



**TC07762**

**Appeal number: TC/2010/04071**

*VAT – whether this appeal should be struck out on the basis that it has no reasonable prospect of success- yes – appeal struck-out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BRITISH TELECOMMUNICATIONS PLC**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE HARRIET MORGAN**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London on 17 July 2017  
and 6 and 7 February 2019**

**Mr Roderick Cordara QC and Ms Lyndsey Frawley, as Counsel for the  
Appellant**

**Mr Kieron Beale QC and Ms Eleni Mitrophanous, as instructed by the General  
Counsel and Solicitor to HM Revenue and Customs, as Counsel for the  
Respondents (“HMRC”)**

## DECISION

1. The hearing was to consider HMRC's application made on 16 June 2016 for this appeal to be struck out on the basis that it has no reasonable prospect of success pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**the Rules**").

### **Part A – Background and the Issues**

#### **Overview**

2. On 30 March 2009, British Telecommunications plc ("**BT**") wrote to HMRC making a claim for the repayment to it of VAT it had accounted for in respect of its supplies made to customers in the period from 1 January 1978 to 31 March 1989 where the customer had failed to pay BT either in part or at all for the supplies ("**the BT claims**"). HMRC refused the BT claims and BT appealed against that decision to this tribunal on 29 April 2010.

3. By a direction released on 26 January 2012, three preliminary issues (as set out in [7] below) ("**the BT issues**") were transferred to the Upper Tribunal (Tax and Chancery Chamber) ("**the UT**") for determination under rule 28 of the Rules. Following this:

(1) The BT issues were heard by the UT in February 2012, together with an appeal by HMRC against a decision of the tribunal allowing an appeal by GMAC UK Plc ("**GMAC**") against HMRC's refusal of GMAC's claim for VAT "bad debt relief" in relation to supplies of cars made on hire-purchase terms between 1978 and 1997. Following this hearing, the UT essentially decided the first two BT issues in favour of BT and the third in favour of HMRC (*HMRC v GMAC UK Plc, BT Plc v HMRC* [2012] UKUT 279 ("**GMAC/BT UT**").

(2) HMRC appealed to the Court of Appeal against the UT's decision in *GMAC/BT UT* and BT made a cross-appeal. The Court of Appeal released its decision on 11 April 2014 (*HMRC v British Telecommunications Plc* [2014] EWCA Civ 433 ("**BT CoA**")) in terms which, as HMRC argued, have effectively decided the appeal in favour of HMRC.

(3) BT's application for permission to appeal against the Court of Appeal's decision in *BT CoA* was rejected by the Supreme Court on 11 December 2014.

Details of the decisions in *GMAC/BT UT* and *BT CoA* are set out in Part B.

4. In the Court of Appeal decision in *BT CoA*, Rimmer LJ, who gave the leading judgement with which the other members of the panel in the Court of Appeal agreed, gave an overview of the issues before that court, at [2], as follows:

(1) At the relevant time the domestic legislation relating to claims for VAT "bad debt relief" in respect of supplies made during the period to 31 March 1989 was contained in s 22 of the Value Added Tax Act 1983 ("**s 22**" and "**VATA 1983**"), which (in materially identical terms) replaced s 12 of the Finance Act 1978 (together "**the Old Scheme**"). This required particular conditions to be satisfied before a claim could be made, including a condition that the customer was insolvent ("**the Insolvency Condition**").

(2) The BT claims were for relief in respect of cases where the Insolvency Condition was not satisfied on the basis that BT had a directly enforceable European Union law right to relief in such cases (an "**EU right**"), with which

the s 22 conditions, in particular the Insolvency Condition, were said to be incompatible. The EU right was said to arise under article 11C(1) of the Sixth VAT Directive 77/388/EC (“**article 11C(1)**” and “**the Directive**”) which contained the provisions which the UK rules in the Old Scheme were intended to implement.

(3) Section 39(5) of the Finance Act 1997 (“**s 39(5)**”), which came into force on 19 March 1997, had finally precluded the making of “bad debt relief” claims under s 22 in respect of supplies made before 1 April 1989, but BT seemed to assert that s 39(5) should be disapplied as denying BT its EU right, leaving it free to make the BT claims in 2009, 12 years after that provision came into force.

5. The Court of Appeal also dealt with BT’s argument that its EU right was to be given effect (and was made) under s 80 of the Value added Tax Act 1994 (“**s 80**” and “**VATA 1994**”) and not under the Old Scheme and that the BT claims were made within the extended time limits for the making of such claims under s 121 of the Finance Act 2008 (“**s 121**” and “**FA 2008**”). BT emphasised at this hearing that this was its primary argument and that, all along, it had regarded s 80 as the correct route for it to obtain relief for its EU right and considered that the BT claims were made under that provision. It said that the argument that s 39(5) should be disapplied was made in response to the approach taken by HMRC in refusing the BT claims.

#### **Transfer of BT issues**

6. Rule 28 provides as follows:

##### **“Transfer of Complex cases to the Upper Tribunal**

28.—(1) If a case has been allocated as a Complex case the Tribunal may, with the consent of the parties, refer a case or a preliminary issue to the President of the Tax Chamber of the First-tier Tribunal with a request that the case or issue be considered for transfer to the Upper Tribunal.

(2) If a case or issue has been referred by the Tribunal under paragraph (1), the President of the Tax Chamber may, with the concurrence of the President of the Tax and Chancery Chamber of the Upper Tribunal, direct that the case or issue be transferred to and determined by the Upper Tribunal.”

7. The formulation of the BT issues, as agreed between the parties, and which President of this tribunal, with the concurrence of the President of the UT, directed were to be transferred to the UT and determined by the UT, was as follows:

“a. Issue 1: On the assumption that BT could otherwise have relied on an EU law right to bad debt relief, in respect of bad debts allegedly arising in the prescribed accounting periods running from 1 January 1978 to 31 March 1989, by virtue of Article 11C(1) of the Sixth VAT Directive, was the exercise of that right in 2009 barred in accordance with the general principles of EU law and/or subject to section 39(5) of the Finance Act 1997?

b. Issue 2: If the answer to Question 1 is in the negative in relation to the general principles of EU law, but affirmative in relation to section 39(5), does section 39(5) fall to be disapplied, or construed, under EU law, in such a way as not to affect the exercise of BT’s right under EU law?

c. Issue 3: Do section 80 of the Value Added Tax Act 1994 and section 121 of the Finance Act 2008 apply to BT’s claim irrespective of the answer to Question 1.”

8. The direction for the transfer of the BT issues was made pursuant to a joint application made by the parties:

(1) Initially, in an application of 13 April 2011, the parties applied for the whole case to be transferred to the UT.

(2) On 26 April 2011, the President of the tribunal informed the parties that he and the President of the UT were willing to agree to the transfer provided that the UT was not required to determine issues of fact or quantum.

