.
- (7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of value added tax by virtue of the fact that it was not tax due to them.
- (8) The preceding provisions of this section apply to an amount paid before, as well as to an amount paid after, the day on which this section comes into force, except where the Commissioners have received a claim for repayment of the amount before that day.

(9) The following paragraph shall be inserted at the end of section 40(1) of [VATA 1983] (appeals)—

[...]

“(s) a claim for the repayment of an amount under section 24 of the Finance Act 1989 (recovery of overpaid tax).” ...”

29. The Finance Act 1990, which received Royal Assent on 26 July 1990, introduced a new scheme of bad debt relief (“the New Scheme”). It was contained in s. 11, with a side heading of “Bad debts”, and provided materially as follows:

“(1) Subsection (2) below applies where—

(a) on or after 1st April 1989 a person has supplied goods or services for a consideration in money and has accounted for and paid tax on the supply,

(b) the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and

(c) a period of two years (beginning with the date of the supply) has elapsed.

(2) Subject to the following provisions of this section and to regulations under it the person shall be entitled, on making a claim to the Commissioners, to a refund of the amount of tax chargeable by reference to the outstanding amount.

(3) In subsection (2) above “the outstanding amount” means—

(a) if at the time of the claim the person has received no payment by way of the consideration written off in his accounts as a bad debt, an amount equal to the amount of the consideration so written off;

(b) if at that time he has received a payment or payments by way of the consideration so written off, an amount by which the payment (or the aggregate of the payments) is exceeded by the amount of the consideration so written off ...’

30. Subsection (4) imposed two conditions on the entitlement to a refund which are of no present materiality. Subsection (5) provided for the making of regulations under the section. The New Scheme was different in kind from the Old Scheme: it was now essentially time-based.

31. Although the 1990 Act (by Pt. III of Sch 19) repealed s. 22 of VATA 1983 (as substituted by s. 32 of the Finance Act 1985) in relation to supplies made after the day on which the 1990 Act was passed (26 July 1990) s. 11 did not repeal s. 22 of VATA 1983, or therefore the Old Scheme, in respect of supplies of goods and services before 1 April 1989, or between then and 26 July 1990. In respect of the latter period, BDR claims could be made under either the Old or New Scheme, but not both. Section 11(9) provided that s. 22 of VATA 1983 was not to apply to any supply made after 26 July 1990: in respect of such supplies, bad debt relief claims could only be made under the New Scheme.

32. Section 11(11) of the Finance Act 1990 amended s. 40(1)(f) of VATA 1983. Before that amendment, s. 40(1)(f) provided for an appeal against a refusal of a refund under s. 22 of VATA 1983 to lie to the VAT tribunal (what is now the First-tier Tribunal or “FTT”). The amendment extended such right of appeal to a refusal of a refund under s. 11 of the Finance Act 1990, i.e., the New Scheme.
33. Appeals against refusals of claims under s. 24 of the Finance Act 1989 (see above) were separately provided for by VATA 1994 s. 83(1)(t).
34. Following the enactment of the Finance Act 1990, new Regulations came into force on 1 April 1991: they were the Value Added Tax (Refunds for Bad Debts) Regulations 1991, SI 1991/371. These Regulations did not revoke the 1986 Regulations, which continued to apply to the making of claims under the Old Scheme. The 1991 Regulations applied to refund claims under the New Scheme.
35. On 1 April 1991 HMRC also issued their “Relief from VAT on Bad Debts” (Leaflet 700/18/91), which explained how to make a refund claim under both the New Scheme and the Old Scheme. As regards the Old Scheme, paras 17 to 24 explained how bad debt relief under the Old Scheme might be claimed in respect of supplies made before 26 July 1990, but said that a condition of such relief was that the “customer has become formally insolvent”. Para 24 explained that any such claim had to be made in the VAT return for the tax period in which the claimant received “the acknowledgment of receipt of your claim or the letter from the administration [*sic*] or administrative receiver confirming that a certificate of insolvency has been issued.” It no longer provided, as had the earlier guidance, that the claim could also be made in the return for any subsequent accounting period.
36. The current bad debt relief scheme is contained in VATA 1994, which came into force on 1 September 1994. Schedule 15 repealed VATA 1983 and ss. 10 to 16 of the Finance Act 1990. Section 36 re-enacted the New Scheme, save that the two-year period prescribed by s. 11(1)(c) of the Finance Act 1990 was, by s. 36(1)(c), reduced to a six-month period. Para 9(1) of Sch 13, “Transitional Provisions and Savings”, provided that: “Claims for refunds of VAT relating to supplies made before 27th July 1990 may continue to be made in accordance with section 22 of [VATA 1983] notwithstanding the repeal of that section by [the 1990 Act].” Para 9(2) provided that claims for refunds of VAT relating to supplies made after 31 March 1989 and before the commencement of VATA 1994 may be made in accordance with s. 36, but so that a claim “shall not be made under s. 36 in relation to any supply as respects of which a claim is made under s. [22 of VATA 1983]”; and, in relation to supplies made before 1 April 1992, that s. 36(1)(c) “shall have effect with the substitution of “one year” for “six months”.”
37. Section 80 of VATA 1994 re-enacted s. 24 of the Finance Act 1989, with sub-s. (4) repeating s. 24(4). Section 80(4) was, however, amended by the Finance Act 1997, with retrospective effect to 4 December 1996, so as to substitute a new provision providing that the Commissioners were “not [to] be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim.”
38. The Value Added Tax Regulations 1995, SI 1995/2518, set out, in Pt. XVIII, the regulations relating to making of claims for bad debt relief under the Old Scheme,

namely under s. 22 of VATA 1983. Regulation 157 provided that, save as the Commissioners might otherwise allow or direct, the claim must be made in the return for the accounting period during which the claimant received the document proving the amount for which he had proved in the liquidation (or other specified document in the case of an administration or administrative receivership).

39. HM Customs and Excise VAT Notice 700/18/96, “Relief from VAT on bad debts”, issued in January 1996, similarly stated, in para 23, that an Old Scheme claim for repayment had to be made in the return for the accounting period prescribed by the 1995 Regulations. As from the introduction of the 1991 Regulations, it was no longer possible for an Old Scheme claim to be made in the return for an accounting period after that in which the claimant received the relevant document.
40. A Budget Notice, “VAT: Bad Debt Relief”, BN 48/96, was published on about 26 November 1996. It answered its question “Who is likely to be affected?” by saying that all traders will be affected “except those on the cash accounting scheme, who get automatic bad debt relief.” Under the next heading, “General description of the measure”, it stated that “a number of measures are being introduced to amend the current scheme for relief from VAT on bad debts.” Para 3, headed “The changes”, itemised proposed changes against nine bullet points. The ninth read “cancel the VAT Regulations covering the old (pre-1990) scheme for bad debt relief “.
41. A Budget News Release dated 26 November 1996 was headed “Budget 1996: VAT” and sub-headed “Bad Debt Relief Scheme to be Tightened”. An introductory paragraph referred to the introduction of measures directed at preventing the bad debt relief “scheme from being manipulated for tax avoidance and raise £120 million next year”. The details were set out under three numbered paragraphs. The relevant one is para 3, which said that: other changes to the bad debt relief scheme were designed to help businesses and clarify the law. These were to be effective from the time the Finance Bill receives the Royal Assent. The last identified change, which was to “cancel the VAT Regulations covering the old (pre-1990) scheme of Bad Debt Relief”.
42. The Bill intended to achieve these changes was published on 3 December 1996. It became the Finance Act 1997, which came into force on 19 March 1997. The relevant provision is s. 39, of which sub-s. (5) provided:

“(5) No claim for a refund may be made in accordance with section 22 of [VATA 1983] (old scheme for bad debt relief) at any time after the day on which this Act is passed’.
43. Section 39(5) of the Finance Act 1997 Act therefore brought the shutters down on any Old Scheme claim for bad debt relief in respect of supplies prior to 26 July 1990.
44. VATA 1994 was amended as from 19 March 1997 so that para 9(2) of Sch 13 then provided:

“(2) Claims for refunds of VAT shall not be made in accordance with section 36 of this Act in relation to—

 - (a) any supply made before 1st April 1989; or

(b) any supply as respects which a claim is or has been made under section 22 of [VATA 1983].”