(3) It appears from the correspondence that the parties sought to address the concern on the fact finding by agreeing a statement of facts which they proposed to provide to the UT. However, in a letter of 9 September 2011 from BT to the UT, BT noted that the parties had confirmed in June 2011 that it was not possible to confirm definitively that all conceivable questions of fact would be agreed in advance between the parties and that some issues of fact may yet require some determination by the UT (or perhaps remission back to the tribunal).

(4) When the parties failed to reach agreement on a statement of facts, it was decided to seek the transfer of preliminary issues to the UT only. On 30 September 2011 the UT confirmed that the Presidents of the tribunal and the UT were willing to agree to the transfer of a preliminary issue under rule 28 to be heard immediately following the appeal of GMAC provided the parties produced an agreed preliminary issue which was acceptable to the President of the UT. It was also stated that the transfer would not be made if the UT were to be expected to find the facts.

(5) The correspondence between the parties shows that a number of changes were made to the initial drafts of the BT issues, in particular:

(a) in the initial draft prepared by BT, what became BT issue 3 was worded differently to ask whether s 121 was applicable which would make BT's claim "in time"; and

(b) in earlier versions, in what became BT issue 2, there was additional wording at the end which said "in circumstances where the relevant national provisions implementing [article 11C(1)] in relation to supplies made before July 1990 were repealed after due notice had been given to taxable persons and their legitimate expectations were respected?".

As explained in Parts D and E, BT argued that the fact that these references were not included in the final version of the BT issues means that the question of whether the BT claims were made in time under s 121 and issues relating to "due notice" and "legitimate expectations" were not included in the scope of the BT issues transferred to the UT for determination.

(6) On these points BT's counsel, Ms Lyndsey Frawley, set out in an email to HMRC of 23 January 2012 that the main concern was that BT did not accept that BT had any "legitimate expectation" as regards "bad debt relief" under the Old Scheme and so could not accept wording that, in its view, suggested there was such an expectation and:

"It is, of course, a matter for [HMRC] how they then put their submission and whether or not they wish to raise "legitimate expectation". It is, however, our view that the inclusion of such a term in the question itself, as if it were an agreed fact, is not appropriate.

There are a number of other formulations that we can agree and we would, again, invite [HMRC] to provide a timeline regarding the notices etc. that they say are pertinent. Perhaps the timeline can be presented and agreed in due course?....."

From the earlier correspondence, it is clear that the reference to “a timeline regarding the notices etc.” was to the timeline of notices and legislation relating to the phasing out of the Old Scheme and the introduction of s 39(5) which finally abolished the Old Scheme.

(7) Ms Frawley then suggested in the email that the question which became BT issue 2 could simply be cut off with the disputed wording deleted (as was the solution adopted) and “the parties can elaborate on the scope of the question and the impact of the legislation at the hearing” or that it could be rewritten either to state (a) “in circumstances where the relevant national provisions purportedly enacted for the purposes of implementing [article 11C(1) in relation to supplies made before July 1990 were repealed.....” or (b) “if as the Commissioners contend due notice of the proposed repeal had been given to taxable persons.....”

(8) It is also apparent from the correspondence that HMRC were not happy for issue 1 to be dealt with without a proper examination of the facts whereas BT took the view this could be dealt with as a pure question of law.

(9) The parties finally agreed the formulation of the BT issues on 23 January 2012.

### **Decision of the UT**

9. In summary, the UT decided in *GMAC/BT UT* that:

(1) As regards BT issue 1, BT had an EU right under article 11C(1) in respect of bad debts arising in the relevant period which it could exercise under the Old Scheme and, whilst the exercise of that right in 2009 was not barred in accordance with general principles of EU law, subject to the answer to BT issue 2, it was no longer available as a result of s 39(5).

(2) As regards BT issue 2, however, s 39(5) fell to be disapplied, or construed, under EU law, in such a way as not to affect the exercise of BT’s EU right because inadequate notice of the termination of the Old Scheme was given. On that basis, the BT claims were not time-barred as a result of s 39(5).

(3) As regards issue 3, s 80 and s 121 of the FA 2008 had no relevance to the BT claims on the footing that the BT claims arose under the Old Scheme. If the BT claims arose, instead, under s 80, they were not made before the applicable time limit in s 121 (1 April 2009) and were time-barred. Before making these conclusions, the UT had stated that on the correct interpretation of its terms, s 80 does not apply to claims for relief for bad debts such as the BT claims (see [181] of the decision).

### **Application for factual findings to be made by the tribunal**

10. Whilst the parties were preparing for the hearing before the Court of Appeal:

(1) In a letter of 19 March 2013 BT raised with HMRC that facts were not to be considered in the transferred proceedings and that it was concerned that in their skeleton argument HMRC were presenting facts relating to the nature of the BT claims which did not take account of the full context.

(2) On 25 April 2013 HMRC responded that the comments in question were made in response to BT’s assertion in its skeleton argument that it had never been in dispute that it had made its claims under s 80. HMRC said that in fact HMRC had never accepted that BT had made the BT claims under s 80.

(3) On 17 July 2013 BT applied to the tribunal for it to arrange a hearing to determine facts relevant to the proceedings in advance of the hearing in the Court of Appeal on the basis that HMRC “have raised issues of fact that they

consider may defeat the appellant's claim. Such facts are not accepted by the appellant and it is the appellant's case that such purported facts cannot be supported or reconciled by reference to the contemporaneous correspondence between the parties during the period March 2009 onwards". BT said that given the UT was not invited to determine matters of fact, it was for the tribunal to determine them.

(4) On 23 July 2013 HMRC objected to the application on the basis that BT was trying to circumvent the UT's decision that it had made no claim under s 80 and that the only proper challenge was by way of appeal against the UT's finding.

(5) The tribunal refused the application on 29 October 2013 stating that it took into account that:

".....the proceedings before the Court of Appeal are already at the hearing stage and that consequential delay for hearing any remaining issues before this tribunal in waiting for their decision is unlikely to be significant. I also take into account the possibility that the Court of Appeal's decision may render the issue irrelevant and even if it does not, that the Court of Appeal's decision is likely to be of considerable assistance to this tribunal in forming a view as to what, if any, issues remain to be determined and, therefore, what directions are appropriate. If there are factual matters that need to be resolved for the purposes of the appeals before the higher courts, it is possible for those courts to identify these and refer them back for determination."

### **Decision of the Court of Appeal**

11. In summary, in *BT CoA*:

(1) The Court of Appeal essentially upheld the UT's decision on BT issue 1. They agreed with the UT that BT's EU right was to be given effect under the Old Scheme and whilst there was no bar to its exercise in 2009 under EU law, on the face of it, the BT claims were barred under s 39(5).

(2) The Court of Appeal disagreed with the UT's conclusion on BT issue 2. They decided that s 39(5) did *not* fall to be disapplied, or construed, under EU law, in such a way as not to affect the exercise of BT's right under EU law. As a matter of EU law, the UK was entitled to change the conditions under which "bad debt relief" was available pursuant to the powers of derogation conferred by article 11C(1), and specifically to impose a time limit within which claims in respect of such supplies had to be brought, subject to the general principles of legal certainty and the protection of "legitimate expectations". The Court of Appeal found that the abolition of the Old Scheme was not made in breach of those general principles. On that basis, the BT claims were barred by s 39(5).