45. Finally, s. 121 of the Finance Act 2008 made an amendment to the time-limit provisions of s. 80(4) of VATA 1994, as amended in 1997. The further amendment provided that:

“(1) The requirement in section 80(4) of VATA 1994 that a claim under that section be made within 3 years of the relevant date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009 ...”

46. Since 22 April 2011, s. 80 VATA 1994 (amended by s. 47 Finance Act 1997 and s. 3 Finance (No 2) Act 2005)) contains a four-year limitation period with no extended period for cases of mistake but still containing the express ouster of common law claims in s. 80(7):

“Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.”

47. It may assist at this stage to draw some of the threads together. First, under the Old Scheme there was no statutory entitlement to a refund unless a claim was made to HMRC (s. 12(1)(b) FA 1978, s. 22(1) VATA 1983). Second, there was no entitlement to a refund unless the insolvency condition was met (s. 12(2) FA 1978, and in a modified form under s. 22(2) VATA 1983). Third, where the claim was in respect of goods sold the claimant had also to satisfy the property condition.

48. Fourth, regulations made under s. 12 FA 1978 and s. 22 VATA 1983 contained procedural requirements for making claims for bad debt relief. These changed over time:

- i) the Value Added Tax (Bad Debt Relief) Regulations 1978 said that a claim was to be made in box 8 of the VAT return for the accounting period during which the relevant document issued in relation to the insolvency was received. These (and later regulations) had the proviso: “save as the Commissioners may otherwise allow”. HMRC specified in Leaflet No 8/78/VAT that the claim could be made in the return for any subsequent accounting period;
- ii) the Value Added (General and Bad Debt Relief) (Amendment) Regulations 1981 said that the claim was instead to be made in Box 6 (regulation 4(1)) and a box was to be ticked to show that Box 6 included BDR;
- iii) the Value Added Tax (Bad Debt Relief) Regulations 1986 and VAT Leaflet 700/18/86 said that the relevant claim had to be made in Box 5 and (under the guidance) could be made in any subsequent return;
- iv) Leaflet 700/18/91 was issued on 1 April 1991. Paras 17-24 related to claims under the Old Scheme (in relation to supplies made before 26 July 1990) and no longer allowed claims to be made for subsequent accounting periods (it had

to be made in the VAT return for the tax period in which the claimant received the acknowledgment of its claim or a letter confirming that a certificate of insolvency had been issued);

- v) the Value Added Tax Regulations 1995 said that the claim must be made in the return for the accounting period during which the claimant received the document proving the amount for which he had proved in the liquidation (regulation 157). VAT Notice 700/18/96 “Relief from VAT on bad debts” issued in January 1996 (para 23) stated that an Old Scheme claim for repayment had to be made in the return for the accounting period prescribed by the 1995 Regulations. Thus, from 1991, it was not possible for an Old Scheme claim to be made in the return for an accounting period subsequent to that in which the claimant received the relevant document;
 - vi) the Value Added Tax Regulations 1995 also further made provision for the evidence to be held in support of a BDR claim (reg. 158); that this was to be held for six years from the making of any claim (reg. 160); for a set-off of debts owed by the supplier to the customer and for a consequent reduction in any refund (reg. 161); and for repayment of the refund where reg. 160 was not complied with or where the supplier claimant proved in the insolvency amounts exceeding the consideration less the refund (reg. 163).
49. Fifth, s. 39(5) of FA 1997 prohibited the making of Old Scheme claims at any time after the day on which FA 1997 was passed (19 March 1997). This finally stopped a taxpayer making any claim in respect of supplies prior to 26 July 1990.
50. Sixth, since the date of the introduction of the Old Scheme appeals against a decision of HMRC refusing BDR could be made to the VAT Tribunal (later, the FTT). As already explained, this was enacted under a separate provision from appeals in relation to s. 80 of VATA 1994 and its predecessors. Appeals under the Old Scheme were, from the time of its creation, subject to time limits, running from the date of the relevant decision of HMRC (though the tribunal could give permission for a later appeal). The VAT Tribunal was created as a specialist tribunal for the resolution of disputes about relevant aspects of VAT.

The decisions of the Court of Appeal in *BT* and *GMAC*

51. As explained above, the Old Scheme was effective from 1 October 1978 to 31 March 1989. It was repealed by s. 39(5) of the FA 1997 from 19 March 1997 with the consequence that no Old Scheme claims could be brought after that date. No such claim for bad debt relief was made by BT before the repeal of the Old Scheme.
52. On 30 March 2009 BT made a claim by letter to HMRC for a refund of amounts it said it had overpaid HMRC in respect of the whole of the period up to 31 March 1989. That was two decades after the bad debts had occurred and more than a decade after the repeal of the Old Scheme.
53. The Court of Appeal decided in *BT* as follows:
- i) As a taxpayer, BT had a directly enforceable right under Art. 11C(1) of the Sixth Directive ([61]). As for the 9 months before 1 October 1978 it would be

wrong to characterise the non-implementation of Art. 11C(1) as a derogation ([16]); and for the subsequent period the power to derogate could not be used to deprive a taxpayer of his right under Art. 11C(1) ([59]).

- ii) The insolvency condition under the Old Scheme was unlawful and infringed BT's directly enforceable EU law rights ([71]-[72]).
- iii) The procedural route by which BT claimed to be entitled to make a claim (including a direct one) based on Art. 11C.1 was under the Old Scheme appropriately moulded so as to accommodate the European law rights it was exercising ([88]).
- iv) There was no basis for HMRC's contention that there was an implied requirement that such a claim had to be brought within a reasonable time ([90]).
- v) But it was no longer open to BT to seek a refund under the Old Scheme, as it had been repealed before BT's claim letter of 30 March 2009 by s. 39(5) FA 1997 ([122]-[123]). As to this Rimer LJ said there was something:

“inherently wrong in BT's complaint that, as from 19 March 1997, s. 39(5) unlawfully deprived it of its right to enforce its directly effective rights under art 11C(1). It had had since 1978 the opportunity to enforce those rights in respect of each and every bad debt as it arose, and was entitled to claim in doing so that the insolvency condition was invalid; and by 19 March 1997 it is likely that all its debts arising from its pre-1 April 1989 supplies were either paid or statute-barred. The only reason it had not taken steps to enforce its directly effective rights is, so I presume, that it was unaware of them. Ignorance of one's legal rights is not, I should have thought, a sound basis upon which a bid can ordinarily be made to disapply legislation that has, eventually, put a stop to their future exercise” ([106]).

- vi) If at the time of the introduction of the New Scheme, BT had any expectations as to the future of the Old Scheme, it would, as a prudent and circumspect operator, have been likely to have foreseen its eventual repeal. A claim by a litigant to a national court inviting disapplication of a provision of its national law as infringing the litigant's EU law rights is one that must be decided on the basis of the facts affecting the particular litigant, in this case BT ([121]-[122]).
- vii) The essential question in this regard was:

“whether BT is right that the enactment of s. 39(5) of the FA 1997, which barred the making of any Old Scheme bad debt relief claims after 19 March 1997, infringed its directly enforceable rights under the Directive to claim VAT bad debt relief in respect of the bad debts the subject of the claim that BT eventually made in March 2009. Those debts all arose from supplies made prior to 31 March 1989.” ([121]).

- viii) In approaching the question Rimer LJ said this:

“It had, therefore, been open to BT from the dawn of the Old Scheme in 1978 down to 1990 to make bad debt relief claims under the machinery of the Old Scheme in respect of each bad debt now relied upon as it arose; and it continued to be open to it to make belated such claims during the remaining years of the 1990s in which the Old Scheme machinery remained on the statute book. Of course, in making good such claims BT would have had to show that the insolvency condition was incompatible with its EU law rights. I consider, however, that we must approach the case on the basis that it could and would have done so. The only reason BT did not make such claims is, I presume, because it was unaware that it was open to it to do so”. ([122])

- ix) BT’s lack of awareness that it could have brought the claims under the Old Scheme was irrelevant – see [123]:

“EU law has been flowing up our estuaries since 1972 and BT had every opportunity to obtain the most expert advice as to its rights. I therefore fail to understand how BT can now say that the eventual demise by the Finance Act 1997 of a bad debt scheme that had included provisions that, so it claims and I would hold, infringed its directly enforceable EU rights was a change in the law that also infringed its directly enforceable EU rights. It did not. BT had literally had almost decades in which to enforce its rights, but did nothing towards doing so BT could in fact have sought to enforce its directly enforceable EU rights during that period, although in the event it still did nothing towards doing so for a further 12 years. It is in my view counter-intuitive that BT should now be entitled to bring such a stale claim.”

- x) Accordingly, the enactment of s. 39(5) FA 1997 did not infringe BT’s directly enforceable EU rights to claim bad debt VAT relief in respect of supplies prior to 31 March 1989 and did not fall to be disapplied. The four-month warning of the impending change in the law was sufficient ([123]).
- xi) In relation to the period 1 January to 30 September 1978, either “the only right that BT ever had to claim relief in respect of these bad debts was a common law restitutionary claim” which was statute barred, or it fell within the Old Scheme and was “blighted by the same problem” affecting the period 1 October 1978 to 31 March 1989 ([118]).
- xii) BT’s claim letter of 30 March 2009 was for bad debt relief and was not a claim under s. 80 VATA 1994 (see [127]). Section 80 related to the bringing into account as output tax an amount that was not output tax due. The fact that debts were not paid did not mean that the output tax earlier paid was not output tax due within the meaning of s. 80; it was due and remained so ([30], [84], and [125]-[128]).

54. BT’s application for permission to appeal to the Supreme Court was refused. HMRC then applied to strike out the FTT statutory appeal. That application was successful. BT’s statutory appeal was struck out by Judge Morgan on 29 June 2020. BT has

sought and obtained (from the FTT) permission to appeal against that striking out decision on the basis that it has a claim under s. 80 VATA 1994.

55. The hearing of the original statutory appeal at the Upper Tribunal level was heard together with an appeal in another case, involving another taxpayer, GMAC (UK) plc. There were separate appeals to the Court of Appeal. The Court of Appeal's decision in the GMAC case was given in October 2016 in *GMAC v Revenue and Customs Commissioners* [2016] EWCA Civ 1015 (“*GMAC*”). The case concerned the property condition as well as the insolvency condition.
56. The Court of Appeal in *GMAC* again concluded that the repeal of the Old Scheme by s. 39(5) FA 1997 did not render excessively difficult or virtually impossible the exercise of EU law rights; and that s. 80 VATA 1994 did not apply to claims for bad debt relief. It held that it would not be appropriate in any moulding of the Old Scheme to conform to Art. 11C(1) of the Directive to set it aside in its entirety ([126]). The repeal of the Old Scheme by s. 39(5) FA 1997 was akin to an alteration in a time limit for making claims, which would terminate the right to claim relief in respect of the supply, and this was plainly within the discretion of the UK as a Member State ([130]).
57. Floyd LJ, giving the lead judgment, said, “I do not therefore consider that it is necessary for the court to find some other route to give effect to GMAC’s EU law rights” ([134]). The Court rejected GMAC’s argument that it had an EU law right that had to be protected by moulding the New Scheme to apply to GMAC retrospectively or by moulding s. 80 VATA 1994.

Summary of the claims made by BT in these proceedings

58. As already explained, BT alleges in the present proceedings that it overpaid HMRC. Having sketched out the statutory landscape I can now explain BT’s contentions rather more concretely. It says that it had a directly enforceable right under the Sixth Directive to deduct (by set-off) the amounts attributable to the bad debts it suffered. It says that the reason for the overpayment was that the UK failed to allow a taxpayer in the position of BT to apply for a set off or refund of VAT when full consideration was not received from the customer. The UK’s domestic requirements made it impossible or excessively difficult to make such claims. BT claims that it wrongly believed those requirements to be lawful and that it acted under a mistake of law by making payments without refund or set off.

HMRC’s application: principles

59. There was no dispute about the principles for striking out or reverse summary judgment. It was accepted that for present purposes there is no practical difference between the two tests.
60. I was reminded of the summary given by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 and many other cases). The court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success. A realistic claim is one that carries some degree of conviction. The court must not conduct a mini-trial.

61. On the other hand, as Lewison J said at [15](vii):

“it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.”

62. BT submitted (and I accept) that the court should only decide a point of law summarily if satisfied that the point was clear; and the court should generally refrain from summarily deciding difficult legal points in a developing area of the law and where the outcome may be sensitive to the facts (see e.g. *Hughes v Richards* [2004] EWCA Civ 266 at [22]). Lewison J deliberately spoke of “short” points of law or construction; the summary process is inapt for heavy or prolonged legal argument.

63. The grounds for HMRC’s application in respect of the period 1 October 1978 to 31 March 1989 are: (a) that the Old Scheme operated to exclude or oust common law claims, and (b) that there was anyway no unjust enrichment of HMRC. In respect of the nine-month period, 1 January 1978 to 30 September 1978, HMRC contends that the claim is statute-barred. HMRC confirmed that it did not seek to contend, in respect of the nine-month period, that the common law claims were ousted by the subsequent enactment of the Old Scheme. Equally it did not seek to rely on the Limitation Act in relation to the later period.

Claims in respect of the period from 1 October 1978 to 31 March 1989

64. As just explained HMRC has two grounds for its application in respect of this period. I shall take them in turn.

(a) Was the Old Scheme an exhaustive and exclusive regime?

65. HMRC says that the Old Scheme provided an exhaustive and exclusive statutory regime for claims for refunds of VAT where relevant customers did not pay the amounts they owed. It says that Parliament intended (or must be taken to have intended) that taxpayers could not resort to common law claims seeking restitution of amounts they could have claimed (but failed to claim) under the statutory scheme.

66. The question whether a legislative scheme is intended to exist alongside common law remedies or is intended to be exhaustive and exclusive has been addressed in many authorities, covering various legislative contexts. These include *Johnson v Unisys Ltd* [2001] UKHL 1, *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, *R (on the application of the Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, and *Littlewoods Limited v Revenue and Customs Commissioners* [2017] UKSC 70.