(3) As regards BT issue 3, the Court of Appeal upheld the UT's view, expressed at [181] of its decision, that on the correct interpretation, s 80 did not apply to claims for relief for bad debts such as the BT claims and, it seems, endorsed the view that BT had not in any event made a claim for the purposes of s 80 within the applicable time limit.

### **Issue**

12. On the face of it, the Court of Appeal's determination in *BT CoA* that the BT claims were blocked by s 39(5), in effect, has determined these appeal proceedings in favour of HMRC. BT's stance, however, is that the Court of Appeal's decision has not necessarily conclusively determined matters against it. In its view, there are a number of factual matters and legal issues which the tribunal must consider at a full

hearing before the tribunal can apply the determinations made by the Court of Appeal (as set out in full in Part D). In particular, BT argued that it is entitled to raise in such a hearing its argument that s 80 provides the route for it to enforce its EU right (in which case, it considers the BT claims were made within the longer time limit for making such claims under s 121). BT considers this argument is supported by new material which was not available to it in the proceedings before the UT and Court of Appeal, namely, the decisions of the Court of Appeal in *Iveco Ltd v Revenue And Customs* [2017] EWCA Civ 1982 (“*Iveco CoA*”) and of the Supreme Court in *HMRC v The Investment Trust Companies* [2017] UKSC 29 (“*ITC*”), which were made some time after the release of the decision in *BT CoA*. Details of these decisions are set out in Parts C and E. BT submitted that it has a reasonable prospect that its appeal will succeed in the light of its arguments on these remaining issues notwithstanding the determinations made by the Court of Appeal in *BT CoA*.

13. On the other hand, HMRC consider that BT’s appeal has no reasonable prospect of success if the appeal was to be heard in full in the tribunal (and so should be struck-out) for the following reasons (as set out in full in Part D):

(1) The Court of Appeal’s clear determination that the BT claims were out of time is binding on BT in these proceedings. Under the doctrine of cause of action estoppel which forms part of the res judicata principles, BT could not raise the issues it seeks to argue in a full hearing in the tribunal. In outline, that principle would prevent BT re-raising issues which have already been decided by the Court of Appeal or raising issues which could reasonably have been raised before the UT and the Court of Appeal. All arguments which BT seeks to rely on would be blocked by that rule or at any rate by the issue estoppel or abuse of process rules, which also form part of the res judicata principles.

(2) In any event, even if BT were permitted to raise all issues of fact and law it wishes to raise in any full hearing, the tribunal would have to apply the determinations set out in *BT CoA* and in other relevant case law (such as the decision of the Court of Appeal in *HM Revenue & Customs v GMAC (UK) Plc* [2016] EWCA Civ 1015 (“*GMAC CoA*”)) with the inevitable result that it would have to dismiss BT’s appeal. Details of the decision in *GMAC CoA* are set out in Part C.

### **Correct approach to whether the appeal should be struck out**

14. BT submitted that a strike out is to be permitted only where the making or pursuit of an appeal would, in effect, amount to an abuse of process. In support of this it made the following points:

(1) It was confirmed in *Fairford Group Ltd v HMRC* [2014] UKUT 329, at [41], that an application for a strike out under rule 8(3)(c) of the Rules must be approached in the same way as under the Civil Procedure Rules (notably rules 3.4 and Part 24).

(2) In *Swain v Hillman* [2001] AER 1, Lord Woolf said, at pages 94 and 95, that the strike out rule in the CPR:

“is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial....the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily”.

(3) It was made very plain in *Three Rivers District Council v. Governor and Company of The Bank of England* [2001] UKHL 16 that if prolonged and serious argument is needed then a strike out is not appropriate.

(4) In *Hughes v Richards* [2004] EWCA Civ 266, Gibson LJ said that in a case where “the pleadings show significant disputes of fact between the parties going to the existence and scope of the alleged duty of care.....the court must be certain that the claim is bound to fail” and he cited comments of Lord Browne Wilkinson in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at page 557 that:

“In an area of the law which was uncertain and developing.....it is not normally appropriate to strike out.....it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out...”

15. However, I agree with HMRC’s point that the comments taken from the caselaw set out above present only a partial picture of the correct approach for the tribunal to take in deciding whether an appeal should be struck out on the basis that it has no reasonable prospect of success. I note the following:

(1) In the *Fairford* case BT referred to, at [41], after the comments set out above, the UT also said:

“The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 2 All ER 91 and *Three Rivers* (see above) Lord Hope at [95]. A “realistic” prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. The tribunal must avoid conducting a ‘mini-trial’. As Lord Hope observed in *Three Rivers*, the strike out procedure is to deal with cases that are not fit for a full hearing at all.”

(2) The decision in *Hughes v Richards* concerns different circumstances to those in this case; the proceedings were at an early stage and no findings had yet been made at all.

(3) In *Swain v Hillman* Lord Woolf said, at [7], that the words “no real prospect of being successful or succeeding”:

“do not need any amplification, they speak for themselves. The word “real” distinguishes fanciful prospects of success or, as Mr Bidder submits, they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success.

(4) Lord Woolf also said, at [13], that the judge was not correct in looking at the matter on the basis that he had to be certain that the case could not succeed and was bound to fail before he could appropriately accede to the defendant's application.

(5) The full passage at [95] of the *Three Rivers* case referred to by BT and in the citations above is set out below together with the preceding passage at [94]:

“.....I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?”



I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.”

16. HMRC cited the decision in *Shiner & Anor v HMRC* [2018] EWCA Civ 31 as establishing that rule 8(3)(c) of the Rules is broad enough to enable the tribunal to strike out grounds of appeal as an abuse of process assuming that issue estoppel or abuse of process has any application in relation to a tax appeal (see [13] to [21]).

### **Conclusion**

17. For all the reasons set out in Part E, I have decided that BT’s case, as set out in its submissions in Part D, has no reasonable prospect of success (as that term is to be interpreted under the case law referred to above) such that the appeal should be struck out under rule 8(3)(c) of the Rules.

### **Part B – GMAC/BT UT and BT CoA**

18. As the scope of the decision in *BT CoA* is critical to determining the application, I have set out material details of that decision and first of the decision in *GMAC/BT UT* which to some extent the Court of Appeal upheld. In *GMAC/BT UT* the UT gave a lengthy judgement in relation to GMAC’s case and a much shorter decision in relation to the BT issues by applying the relevant principles it had set out in relation to GMAC. I have started, therefore, with the UT’s decision in relation to GMAC so far as that raised issues relevant to the determination of the BT issues.