67. These cases and others were recently reviewed and summarised in *Southern Gas Networks Plc v Thames Water Utilities Ltd* [2018] EWCA Civ 33 at [37] per Hickinbottom LJ:

“It is unnecessary to quote at length from the cases to which I have already referred. The following propositions can be drawn from them.

i) Where Parliament has legislated for a statutory remedy to apply in certain circumstances, whether that remedy ousts any common law remedy which would or might have arisen on the same facts depends upon whether, on the true construction of the particular statutory provisions, Parliament intended that provision to oust, or co-exist with, the common law remedy. The courts will not maintain a common law remedy in the case of an evident intention of Parliament to displace it (see, e.g., *Johnson v Unisys* at [58] per Lord Hoffmann and [80] per Lord Millett, *Deutsche Morgan Grenfell* at [19] per Lord Hoffmann, and *CPAG* at [27] per Sir John Dyson JSC).

ii) Where that intention is not express, the threshold for inferring ouster of common law rights is high; but it is not helpful to approach the question on the basis that there is a presumption against ouster. Nor, before common law rights are displaced, does ouster have to be a necessary implication, in the sense that the common law remedy is only displaced if, as a matter of logic, it cannot co-exist with the statutory regime (although, of course, common law remedies can be ousted by such necessary implication) (*CPAG* at [31] per Sir John Dyson).

iii) Whether common law remedies are ousted is dependent upon the true construction of the particular statutory provisions. However, where the statutory remedy covers precisely the same ground as the common law remedy, the latter will almost certainly have been excluded by necessary implication (*ibid* at [33]). Furthermore, where the statutory regime provides a special or qualified remedy, it may (although not necessarily will) be inferred that Parliament intended to exclude any common law remedy that would or might arise on the same facts (see, e.g., *Deutsche Morgan Grenfell* at [19] per Lord Hoffmann, and at [135] per Lord Walker of Gestingthorpe).

iv) The identification of some differences between the statutory scheme and the common law remedy will not necessarily lead to an inference that Parliament intended the former to oust the latter. As Sir John Dyson put it in *CPAG* at [34]:

“The question is not whether there are any differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme. The court should not be too ready to find that a common law remedy has been displaced by a statutory one, not least because it is always open to Parliament to make the position clear by stating explicitly whether the statute is intended to be exhaustive. The mere fact that there are some differences between the common law and the

statutory positions is unlikely to be sufficient unless they are substantial.... The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended by [*sic*] coexist with it.”

Rather than “incompatible”, in *Total Network* at [130] Lord Mance used the phrase “positively inconsistent”.

68. Counsel for BT placed some emphasis on Lord Mance’s use of the words “positively inconsistent”. I do not think that much is to be made of the different phrasing. Hickinbottom LJ noted, but made nothing of, the different phrases used by Lord Mance in *Total* and Sir John Dyson in *CPAG*. Moreover, *Total* was cited in *CPAG* and, when setting out his summary of the principles, Sir John Dyson carefully considered each of the speeches in that case. Paragraph [34] of *CPAG* included his synthesis of the principles to be drawn from the earlier cases, including *Total*. And, as the Court of Appeal noted in *Monro*, *Total* was merely an application of established principles rather than an attempted reformulation. It should also be noted that, in his statement of the principles, Hickinbottom LJ said that the touchstone is not necessary implication or logical inconsistency: in the end the question is whether looking at things overall the common law remedy can sensibly co-exist with the statute. I also note that in the *Investment Trust Companies* case, Lord Reed cited the *CPAG* case without any suggested reservation.
69. I shall adopt and apply the principles distilled by Hickinbottom LJ in *Southern Gas*.
70. The first thing to note is that the question is one of statutory construction: did the legislation constituting the Old Scheme create an exhaustive and exclusive scheme for refunding taxpayers in respect of bad debts or did it create an additional remedy alongside the rights of taxpayers at common law?
71. As already mentioned, courts should not embark on prolonged and difficult legal questions on a summary application. BT said this was such a case. I do not agree. This is the kind of short question of law or construction which does not depend on the particular facts. And the relevant principles are clear and established. This is not an area where the law is under development or in flux.
72. HMRC submits (in outline) that several features of the Old Scheme show a parliamentary intention that it was to be a comprehensive and exclusive scheme for refunds for bad debts. I shall return to these in a moment.
73. BT contends (in outline) that the Old Scheme was not intended to exclude its common law claims. It starts by noting that there is no express ouster and says that the VAT legislation itself (in the form of s. 80 VATA 1994 and its predecessor) shows that where Parliament means to achieve an ouster it knows how to do so. BT says that the Old Scheme was one way of claiming a refund where a customer did not pay, but not the only one. It submits that there is no incompatibility or inconsistency between a taxpayer being able to claim under the Old Scheme and also having recourse to the common law. The Old Scheme no doubt provided a convenient procedural mechanism, but that does not overcome the high hurdle required for an ouster of common law rights.

74. In my view there are numerous features of the statute which lead to the conclusion that Parliament intended the Old Scheme to be an exhaustive and exclusive scheme for making claims in respect of non-payment by customers of VAT taxpayers. I shall list these features separately, though they overlap to some extent, and they need to be considered cumulatively as well as separately.
75. First, the Old Scheme was specifically enacted to implement Art. 11C(1) of the Sixth Directive (as found by the Upper Tribunal at [165] in the *BT* case). The purpose of the statute was to give effect to the very right of refund now relied on by the taxpayer. The courts have since found that the UK failed effectively to implement the Directive, but nonetheless Parliament meant to create a statutory remedy for cases of non-payment by customers.
76. It is also of some relevance that Art. 11C(1) expressly allowed Member States to set out the conditions for recovery of tax, and to make changes to those conditions (see the discussion in *GMAC* at [126]). This is what the UK Parliament took itself to be doing when it enacted the Old Scheme and then made changes to it through the various iterations of regulations. It implemented the requirements of Art. 11C(1) in what was, in principle, an entirely acceptable manner, but wrongly included objectionable conditions.
77. So the starting point is that the statutory claim covers the same ground as the putative common law remedy. The foundation of BT's present case is its direct right under Art. 11C(1) (concerning non-payment by its debtors); and that is precisely the territory the Old Scheme was intended to cover. The cases show that where a statutory remedy covers the same ground as the putative common law claim this an indicator that the statutory remedy is intended to be comprehensive and exclusive. (I shall return in a moment to address the point that the UK statute did not lawfully and effectively implement Art. 11C(1). The short point is that Parliament must be taken to have intended faithfully to implement the requirements of the Directive.)
78. Secondly, Parliament enacted a series of procedural and substantive conditions in both the primary and secondary legislation that had to be complied with before a refund could be claimed. So the remedy under the legislation was a special, qualified one, hedged about by conditions (see point (iii) in Hickinbottom LJ's summary).
79. As to the procedural conditions, s.12(1) created a right to make a claim for relief. It gave taxpayers that option, but the right to a refund was not automatic. Section 12(3) of the 1978 Act empowered regulations to be made as to the time, form and way claims could be made. Such regulations were then made which required claims to be made in a certain form (in the relevant parts of the VAT returns). There were also requirements for the submission of specified documents and for the period in which the documents had to be submitted (these requirements changed from time to time). These procedural pre-conditions would not apply to a common law claim.
80. The substantive conditions included the insolvency condition and the property condition. The insolvency condition was also amended during the subsistence of the Old Scheme.
81. I do not think Parliament can sensibly be taken to have intended, when setting out these substantive and procedural conditions, that the taxpayer could, without fulfilling

them, have made a claim for a refund in cases where a customer did not pay in respect of a relevant supply. There would have been no point in the statute containing these specific conditions. Any taxpayer could have ignored them and sought a refund or set off simply on the basis that it had not been paid by its customer. The sensible inference seems to me (other things being equal) that Parliament intended to exclude recourse to a common law remedy that would or might arise on the same facts.

82. In the present case the courts have of course subsequently held that, though there was nothing objectionable in the Old Scheme in principle as a means of implementing Art. 11C(1), the insolvency condition and the property condition failed to comply with European law; and that the procedural requirements were largely parasitical on the insolvency condition. However, Parliament must be taken to have intended faithfully to implement European law when it introduced the Old Scheme; and when assessing whether Parliament intended to enact a comprehensive and exclusive domestic scheme for refunding tax for non-payment of debts it seems to me that the court should not disregard those elements which have turned out to infringe the requirements of European law. The search is for the intent of Parliament and to ignore the offending parts of the Old Scheme would be to exclude significant indicators of what Parliament meant to achieve.
83. But even if this conclusion is wrong and when assessing Parliament's intentions one should approach the Old Scheme stripped of the offending elements, it appears to me that other elements of the Old Scheme point firmly towards a Parliamentary intention to create a comprehensive and exclusive statutory scheme. I have in mind the requirement that the taxpayer had to claim from HMRC (see [79] above), the provisions concerning appeals (see [84] below), the provisions concerning the determination of the outstanding amounts (see [85] below), those concerning the repayment of refunded amounts (see [86]), the express exclusion of statutory restitution (see [87] below), and the terms of s. 39(5) FA 1997 (see [88] below).
84. Thirdly, the statutes enacting the Old Scheme provided specifically for appeals against the decisions of the HMRC for bad debt relief to be made to a specialist statutory tribunal (originally the VAT Tribunal, later the FTT). The allocation of statutory claims to a specialist tribunal system was a significant factor in favour of an implied ouster of the common law in *Johnson*. Under the rules governing tribunal claims (applicable to Old Scheme appeals) there were statutory time limits for bringing appeals (running from the date of the decision of HMRC being appealed from). Though such proceedings are "appeals" (from a decision of the Commissioners) they are in reality first instance judicial proceedings allocated to a specialist tribunal (rather than a court). The time limits are relatively short and would not apply to common law proceedings for restitution. It would again be very surprising if the statutory allocation to a specialist tribunal and the concomitant time limits could be circumvented by the taxpayer deciding to frame its claim (arising from identical facts) as a common law restitutionary one.
85. Fourthly, there were detailed provisions in the Old Scheme for the determination of the outstanding amount of the consideration in money (see for instance s. 12(3)(c) FA 1978 and para 7 of the 1978 Regulations). These were prescriptive and placed a further qualification on the remedy (again see point (iii) in Hickinbottom LJ's summary). It is somewhat counterintuitive to suppose that, having gone to the trouble of putting these special qualifications on scope of the statutory remedy, Parliament

intended that the taxpayer should be able to use another (non-statutory) method for calculating the amount of any overpayment.

86. Fifthly, there were provisions in the Old Scheme for the repayment by the taxpayer of any refunds where any requirement was not complied with or where the claimant subsequently recovered from the bad debtor (see for instance s. 12(3)(d) FA 1978 and para 8 of the 1978 Regulations). These placed further qualifications on the statutory remedy (which would feature in a claim at common law). To my mind it is again unlikely that Parliament can have intended that the taxpayer could avoid these special qualifications by making a common law claim outside the Old Scheme.
87. Sixthly, the procedure under the Old Scheme was expressed to be separate and distinct from the statutory procedure for restitution of overpaid tax contained in s. 80 VATA 1994 and its predecessors. The Old Scheme therefore expressly excluded the s. 80 procedure. To my mind this further indicates that the Old Scheme was intended to be a comprehensive and exclusive process for claims with a particular and specific subject matter, i.e., those arising where tax had been accounted for on a supply to a person who then failed to pay (in whole or part). It would to my mind be surprising to conclude that Parliament intended to exclude the statutory route to restitution for this category of claims but intended nonetheless to allow the claims to be brought at common law.
88. Seventhly, Parliament decided, by enacting s. 39(5) FA 1997, finally to bring down the shutters on claims under the Old Scheme in respect of any supplies before 26 July 1990. The legislation (in the shape of the New Scheme) allowed bad debt relief to continue to be claimed for supplies after that; but it was no longer possible after 19 March 1997 to claim a refund under the Old Scheme. The history of the repeal of the Old Scheme is set out above. As the Court of Appeal has held in *BT* and *GMAC*, the notice given of the ending of the Old Scheme was adequate so that the ending of the scheme by s. 39(5) FA 1997 did not render excessively difficult or virtually impossible the exercise of EU law rights and did not require some other remedy to be identified.
89. I agree with HMRC's submission that this further evinces a parliamentary intention to control the circumstances under which refunds for bad debts could be claimed. It is hard to suppose that, when it repealed the Old Scheme, Parliament intended that taxpayers would simply be able to issue a claim for restitution.
90. BT submitted that the various features of the Old Scheme I have enumerated do not show a legislative intention to exclude the common law. It submitted, first, that there was no necessary incongruity, inconsistency, or incompatibility with the co-existence of common law claims. They could co-exist: the taxpayer would have had rights under the Old Scheme or at common law. BT says that there is nothing surprising about the two regimes running side-by-side.
91. But as I have said the touchstone is not necessary implication or the logical impossibility of co-existence (see Hickinbottom LJ's summary). The question is whether it is reasonable to suppose that Parliament intended a common law remedy to co-exist with the statutory enactment. In the present case BT's side-by-side argument would set at naught the various specific requirements and preconditions of the Old Scheme. It would make the various qualifications contained in the statutory remedy

(with its requirements for making claims, allocation of claims to the specialist tribunal, time limits for appeals, quantification of claims, requirements for repayment etc.) entirely optional for the taxpayer. The taxpayer could on BT's argument have ignored the whole procedural and substantive machinery and its requirements. That does not seem to me a sensible view of what Parliament intended.

92. BT also suggested that Parliament could not have intended at the time of the introduction of the Old Scheme in 1978 to exclude claims for mistake of law as such claims were not recognised in English law until the decision of the House of Lords in *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349). An argument on those lines was considered and rejected by Lord Reed in the *Investment Trust Companies* case at [86]. The question is not whether Parliament meant to exclude a particular or specific common law route to recovery but whether it intended (more generally) to create a comprehensive and exclusive scheme in respect of the relevant subject matter, namely, the recovery of VAT where customers had failed to pay in full the agreed consideration for goods or services.
93. BT relied heavily on passages from the case of *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19. BT submitted indeed that those passages constituted a complete answer to the ouster argument.
94. The claimants in that case contended that differences between their tax treatment and that of wholly UK-resident groups of companies breached Art. 43 EC (freedom of establishment) and Art. 56 EC (free movement of capital) of the EC Treaty and that they had therefore overpaid. There were restitutionary remedies available in domestic law including money paid under a mistake of law. HMRC contended that parts of the common law claims were excluded by s. 33 of the Taxes Management Act 1970. That section applies where the taxpayer alleges that tax paid under an assessment was excessive by reason of a mistake in a return; and it gives HMRC a discretion to repay such amount as is reasonable and just, but no relief may be given in respect of (inter alia) a mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made. Lord Walker addressed the ouster argument at [119]. He concluded that the provision should not be read as impliedly excluding the restitutionary claims and (to the extent necessary) interpreted s. 33 conformably with EU law under the *Marleasing* principle. Lord Sumption addressed the issue at [204] to [205]. He said that s. 33 could not be interpreted as impliedly excluding the taxpayers' common law rights as it was "axiomatic that the courts cannot imply an exclusion of unrestricted rights of action at common law where that would be inconsistent with an overriding rule of EU law that an unrestricted right must be available". The other members of the Supreme Court agreed with Lords Walker and Sumption.
95. BT submitted that the Old Scheme cannot be read as excluding its directly applicable rights under Art. 11C(1) of the Sixth Directive as that would mean that it had no effective remedy, and so would infringe Lord Sumption's axiom.
96. HMRC submitted that BT's argument is answered by the conclusion of the Court of Appeal in *BT* that the Old Scheme fell to moulded (by disregarding the insolvency condition and the associated procedural requirements) and that, so reformed, the Old Scheme provided BT with an effective and available remedy to enforce its EU law

rights. The present case is therefore entirely different from the situation in *FII*. The Court in that case held that if the domestic statute (s.33 TMA) ousted the restitutionary claim the taxpayer would have been entirely deprived of any domestic legal route to enforce its direct EU rights. But in the present case the Court of Appeal has concluded that the Old Scheme as moulded gave BT a fully effective domestic means of enforcing its rights (by way of statutory appeal).