#### **Decision in GMAC/BT UT - GMAC**

19. GMAC supplied cars on hire-purchase terms whereby the customer agreed to pay for the car by instalments. If the customer defaulted, GMAC repossessed the car and sold it at auction and the proceeds reduced the balance of the instalments due from the customer. At the time of the repossession, GMAC had already accounted for VAT on the full (VAT-inclusive) purchase price. It was entitled to adjust its VAT accounts in respect of the reduction in the consideration, that is to say the amount at which the car was resold at auction, pursuant to regulation 38 of the Value Added Tax Regulations 1995 (“**the Regulations 1995**”). That adjustment did not, however, cover the amount remaining outstanding, and unpaid, by the customer. The appeal concerned whether GMAC was entitled to some form of VAT “bad debt relief” in respect of that sum. The hire purchase supplies in question took place between 1978

and 1997 and the bad debts arose between 1978 and sometime after 1997 but GMAC did not make its claim for bad debt relief until 20 February 2006 (“**the GMAC claim**”).

20. As the UT explained, during the period from 1978 to 1997, the domestic VAT bad debt relief provisions in place at the time imposed one or both of two conditions which had to be satisfied before bad debt relief was available “(a) the Property Condition: that on a supply of goods the property had passed; and (b) from 1978 to 1990 only, the Insolvency Condition which required that the debtor was formally insolvent and, for part of that period, that the taxpayer had proved in the insolvency”. GMAC was not able to satisfy the Property Condition at any time in the relevant period and was not able to satisfy the Insolvency Condition in many instances. Only the Insolvency Condition was relevant to BT.

21. In outline, the issues in GMAC of relevance to BT’s case were as follows:

(1) GMAC said that the Property Condition and the Insolvency Condition were incompatible with article 11C(1), under which, in its view, it had an EU right to relief for non-payment on which it could rely.

(2) HMRC said that the part of GMAC’s claim which related to the period from 1978 to 1989/1990 was time-barred as a result of s 39(5).

(3) GMAC argued that s 39(5) was not relevant. Its claim was not made under the domestic provisions relating to bad debts; it sought simply to assert its EU right under article 11C(1) to which no domestic time limits are relevant.

(4) HMRC argued that as a result of the judgment of the General Court of the European Court of Justice (“**CJEU**”), Case T-433/10P *Allen v Commission* 14 December 2011 (“*Allen*”), GMAC had no exercisable rights under EU law at the time when it made the GMAC claim.

#### *Relevant law*

22. The UT set out the applicable law at [20] to [37] and [152] to [156]. The Court of Appeal’s decision in *BT CoA* also contains a full description of the legislative history at [10] to [44].

23. The Directive was adopted on 17 May 1977. Article 11A(1) of the Directive provided for the taxable amount (by reference to which VAT is charged) to be everything which constitutes consideration from the customer. Article 11C(1) provided:

“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.”

24. The UT explained, at [25], that the UK domestic legislation which was intended to implement article 11C(1) contained two sets of provisions: (a) those which apply to give relief where there is total or partial non-payment, termed “bad debt relief”, and (b) those which apply in the other circumstances set out in article 11C(1), under regulation 38 of the Regulations 1995 (and earlier regulations introduced in 1989). These regulations provided that where there was a decrease in the consideration for a supply which included an amount of VAT then the taxpayer should adjust his VAT account by making a negative entry for the relevant amount of VAT (see [26]).

25. For supplies made between 2 October 1978 and 19 March 1997 (and for supplies made prior to 2 October 1978 giving rise to a bad debt after that date) “bad

debt relief” in domestic legislation was available under the Old Scheme or, what the UT termed, the New Scheme:

(1) Claims could be made under the Old Scheme in relation to supplies made between 2 October 1978 and 26 July 1990.

(2) Claims could be made under the New Scheme for supplies made between 1 April 1989 and 19 March 1997.

(3) There was thus an overlap period, between 1 April 1989 and 26 July 1990 when a claim could be made under either (but not both) schemes. (See [31])

26. Details of the Old Scheme and New Scheme were set out at [32] to [38]. The Old Scheme contained the Property Condition and the Insolvency Condition (in one of two differing forms). The New Scheme contained the Property Condition only (and there were other differences which are not material).

(1) The Old Scheme was first enacted by s 12 of the Finance Act 1978 (“FA 1978”), and then re-enacted in s 22. Section 22 provided:

“(1) Where –

(a) a person has supplied goods or services for 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...”

(2) There were rules in s 22(4) as to when an individual or company was to be regarded as insolvent for this purpose. The requirement that the taxpayer “has proved in the insolvency...” was removed by the Finance Act 1985 which applied to persons becoming insolvent after 31 March 1986 (although the definition of insolvency was then tightened).

(3) The New Scheme was brought in by s 11 of the Finance Act 1990 (“**FA 1990**”) for supplies made on or after 1 April 1989. This provided that (a) the Old Scheme did not apply to any supply made after 26 July 1990 (the date FA 1990 was passed) (under sub-s(9)) and (b) a claim under the New Scheme could not be made if a claim had been made under the Old Scheme (under sub-s(8)). A taxpayer had therefore to elect between the two schemes in relation to supplies made in the overlap period.

(4) The New Scheme was re-enacted in s 36 VATA 1994. Para 9(1) of schedule 13 VATA 1994 provided that: “(1) claims for refunds of VAT relating to supplies made before 27 July 1990 may continue to be made in accordance with section 22 of the 1983 Act notwithstanding the repeal of that section by the Finance Act 1990”.

27. In 1997, s 39(5) was introduced as follows, as set out at [152]:

“(5) No claim for a refund may be made in accordance with section 22 of the Value Added Tax Act 1983 (old scheme for bad debt relief) at any time after the date on which this Act is passed [19 March 1997].”

28. FA 1997 also formally repealed the provisions in para 9(1) of schedule 13 VATA 1994 under which claims for supplies before 27 July 1990 could continue to be made under the Old Scheme (see [153]).

29. GMAC submitted that its EU right was to be dealt with under s 80 (rather than under the “bad debt relief” provisions) which provided as follows (see [156]):

“(1) Where a person –

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due, the Commissioners shall be liable to credit the person with that amount.

(2) the Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose. ...

(4) the Commissioners shall not be liable on a claim under this section [to credit or repay an amount] if the claim is made more than three years after the relevant date.”

30. The earlier version of s 80(4) (and its predecessor in s 24 of the Finance Act 1989) had provided for a six-year time limit for claims to be made under s 80. The Government announced its intention to introduce the three year time limit, with immediate effect, on 18 July 1996 and it became law on 4 December 1996, with retrospective effect to 18 July 1996, under a resolution made by Parliament pursuant to the Provisional Collection of Taxes Act 1968. Legislation in terms of the resolution was in due course enacted as part of the Finance Act 1997, and came into force on 19 March 1997 with similar retrospective effect to 18 July 1996.

31. In the wake of the decision of House of Lords in *Fleming (t/a) Bodycraft v HMRC* [2008] UKHL 2 (“*Fleming*”), which resolved a challenge to a similar shortening of a time limit applicable for VAT purposes, s 121 FA 2008, in effect, amended the three year time-limit in s 80(4) as follows (see [155]):

“(1) The requirement in section 80(4) 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.” (emphasis added)

32. I note that by the time that BT brought the BT claims, s 80 had been amended (by the Finance (No. 2) Act 2005) to include sub-s(1B) (“**s 80(1B)**”) as follows:

“Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of -

(a) an amount that was not output tax due being brought into account as output tax, or

(b) an amount of input tax allowable under section 26 not being brought into account,

the Commissioners shall be liable to repay to that person the amount so paid.”

*UT decision in GMAC – Insolvency Condition*

33. The UT decided that the Insolvency Condition and the Property Condition were incompatible with the Directive and fell to that extent to be disapplied at [39] and [91].

*UT decision in GMAC – did s 39(5) apply to bar the GMAC claim?*

34. The UT noted, at [147], that the New Scheme never applied to supplies made before 1 April 1989: the New Scheme did not replace the Old Scheme in relation to such supplies: instead, the eventual total repeal of the Old Scheme resulted in no bad debt relief being available thereafter for such supplies where a claim for bad debt relief had not been made, even in cases where the bad debt had not yet arisen by the time of the repeal.

35. At [148], they said that it was not difficult to envisage cases where this could have led to relief being unavailable. They gave an example on the facts relevant to GMAC:

“For example, consider a 5-year hp agreement entered into with GMAC on 31 March 1989 so that a bad debt, should one materialise, could only fall within the Old Scheme (ignoring for the purpose of this example the Property Condition). Suppose that the contract was terminated in the final year (say on 14 January 1994). In order to claim bad debt relief, GMAC would have had to prove in the insolvency of the customer. GMAC may have had perfectly sound commercial reasons for not pursuing, itself, insolvency proceedings. But even if it had done so, it may well not have been able to have obtained a bankruptcy order or a winding up order and to have proved in the bankruptcy or insolvency by 18 March 1997, let alone to have submitted a claim for relief.”

36. The UT commented as follows as regards the various changes to the “bad debt relief” regime set out above:

(1) As regards the introduction of the New Scheme in 1990, at [149]:

“The continued application of section 22 to supplies made before 26 July 1990 cannot, we think, be seen as intended to be simply a temporary arrangement so far as concerns those supplies. We do not consider that the provisions of FA 1990 can be seen as a signal that the provisions of the Old Scheme would be likely, in the future, to be repealed rather than to be allowed to run their course.”

(2) As regards the saving provision in para 9(1) of schedule 13 VATA 1994, at [151]:

“It is correct, no doubt, to describe this as a transitional provision in the sense that it provides for the Old Scheme to apply in relation to old supplies and would, in the course of time, become exhausted. But that is not to say that it was transitional in the sense of being merely temporary in the expectation that it would in due course be abrogated. As with FA 1990, we do not consider that the provisions of the VATA 1994 can be seen as a signal that the provisions of the Old Scheme would be likely, in the future, to be repealed rather than to be allowed to run their course.”

(3) On the effect of the introduction of s 39(5), at [154]:

“Thus up to 19 March 1997 the taxpayer could make a claim under the Old Scheme in respect of a supply made before 27 July 1990 if the debt on that supply went bad (and the relevant conditions of the regulations were satisfied), and thereafter he could not. If the supply was made before 1 April 1989 (in which case a claim could not be

made under the New Scheme), he therefore ceased to be able to claim bad debt relief at all under domestic legislation.”

37. At [157] to [159] the UT set out that HMRC relied on the following publications as giving notice of the abolition of the Old Scheme (a) VAT Notes No 2, 1990 published in September 1990 (after the passing of the Finance Act 1990 and after the end of the overlap period on 26 July 1990), (b) a Budget News Release of 26 November 1996 (“**the Budget News Release**”), and (c) a Budget Notice 48/96 (“**the Budget Notice**”). They noted that the Budget News Release and the Budget Notice were followed by the Finance Bill which was published on 3 December 1996 and said:

“The Bill, as amended, was enacted as FA 1997. Clause 39 of the Bill dealt with bad debt relief. Clause 39(5), dealing with termination of the Old Scheme, was reflected in section 39(5) of FA 1997. Anyone reading the Budget News Release and the Budget Notice would have known that details would be found in the Finance Bill and anyone reading and understanding the Bill would have known that the Old Scheme was to come to an end once the Bill passed into law.”

38. The UT first addressed whether, on the footing that the Property and Insolvency conditions are incompatible with EU law, (a) as HMRC argued, GMAC’s EU right should be given effect through the mechanism of s 22 but with some appropriate “moulding” to reflect the invalidity of those Conditions (see [163]) or (b) as GMAC argued, “GMAC’s claims should not be considered to lie under section 22 at all, but are to be treated as separate direct claims to rights under the Directive....based on the premise that section 22 cannot be read so as to cover the current claim” (see [160]).

39. At [164], the UT noted that where domestic legislation is inconsistent with EU law, in the sense that the legislation provides for something which EU law does not allow, the well-established jurisprudence demonstrates that the relevant legislation is to be read as being without prejudice to any EU right (see for instance *Autologic plc v Inland Revenue Commissioners* [2006] 1 AC 118 citing *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85 ,140, and *Imperial Chemical Industries plc v Colmer (No 2)* [1999] 1 WLR 2035, 2041).

40. They said, at [165], that the fact that the Property Condition and the Insolvency Condition in s 22 “were impermissible restrictions on the right to [bad debt] relief.....does not detract from the fact that section 22 *was the mechanism by which bad debt relief was to be delivered*” (emphasis added). They saw “no reason why the approach of the cases just mentioned should not be applied to GMAC’s claims for “bad debt relief” and concluded that:

“.....section 22 can, and should, be read *as providing the mechanism for giving effect to* GMAC’s directly enforceable claims. Where there is a partial or total non-payment within the meaning of Article 11C(1), section 22 is to be read as providing relief in relation to that non-payment by disapplying the Property Condition and the Insolvency Condition.” (Emphasis added.)

41. They continued, at [167], to note that domestic legislation provided for a claim to be made in accordance with regulations (see s 22(3)) and that those regulations “set out a procedure intimately connected with the Insolvency Condition”. In their view it was “only by reference to that procedure that any time-limit for making the claim is imposed” but that procedure could not apply to GMAC’s EU right since the Insolvency Condition was not fulfilled. They said, at [172]:

“Accordingly, the requirement to make a claim in the way specified in the regulations will have to be disappplied and adapted (to use the word used by Lord Nicholls in *Autologic* at [17]) in some way to give effect to GMAC’s

directly enforceable rights. In that context, it might be said that the provisions of the regulations concerning VAT returns do apply to a directly enforceable claim at least to this extent, namely that the claim must be made by including the correct amount of the refund in the box identified. But that does not lead one anywhere in terms of time limits since what those provisions do not do is to identify which return is the appropriate return in the case of a directly enforceable claim. It would go far beyond any permissible adaptation of the statutory provisions to treat them as identifying some other VAT period as the relevant period and could lead to anomalies.”