97. I agree with HMRC's submission. As Lord Sumption explained in the *FII Group Litigation* case at [204], no one suggested that the essentially discretionary power of the Commissioners under s.33 to grant a refund could be enough in itself to satisfy the unqualified obligation of the UK to provide an effective means of recovering tax overcharged contrary to EU law. As he explained, it would not matter if s.33 provided an additional remedy as opposed to an exclusive one. Hence the question for the court was whether s. 33 – which would not provide an effective remedy – should be seen as excluding the common law cause of action – which would provide an effective remedy. Expressed in that way the question more or less answered itself. Lord Sumption applied the axiom that the courts cannot imply an exclusion of unrestricted rights of action at common law where that would be inconsistent with an overriding rule of EU that an unrestricted right must be available.
98. The contrast between the *FII* case and the present case is therefore clear and complete. At [88] of *BT* the Court held that it had always been open to BT to bring claims (including direct claims under Art. 11C(1)) under the (moulded) Old Scheme:
- “[88] BT could, as I would hold, and had it grasped the point at the time, also have made direct claims under art 11C(1) of the Directive for bad debt relief in all cases (whether or not the insolvency condition was satisfied) on the basis that the insolvency condition was unlawful and incompatible with its EU law rights under the Directive. But the only procedural way in which it claims it was then entitled to do so was by way of an appropriate adaptation and moulding of ss 12, 22 and the regulations so as to accommodate the rights it was exercising and which ought to have provided for them in the first place.”
99. If BT had taken the Old Scheme procedural route the domestic court would have had to read down the various (unlawful) preconditions to claiming a refund. The problem for BT is not that there was not a fully effective right to recovery; it is that BT did not make the claims before the shutters fell on the Old Scheme in 1997 (many years after the debts became bad). The Court of Appeal has held BT's failure to realise that it was able to make such claims did not mean that it lacked a fully effective domestic route to exercising its directly effective rights.
100. So this is not a case where the statutory exclusion of a common law right would deprive the taxpayer of an unrestricted right which must be made available under EU law. BT throughout had an available and effective remedy (under the adapted, moulded, Old Scheme) to give effect to its directly effective rights under the Sixth Directive. And the Court of Appeal held the right did not cease to be effective merely because BT did not appreciate that it existed.
101. The Court of Appeal in *BT* also held that the repeal of the Old Scheme by s. 39(5) FA 1997 did not render BT's exercise of its EU law rights excessively difficult or virtually impossible and did not require some other remedy to be identified. The Court

of Appeal in *GMAC* reached a similar conclusion at [134] where Floyd LJ said, “I do not therefore consider that it is necessary for the court to find some other route to give effect to GMAC’s EU law rights, so as to avoid collision with section 39(5).”

102. For these reasons BT’s arguments based on the passages from the *FII Group Litigation* case are to my mind unpersuasive. The question being considered in that case (identified by Lord Sumption at [204]) was quite different from that in the present case.
103. BT also submitted that Parliament knows when passing taxing statutes how to oust common law rights. It just says so: see, e.g., s. 80 VATA 1994. That is an important, but not decisive, point. *Monro* concerned a tax statute which was silent, but the Court held that it impliedly ousted common law rights. The principles summarised by Hickinbottom LJ apply to tax statutes as they do to other statutory regimes (see also *the Investment Trust Companies* case, where the general principles were cited). The absence of an express ouster is a telling and material factor, but it must be considered with the other circumstances. To my mind the factors I have enumerated above establish that, looked at as a whole, common law remedies would be incompatible (or positively inconsistent) with the statutory scheme and therefore cannot have been intended to co-exist with it. While comparisons with other cases concerning different statutory contexts are helpful, the issue is one of statutory construction and requires a close analysis of the statutory regime under consideration (as above).
104. BT also submitted that it was entitled to set off the amounts it says it overpaid (or failed to reclaim) against future tax liabilities and that this was separate from its restitutionary claims. It says it has sought a declaration of an entitlement to set these amounts off. Given my conclusions about the exhaustive and exclusive reach of the Old Scheme I do not think that there is anything in this argument. The Old Scheme was (for the reasons already given) the exhaustive and exclusive domestic route for the refund of taxes arising by reason of bad debts in the period ended 31 March 1989. It required claims to be made to HMRC in the form and subject to the conditions set out in detail above. It also created time limits for appeals against the denial of relief. The statutory scheme was repealed by Parliament. That repeal operated (as the Court of Appeal has held) as a time bar. It would to my mind make a nonsense of the legislation (and the provisions concerning its repeal) if a taxpayer could set-off the same amounts against its future tax liabilities more than twenty years after the Old Scheme (under which such claims to refund had to be made) was finally repealed.
105. For these reasons I conclude that the Old Scheme created an exhaustive scheme which excluded the common law restitutionary claims (or rights of set-off) now sought to be advanced by BT. HMRC is therefore entitled to summary judgment or to strike out the claim for the period 1 October 1978 to 31 March 1989 on this ground.

(b) Was HMRC unjustly enriched?

106. BT claims that it did not appreciate at the material times that the Old Scheme was incompatible with EU law. BT says that it had (but did not realise it had) a right to claim a refund; that it could have set off unrefunded amounts against later output tax; and that by failing to do that it (mistakenly) overpaid HMRC.

107. HMRC submits that BT did not overpay any tax and that therefore there was no unjust enrichment. BT had the right to claim bad debt relief (under the Old Scheme as moulded to comply with EU law) and had it done so would have been entitled to relief. In reality its complaint is that it did not exercise a right available to it in time to seek a deduction or set-off. But BT did not overpay any output tax: all the tax that was paid was due when paid and the subsequent failure of the customer to pay its debts did not retroactively change that liability. HMRC submits that there was therefore no transfer of value to it when BT did not claim a refund under the Old Scheme.
108. HMRC relies on the reasoning of the Court of Appeal in *BT* and *GMAC* concerning s. 80 VATA 1994. HMRC does not argue that s. 80 applies. Rather it says that had there been an overpayment it would have fallen within the terms of that section (and the common law claim would have been expressly ousted by s. 80(7)).
109. HMRC says more generally that the reasons given by the Court of Appeal in *BT* and *GMAC* for saying that BT's claims fell outside s. 80 apply with equal force to the common law claims.
110. HMRC says it did not "deny" any "adjustments" for bad debts as BT claims. BT did not make a claim under the Old Scheme until over 10 years after its repeal and HMRC then denied them because no such claims could then be made. BT did not seek to make any relevant "adjustments" while the Old Scheme was alive; and the Court of Appeal has held that the repeal of the Old Scheme was lawful and effective in extinguishing BT's rights.
111. HMRC accepts that it benefited economically from BT's failure to pursue an Old Scheme claim but says that this is insufficient to establish the necessary enrichment. It says that there was no transfer of value to HMRC of amounts to which HMRC was not entitled; there was simply a failure to seek a refund in time. Where a party does not exercise a right available to it within the relevant time (here, before the repeal of the Old Scheme) there is no enrichment of the defendant and there is nothing unjust about its receipt or retention of the tax paid to it.
112. BT submits that HMRC's argument takes too narrow a view of the law of restitution for mistake of law. BT says that the law takes an expansive view of unjust enrichment, and asks the broad question whether a mistake has resulted in a transfer of value to the defendant.
113. BT illustrates this by reference to the *Deutsche Morgan Grenfell* case. It says that the court should ask itself the broad, counterfactual, question: but for the mistake would there have been a transfer of value by the claimant to the defendant? In *Deutsche Morgan Grenfell* the taxpayer failed to make (because it did not realise it could make) a group income election ("GIE"). The consequence was that the taxpayer paid more tax than it otherwise would have had to pay, even though the tax it did pay was all due. BT says that the case shows that the claim does not turn on a nice analysis of the nature of the mistake but on a causation test: did the mistake cause the taxpayer to pay more than it would have done? (see Lord Walker at [143]).
114. BT says that it is telling that Lord Scott, who dissented, would have denied the claim on the basis that the taxpayer was under a legal obligation to pay. The majority

rejected that analysis. BT submits that this shows that the touchstone is not whether the sums were due but whether on a broad causation test the taxpayer had paid more than it would (and should) have done.

115. BT relies on Chapter 9 of Goff and Jones on the Law of Unjust Enrichment (headed “Mistake”) as support for the following propositions. The law’s starting point is now that any causative mistake of fact or law, spontaneous or induced, can qualify [9-01]. The authorities show that if a claimant brings a personal claim for the benefit not conferred under a contract nor pursuant to a “voluntary transaction” the authorities overwhelmingly indicate that the liberal test of causative mistake governs the case [9-02]. The types of benefits for which claims may be made have developed beyond payments of money. If a defendant has been enriched as a result of an operative mistake, a restitutionary remedy should be available to recover the value of the benefit, regardless of whether this was the face value of money, the use value of money, the capital value or use value of some other type of asset, the receipt of services, or the discharge of an obligation owed to a third party [9-03]. A mistake involves an incorrect belief or assumption about a past or present state of affairs [9-06].
116. BT submits that its essential mistake was that it did not know that there had been a failure to implement directly applicable European legislation. It thought that the UK legislation had implemented EU law and the insolvency condition meant that, in respect of the bad debts in question, it could not claim relief. BT says that its responsible employees did not understand that it was entitled to deduct amounts in respect of bad debts where the insolvency condition was not satisfied, and it therefore ended up paying more to HMRC than it otherwise would have done.
117. BT says that the benefit conferred on HMRC may be seen either as overpayment of output taxes (in the sense explained in cases such as *Deutsche*) or as arising from its own mistaken forbearance to make claims by way of set-off. For the reasons given above, BT says that its claim is not foreclosed by saying that the tax paid by BT was due or owing.
118. BT also relies on the decision of the Court of Appeal in *Iveco Ltd v Revenue and Customs Commissioners* [2017] EWCA Civ 1982. That case concerned another aspect of Art. 11C(1), namely, where there had been price reductions. The domestic legislation concerning price reductions (introduced in 1989) was different from that concerning bad debt relief. The Court of Appeal held that the taxpayer, which had given price reductions, had a directly enforceable EU law right to make a negative entry in their tax accounts. To the extent it had not done so, it had overpaid HMRC relevant amounts. The Court of Appeal held that such claims came within s. 80 VATA 1994 (or its predecessor). BT argue that *Iveco* shows that where there has been a failure to comply with the provisions of Art. 11C(1) any reduction in the taxable amount is automatic. It appears to me that *Iveco* is of some assistance to BT’s argument in respect of the nine-month period before the implementation of Art 11C(1) concerning bad debts. (The case may also have a sting in its tail for BT as the Court of Appeal held that the relevant claims were governed by s. 80, which includes an express ouster of restitutionary claims. But, as I have said, HMRC did not seek to rely on s. 80 on the present application.)

119. I have reached the conclusion on this second ground that BT has a realistically arguable case, essentially for the reasons given by BT and summarised above. Having reached this view, it would not be appropriate for me to set out a detailed assessment of the merits on this issue. But, briefly, I consider that BT has an arguable case that the restitutionary claim is governed by the broad causal test illustrated by *Deutsche*. I do not think that HMRC's point that the tax BT paid was due provides a clear answer to the claim. The legal issues appear to me to be complex and involved and would require more prolonged and detailed argument than the summary process allows. This is also a developing area of law (as exemplified by the passages cited above from Goff and Jones). Unlike the first ground of HMRC's application (which is an issue of statutory construction) I do not see this as a short point of law properly amenable to summary determination.

The claim for the period 1 January 1978 to 30 September 1978

120. This part of the claim concerns the nine months before the UK implemented Art. 11C(1). As already mentioned, the UK was required by the Sixth Directive to implement it by 1 January 1978. BT says that it had (but did not realise it had) a directly effective right to seek a refund (including by way of set off) from that date onwards, and that since there was no statutory mechanism in place for the period before 1 October 1978 it has a restitutionary claim for monies paid under a mistake of fact.
121. The Court of Appeal in *BT* left open the question whether BT could have brought a claim under the Old Scheme in respect of supplies before 1 October 1978 (see [118]). HMRC did not seek to argue this point on the application before me. HMRC relied on only one ground in relation to this part of the claim, namely, that the claim is barred by the Limitation Act 1980. It is common ground that, generally, claims in restitution are barred after six years.
122. BT says however that its claim is based on a mistake and that s. 32(1)(c) therefore applies. That section reads (materially) as follows:
- “(1) Subject to subsection (3) below, where in the case of any action for which a period of limitation is prescribed by this Act, either -
- (a) the action is based upon the fraud of the defendant; or
- (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
- (c) the action is for relief from the consequences of a mistake;
- the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.”
123. Section 32(1)(c) was recently considered in the context of a restitutionary claim for overpaid tax in *Test Claimants in the Franked Investment Income Group Litigation v Commissions for HMRC* [2020] UKSC (“*FII 2020*”) in which the majority judgment was given by Lords Reed and Hodge. The Supreme Court decided to depart from the

decision of the House of Lords in *Deutsche Morgan Grenfell* that the taxpayer's mistake of law was only discovered or discoverable when authoritatively established by a final court.

124. Lords Reed and Hodge concluded a mistake of law is discoverable when the claimant knows or could with reasonable diligence know that he had made such a mistake with sufficient confidence to justify embarking on the preliminaries to the issue of a claim. The standard of reasonable diligence is how a person carrying on a business of the relevant kind would act, on the assumption that he desired to know whether or not he had made a mistake, if he had adequate but not unlimited staff and resources and was motivated by a reasonable but not excessive sense of urgency, with the burden of proof being on the claimant (see [209]).
125. At [210]-[212] Lords Reed and Hodge said this:

“210. In practice, the application of that approach will depend on the circumstances of the case. For example, in cases where the claimant has made a payment on the basis of a mistaken understanding of the law which has resulted from ignorance, the mistake will normally have been discoverable immediately, by seeking legal advice. Section 32(1) only has effect where a mistake could not have been discovered at the time of the payment with the exercise of reasonable diligence. On the other hand, where the payment was made in reliance on a precedent that was subsequently overruled, or an understanding of the law that was later altered by a judicial decision, the question will be whether the claim was brought within the prescribed period beginning on the date when it was discoverable by the exercise of reasonable diligence that the basis of the payment was legally questionable, so as to give rise to a worthwhile claim to restitution. Depending on the circumstances, it may be difficult to identify a specific date, but doubtful cases can be resolved by bearing in mind that the burden of proof lies on the claimant to prove that his claim was brought within the prescribed limitation period.

211. Clearly, where a payment was made in accordance with the law as it was then understood to be, the point in time at which the claimant could, with reasonable diligence, have discovered that the basis of the payment was legally questionable, so as to give rise to a worthwhile claim to restitution, will have to be established by evidence. The focus of that evidence is likely to be upon developments in legal understanding within the relevant category of claimants and their advisers, as explained in para 178 above. Thus, in the circumstances of the present case, Lord Walker referred in *FII (SC) I* [2012] 2 AC 33 (para 48 above) to there being a reasonable prospect that the limitation period could be deferred until the time when “a well advised multi-national group based in the UK would have had good grounds for supposing that it had a valid claim to recover ACT levied contrary to EU law”. This point is considered in greater detail in para 255 below. Evidence in relation to matters of this kind may well include expert evidence concerning the state of understanding of the law within the relevant categories of professional advisers during the relevant period.