42. They added, at [173], that subject to the impact of *Allen* which they considered later, they did not consider that “there is to be implied, as a matter of domestic law, any limitation period for the making of a claim” so “although GMAC’s claims can, and.... should, be treated as made under section 22, neither that section nor the regulations made under it result in the imposition of a time limit within which the claims must be made”. They concluded, therefore, at [174], that s 22 “*does provide the mechanism for giving effect to*” GMAC’s EU right (emphasis added); but it does not result in the imposition of any time-limit for the making of a claim.

43. The UT continued, at [175], that, on that basis, s 83(1)(h) VATA 1994 provided the jurisdiction for the tribunal to deal with GMAC’s appeal in relation to claims for relief made in respect of supplies made before 1 April 1989. Section 83(1) provides for an appeal to lie to the tribunal in relation to the matters listed which include at (h) “a claim for a refund under section 36 or section 22 of the 1983 Act”. They thought that even if the claims were not strictly under s 22, but are given effect to as if s 22 applies as a result of the necessary adaptation, there should, “be a parallel adaptation of paragraph (h) to bring within its scope the claims”.

44. At [176] the UT noted that GMAC argued that its recourse to the tribunal as regards HMRC’s denial of the GMAC claims was not under s 22 but rather under para (b) or (t) of s 83 VATA 1994 which relate respectively to “the VAT chargeable on the supply of goods.....” and “a claim for the crediting of an amount under section 80.....”. On that basis, the time limit in s 121 would be applicable and GMAC plainly made the GMAC claim before the expiry of that time limit. On this issue:

(1) At [177], they explained that GMAC submitted that (a) para (b) looks at the nature of the underlying tax dispute, (b) the dispute was about the taxable amount under article 11C(1) and (c) that is precisely a dispute about the VAT chargeable on the supply of goods within that para. In its view there was no need to find a substantive right under domestic legislation to found that jurisdiction. The UT said that they saw the force of this argument if s 22 was not applicable but if, as they had held, it was applicable “it really takes the matter no further” because in addressing the dispute about the amount of VAT chargeable for the purposes of para (b), “one is thrown back to the provisions of” s 22 itself: it makes no difference whether jurisdiction is founded on paragraph (b) or paragraph (h)”.

(2) At [178], they said that this met Mr Cordara’s argument (as counsel for GMAC) on s 121:

“He would, no doubt, be correct in saying that there was no time limit, before 1 April 2009, for the making of a claim if the claim was properly made as one for “output tax not due”. But that is not the proper basis of the claim which is one under section 22 as appropriately adapted and moulded.”

(3) At [179], they set out that GMAC submitted that s 80 “is not focussed on any category of underlying dispute but merely focuses on situations in which a

refund of tax is due for whatever reasons”. In its view, GMAC’s EU right resulted in a reduction of the amount chargeable to VAT so that GMAC had brought into account as output tax an amount that was not output tax due (within the meaning of s 80). The UT thought that, for the same reasons as they gave in relation to para (b) “this does not take matters further” once it is accepted that s 22 applies as, para (t), like para (b), “throws one back to s 22 and the effect of the bringing to an end of the Old Scheme”.

45. The UT appeared to think that the above points disposed of GMAC’s arguments on the basis that, as they had decided that the Old Scheme was applicable, s 80 was irrelevant. However, the UT went on to consider whether s 80 could in any event apply. At [180], they set out that HMRC submitted that s 80 does not apply to claims for bad debt relief on the basis that such relief under domestic law:

“results in a refund of VAT so that....GMAC is wrong in asserting that, as it did not make a claim for bad debt relief when it arose, it has overpaid VAT.... if no claim for bad debt relief is made, no refund can be granted and there is therefore no overpayment”.

46. They continued, at [181], that s 80 is concerned with cases where a taxpayer has brought into account as output tax an amount that was *not* output tax due but:

“When GMAC made its supplies and accounted for the full amount of output tax, it accounted for an amount of output tax which *was then due*: it is only the subsequent failure of the customer to pay which has resulted in any possible claim for bad debt relief. It does not seem to us that later circumstances giving rise to a bad debt for the purposes of Article 11C(1) and which results in a reduction in the chargeable amount renders the amount which was actually paid retrospectively incorrect in the sense that it can be said that the amount actually paid was “not output tax due” within section 80. It was, when paid, output tax which was due; and remained such until a bad debt arose.” (Emphasis added.)

47. The UT said, at [182], that if they were wrong about the applicability of s 22, then GMAC would have paid “more output VAT than was due”. They noted that under s 80(2) HMRC were only liable to repay an amount under that section “on the claim being made for the purpose”. In their view the GMAC claims were made as claims for “bad debt relief “under the relevant statutory provisions relating to “bad debt relief”. At [183], they concluded that GMAC’s claim letter could not be read as an alternative claim to credit or repayment under section 80(2), they knew of no other claim and it was therefore too late for GMAC to rely on s 121.

48. They continued, at [184], that, once it had become apparent that the taxable amount should be reduced pursuant to article 11C(1), it would be open to the taxpayer to claim appropriate relief but if (contrary to the UT’s view) s 22 did not apply, there was no domestic provision which indicates how or when the relief was to be given. They considered it obvious, however, that:

“the onus is on the taxpayer to make a claim; in the absence of a claim, HMRC would have no way of knowing that a bad debt had arisen. It follows, unless and until a claim is indicated, that it cannot be said that any relief is to be afforded and that it cannot be said that any amount has been brought into account as output tax that was not output tax due. Accordingly, section 80 does not, in our judgment, in terms apply to GMAC’s claims.”

49. At [185], the UT said that that is not to say that s 80 could not be moulded or adapted in order to give effect to GMAC’s EU right to include within the words “not output tax due” an amount by which output tax is reduced following the giving of “bad debt relief” pursuant to article 11C(1). However, they did not consider



adaptation of s 80 to be as appropriate a way of giving effect, under domestic law, to GMAC's EU right as the adaptation of s 22.

50. The UT thought it clear, at [187], that given their decision on s 22, subject to the second issue, s 39(5) "precludes GMAC's claim being made through the mechanism of section 22". They made "the important point", at [188], that GMAC's claim was one "which it could first have asserted under EU law many years ago" and would have been subject to domestic time-limits had any been imposed and:

"Where there is such a domestic time-limit, it will apply, subject to the principle of effectiveness.....to directly enforceable rights under EU law even if those rights have not been established by a decision of the Court and are disputed by the Member State concerned. This was the position in Case C-188/95 *Fantask A/S and Others v Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783...."

51. At [189], they said that once it is accepted that GMAC's rights are to be effected under s 22 and the relevant regulations, appropriately adapted, the ending of the possibility of claims under s 22 should apply as much to EU rights as it does to purely domestic rights.

52. At [190] they noted that under domestic law it was clear when the claim under the Old Scheme would first arise, namely when the Insolvency Condition was fulfilled. In the case of an EU right:

"it is less clear when the claim would first arise. It would, we suppose, be when the facts first fell within Article 11C(1) absent any derogation by the Member State concerned but it is not at all clear to us when that would be. It is, of course, a factual question in any particular case, but what would be sufficient in order for a taxpayer to establish a directly enforceable claim is not, at least to us, obvious. A few things are, however, clear. The first is that many of GMAC's bad debts giving rise to a directly enforceable claim.....arose many years before the passing of the FA 1997.... in relation to supplies made before 1 April 1989, many, if not most, directly enforceable claims....would have arisen well before 18 March 1997....at least in theory and probably in reality, there will, in respect of such supplies, have been some bad debts which arose for the first time shortly before or even after 18 March 1997....."

53. At [191], the UT explained that:

(1) HMRC submitted that s 39(5) was not about time limits at all; it was simply the final stage of a change from the Old Scheme to the New Scheme. HMRC viewed the provisions of s 11 FA 1990 and schedule 13 VATA 1994 as "transitional provisions continuing the Old Scheme for a temporary period with the final termination of the Old Scheme – something which everyone knew would be coming at some time – being effected by s 39(5)".

(2) GMAC submitted that s 39(5), "viewed purposively, is simply a provision which imposes a time limit on the making a claim in respect of a subsisting right" which "is really no different from" *Fleming*.

54. The UT said, at [192] that it was true that the UK government was entitled to change the conditions under which bad debt relief was available pursuant to its powers of derogation from article 11C(1). They noted that HMRC submitted that this is precisely what it did by substituting the New Scheme for the Old Scheme. In HMRC's view, taxpayers in general and GMAC in particular had no "legitimate expectation" that the Old Scheme would remain in force unchanged. The UT thought that was "only half the story":

“It was never the case (except in relation to supplies made during the overlap period from 1 April 1989 to 26 July 1990) that the New Scheme was substituted for the Old Scheme. In relation to supplies made before 1 April 1989, it was the Old Scheme alone which applied; the New Scheme could never apply. The termination of the Old Scheme therefore had the result that it ceased to be possible to obtain bad debt relief in relation to supplies made before that date; there was no question of some alternative scheme of relief being available. So far as those supplies are concerned, the position was this: immediately before the coming into effect of section 39(5), GMAC had claims (under section 22 and the regulations as appropriately adapted) for bad debt relief.....After that date, GMAC had no claims at all if section 39(5) is to be given its apparent temporal effect.”

55. At [193], the UT explained that the *Fleming* case related to claims for input tax repayment under regulation 29 of the Regulations 1995 which required a claim to be made in the period in which the VAT became chargeable “save as the Commissioners may otherwise allow or direct”. The question in *Fleming* was, as the UT set out at [194]:

(1) Whether it was permissible to introduce a provision (in regulation 29A which) removed the right under regulation 29 to claim a deduction more than three years after the return date for the period in which the VAT became chargeable without the creation of a sufficient transitional period in which outstanding claims could be made.

(2) If not, whether the way in which the change had been advertised created such a sufficient period.

56. The UT noted that Lord Hope (see at [1]), Lord Carswell (see at [77]) and Lord Neuberger (see at [103]), and as such, a majority of the House, “all appear to have considered that the communication of a transitional period might be made by the Administration rather than the legislature, but said that it must be widely disseminated”.

57. At [203] the UT summarised the decision in *Fleming* as follows:

“...to be compliant with EU law (i) the new time limit had to be fixed in advance so as to give legal certainty (ii) where the new time limit was retrospective, there had to be an adequate transitional provision so that those with accrued rights had a reasonable time within which to make their claims before the new time limit applied, it being for Parliament, or HMRC by means of an announcement disseminated to taxpayers to introduce prospectively an adequate transitional period (iii) that where a new time limit was introduced without any, or any reasonable, transitional period, it would be a breach of EU law to enforce the new time limit in relation to accrued rights at least for a reasonable period (iv) that the adequacy of the transitional period was to be determined by reference to the principles of effectiveness and legitimate expectations, so that the period was not so short as to render it practically impossible or excessively difficult for a person with an accrued right to make his claim and (v) where the national court decided that the transitional period was inadequate, it had to fashion the remedy necessary to avoid an infringement of EU law which would normally be to disapply either permanently or temporarily the operation of the retrospective application of the new time limit. As to (iii), the reasonable period must itself be certain. This appears most clearly from the speech of Lord Neuberger at [88] and [90], although it is implicit in the speeches of Lords Hope and Scott and of Lord Carswell too.”

58. At [196] and [197], the UT set out that HMRC submitted that the present case is different from *Fleming* on the basis that:

(1) It is not one of “a retrospective imposition of a time-limit when before there was none.....because it concerns the discontinuance of a legal regime applicable during a particular period of time, on the expiry of a transitional period, rather than a change in the limitation period applicable to claims made under that regime”. In *Fleming*, the disapplication of the (invalid) statutory time-limit removed a bar on the exercise of a right to make a claim under the regulation 29 regime; there was no similar bar on the exercise of any right that GMAC might have had; instead, the underlying legal regime itself has changed. The UT commented that “whilst the regime has changed...so far as supplies made before 1 April 1989 are concerned, the regime has not changed, rather it has been abolished without replacement”.

(2) The decision in *Fleming* was based on the proposition that transitional provisions were needed to protect “legitimate expectations” but in this case there was no legitimate expectation that any particular bad debt regime would continue unaltered.

(3) The present case is more akin to cases such as Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Grop v Staatsecretaris va Financien* [2004] ECR I-5337 (“*Gemeente Leusden*”) and Case C-201/08 *Plantanol GmbH & Co KG v Hauptsollant Darmstadt* [2009] ECR I-8343 (“*Plantanol*”). In these cases, the exercise by Member States of options permitted by the Directive on notice (or short) notice was upheld by the CJEU. HMRC said that article 11C(1) permitted derogations and conditions, and that the Member States could vary the derogations and conditions which they adopted from time to time: the discontinuation of one regime (the Old Scheme) and its replacement by another (the New Scheme) was merely such an action. The notice of the change was adequately disseminated.

59. On HMRC’s points the UT concluded as follows:

(1) At [200], a taxpayer could not have a “legitimate expectation” that any particular scheme of derogation from the Directive adopted by a Member State would remain in force unchanged. As was said in *Plantanol*, economic operators have no “legitimate expectation” in the continuance of an existing situation which is capable of being altered by the national authorities in the exercise of their discretionary powers.

(2) However, at [200], even if HMRC were right that the present case is more akin to the cases cited than to *Fleming*, it has to be recognised (as it was in *Gemeente Leusden*) that:

“there would be a breach of legitimate expectations if a Member State suddenly and unexpectedly withdrew a particular regime in relation to a particular subject matter; in particular if the UK had suddenly and unexpectedly withdrawn the Old Scheme (particularly if, in doing so, it did not replace the Old Scheme so far as concerns old supplies)”.