212. It is true that this approach involves a more nuanced inquiry than a mechanical test based on the date on which an authoritative appellate judgment determined the point in issue. But it would be unduly pessimistic to conclude at

this stage that it will prove to be unworkable in practice, or too uncertain in its operation to be acceptable.”

126. HMRC has two principal arguments. It submits first that the claim is not one for “relief from the consequences of a mistake”. It says that in reality this is a case where a claimant was ignorant that it had a claim and ignorance of that kind does not engage s. 32(1) at all. HMRC says that the section applies only where the relevant enrichment has been made as a consequence of the mistake, not where the limitation period has been missed as a consequence of a mistake. There was simply a failure to bring an in-time claim for an enrichment that, on BT’s case, occurred when the bad debt arose, and no UK legislative provision was made for a refund.
127. HMRC says, second, that in any event any mistake was discoverable well before 30 June 2004 (being 6 years before the issue of these proceedings). HMRC says that BT was a large taxpayer and, making the necessary assumptions about resourcing and reasonable urgency, BT could with reasonable diligence have discovered that it had made a mistake with sufficient confidence to justify embarking on the preliminaries to the issue of a claim against HMRC. HMRC says that the following would have been obvious to a taxpayer like BT before 2004:
- i) The UK had not implemented Article 11C(1) prior to October 1978.
 - ii) The non-implementation of a Directive is to be challenged through national law procedures, which can include limitation periods *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] ECR 1989 (paragraphs 4-5).
 - iii) In Case 8/81 *Becker v Finanzamt Munster-Innenstadt* [1982] ECR 53 the legal effect of a directive and its non-implementation were set out (paragraphs 12-25).
 - iv) In Case C-330/95 *Goldsmiths (Jewellers) Ltd v Commissioners of Customs and Excise* [1997] ECR I-3801 the CJEU considered whether the Old Scheme was compatible with Article 11C(1) of the Directive and found that the exclusion of barter transactions was not. Goldsmiths adjusted their own returns to take account of bad debt, relying on the Directive.
 - v) In Case 62/00 *Marks and Spencer plc v Customs and Excise Commissioners* (Case [2002] STC 1036, the CJEU noted the rights conferred by Article 11A(1)(a) were directly effective (paragraphs 29 and 40) and that this had been established in 1995 in Case C- 62/93 *BP Supergas*.
 - vi) *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 established that a mistake of law could found a claim in unjust enrichment.
128. HMRC says that, against this legal backdrop, it is plain and obvious that a reasonably resourced and diligent taxpayer in BT’s position would have discovered (in the sense described in the cases) that there was at least the basis for taking the preliminary steps of a claim against HMRC.

129. BT contends that it has a realistic prospect of establishing a case under s. 32(1). As to the threshold point, it says that its claim falls within the scope of s. 32(1) because it erroneously failed to appreciate that the UK had not properly enacted directly effective legislation and that it could have deducted or set off amounts arising from bad debts against its output tax. It says that its claim is therefore for relief from the consequences of a mistake.
130. As to the discoverability of the mistake, BT says that it (reasonably) did not realise that the UK had failed to carry out its obligations under EU law. It thought (and was reasonably entitled to think) that the domestic statute faithfully implemented the law. It also points out first that Art. 11C(1) allowed Member States to derogate in respect of cases of non-payment by persons to whom supplies had been made and says that it did not know that the UK had not done this. BT also says that it could reasonably suppose (at least until the decision of the Court of Appeal in *BT*) that if it had a restitutionary claim at all, it was required to be brought under s. 80 VATA 1984. BT also says that the question of discoverability has to be approached without hindsight. It says that taxpayers' understanding of European law and the availability of restitutionary claims has developed and that one cannot necessarily cast today's standards into the past.
131. BT submits that what HMRC has presented is a selective list of some cases on a variety of subjects and presumed that everyone knows the law. It says that HMRC is asking the court to assume that BT would or should have been able to work out the connections between cases on varying subjects over several years and relate them back to events in the first 9 months of 1978. BT says that the issue is one of fact and that it needs to be determined on the whole of the evidence, including expert evidence.
132. As to the threshold point, on the basis of cases such as *Deutsche Morgan Grenfell I* I consider it is realistically arguable that any enrichment of HMRC was the consequence of a mistake and that the claim is for relief against the consequences of that mistake. As explained earlier, it is arguable that the question whether there is enrichment falls to be assessed under a broad causal test. *Deutsche* suggests that you ask whether the taxpayer has paid more to the revenue because of a mistake. You look at the overall position of the parties. It is at least arguable that HMRC's argument impermissibly dissects the dealings between the parties into the payments of tax due on the one hand and the mistaken failure of BT to bring a claim for a repayment on the other. BT says that if it had not been acting under a mistaken understanding of its legal rights it would have knocked off amounts for bad debts from its output tax account. I think there is (at least) an arguable analogy with cases like *Deutsche*, which show that s. 32(1) is capable of applying to claims of this kind. I consider that BT has a real prospect of succeeding on this first issue.
133. The second issue is whether BT has a realistic prospect of establishing on the facts that it could not with the exercise of reasonable diligence have discovered the legal mistake to justify embarking on the preliminaries of a claim against HMRC. That question, which is one of fact, must be answered without the influence of hindsight, but informed by the perspective of an adequately resourced taxpayer in the position of BT at the relevant times. BT says that, avoiding hindsight, a reasonably resourced etc. taxpayer in its position could reasonably have supposed that the UK legislation (including the insolvency condition) complied with European law. The fact that other

parts of the UK legislation (such as the exclusion of barter deals) were held not to comply with European law did not indicate to a reasonably resourced etc. taxpayer that other parts of it were bad too. It was only much later (indeed, in the *BT* case itself) that the insolvency condition was struck down. BT says that there was no authority, or even a legal dispute, suggesting that the insolvency condition (a core component of the Old Scheme) was or might be unlawful.

134. I accept BT's submissions. I think that these are factual issues which should be resolved with the benefit of fuller evidence than is available on a summary application. This may include expert evidence: in *FII 2020* Lords Reed and Hodge said cases of this kind may involve expert evidence concerning the state of understanding of the law within the relevant categories of professional advisers during the relevant period. BT may wish to call evidence of that kind in the present case. I do not think that the issue, which is in the end one of fact, can properly be decided on a summary application.
135. BT also says that an adequately resourced etc. taxpayer in its position would reasonably have thought that any claim it might have had would fall under s. 80. I find that argument problematic. It seems to me that if there was such a mistake it would have been one about the appropriate procedure for making a claim rather than one giving rise to the claim. Section 32(1) is concerned with actions for relief against the consequences of a mistake: that is mistakes giving rise to the claim for relief. It is not to my mind concerned with errors about process or procedure. But I do not have to decide this point conclusively.
136. BT submits that if the claims for the nine-month period are allowed to proceed, that is a good reason to allow the main claim (for the period 1 October 1978 to 31 March 1989) to go to trial too. I do not agree. The issues and arguments about the two periods are distinct and separate. I have concluded that BT's claim for the main period lacks any conviction as a matter of law. As the courts have made clear, where the court concludes that a claim is bad in law it should bring it to an end.

Outcome

137. HMRC's application in respect of BT's claims for the period 1 October 1978 to 31 March 1989 succeeds. Those claims are dismissed. HMRC's application fails in respect of the period 1 January 1978 to 30 September 1978.