(3) At [201], in both *Gemeente Leusden* and *Plantanol*, the regime which resulted from the changes in each case were permissible end results in accordance with EU law. In contrast, the absence of any “bad debt relief” in relation to supplies made before 1 April 1989 was not in accordance with EU law save to the extent the right to claim such relief had become time-barred by some permissible temporal limitation imposed under national law (or under EU

law itself). As is well established, the imposition of a reasonable limitation period is not incompatible with EU law.

60. The UT continued, at [202], that the position in *GMAC* was much closer to *Fleming* than it is to *Gemeente Leusden* and *Plantanol*.

(1) In both *GMAC* and in *Fleming*, the taxpayer had a claim to reduce its liability for tax. In contrast, the impact of the changes in *Gemeente Leusden* and *Plantanol* was on the amount of tax which would become payable because of the way the transactions in question would be charged.

(2) The total exclusion of “bad debt relief” for supplies made before 1 April 1989 – in contrast with the adoption of a replacement scheme applicable to such supplies:

“cannot...be justified as a condition or derogation within Article 11C(1). The only justification...is that the elimination of claims under section 22 (as appropriately adapted for directly enforceable claims) is the imposition of a reasonable time limit within which such claims must be made. The fact that a replacement scheme might have been adopted (and in such a case, the *Gemeente Leusden* and *Plantanol* approach might well be correct) is not an answer in the case where the section 22 claim was altogether abolished”.

(3) A taxpayer in the position of *GMAC* with an accrued directly enforceable claim was in substantially the same position as Mr Fleming. *GMAC* had a “legitimate expectation” that the period during which it would be able to make a claim for “bad debt relief” in the absence of any replacement scheme would not be brought to an end without an adequate opportunity being given to make a claim.

(4) Thus, just as the introduction of a shortened time limit without a transitional period in *Fleming* breached the principles of effectiveness and “legitimate expectation”, so, in the present case, the termination of the right to make a claim under s 22 without an adequate opportunity to make a claim would breach those principles unless an adequate transitional period was provided for.

61. At [204] they said that on the basis of the holdings in *Fleming*, it can be argued that:

(1) Section 39(5) imposed a retrospective time limit in that it precluded a person with an accrued right prior to 18 March 1997 from making a claim.

(2) It did not contain any transitional provision nor has any announcement been made since its commencement about the period within which claims could be made.

(3) Although clear notice of an impending change in the legislation might be sufficient to satisfy the requirements of the principles of certainty, “legitimate expectations” and effectiveness, there was no sufficient notification on the facts.

(4) The operation of section 39(5) must be suspended until certainty is provided either by legislation or an appropriate announcement.

62. They then highlighted three differences between *Fleming* and *GMAC*’s case at [205]:

(1) In *Fleming*, HMRC attempted to correct the position with announcements made after the relevant legislation had come into force whereas in the present case HMRC’s position is that adequate notice was given by notices and the Finance Bill published before the legislation was passed. HMRC said that

these, whether taken separately or cumulatively, were sufficient to put taxpayers generally on notice that the Old Scheme was coming to an end so that, on the footing that s 22 applied, they had the opportunity to make claims in respect of bad debts arising from supplies made from 1978 to 1989. HMRC considered that this is particularly so given that the possible ending of the Old Scheme had been signalled, they said, by the repeal of s 22 contained in FA 1990 and its continuance in VAT Act 1984 under the heading “Transitional Provisions and Savings”.

(2) In *Fleming*, the taxpayer made his claim within a reasonable time of the date of as Lord Neuberger put it “the start of the end of disapplication period” meaning the date from which it is appropriate to start measuring the appropriate period within which the taxpayer must make his claim. GMAC did not in fact make its claims until sometime in 2006, around nine years after the Old Scheme was finally terminated.

(3) In *Fleming*, the taxpayer’s substantive rights were clear: the case was concerned with the introduction of time limits. GMAC’s substantive rights are disputed by HMRC as set out above.

63. At [206] to [208] the UT concluded as follows:

(1) “*Fantask* shows that a domestic time limit can be effective against a claim under EU law” and there was no reason to apply a different approach as regards time limits “in the case of a right which has been validly transposed into domestic law and one which has not”; in both cases the protection afforded to taxpayers as a result of *Fleming* must be observed. But provided that this is observed, the introduction of a time limit should be as effective in relation to an EU right as it is in relation to a domestic right; and it should be effective notwithstanding that the existence of that right is not appreciated by the taxpayer and that HMRC deny its existence.

(2) An announcement made prior to the passing of legislation to the effect that the Old Scheme would be withdrawn from a specified future date is capable of satisfying the principles of certainty, effectiveness and “legitimate expectations” in relation to accrued rights at the date of the announcement and, to some extent, in relation to rights which accrue between that date and the date of the withdrawal. The announcement would fulfil the same function as the sort of communication which it was acknowledged in *Fleming* would be sufficient to bring about an effective disapplication of the offending statutory provisions. The period thereby afforded to the taxpayer to make his claim could be certain enough to satisfy the legal requirement for certainty. Although the end date of the period (the commencement of the legislation) could not be known for sure at the date of the announcement, taxpayers and their advisers would have a very good idea of when an announced proposal to be included in the next Finance Bill would be likely to become law. The decision in *Allen* lent support to that last conclusion.

(3) Whether the principles of effectiveness and “legitimate expectation” were fulfilled thus depends on the length of notice given of the termination of the Old Scheme and of the right to make a claim in respect of accrued rights. In contrast with *Fleming*, the adequacy of the notice should be judged by reference to the period appropriate to an express transitional period and not by reference to a reasonable period of disapplication; the period from the date of the announcement to the date when the legislation comes into effect is analogous to an express transitional period

64. The UT then addressed whether the announcements made in relation to the ending of the Old Scheme were effective notice of the ending of the Old Scheme and, if so, whether that notice was of adequate duration.

65. At [210] they set out an example of a taxpayer who (unlike) GMAC may still have been able to satisfy the Insolvency Condition when the announcements were made. Such a taxpayer who, immediately prior to 26 November 1996, owed a debt which he considered would never be paid, assuming he knew of the announcements and the Finance Bill, would have realised that he needed to satisfy the Insolvency Condition to be able to make a claim under domestic legislation. They considered it clear that:

“if it was necessary, as a matter of EU law, for such a taxpayer to be provided with a transitional period sufficient to enable him to satisfy the Insolvency Condition, the period from 26 November 1996 to 18 March 1997 would have been insufficient.”

66. At [211], they held that such a taxpayer “who wished to take advantage of the domestic legislation cannot simply be deprived of that opportunity without an adequate transitional period, especially given that he was not provided with any replacement bad debt regime at all....”. At [212], they acknowledged that GMAC was not such a taxpayer but “the fact that there may be other taxpayers who could seek to rely on a transitional period sufficient to allow the Insolvency Condition to be satisfied has an impact, in our view, on the appropriate transitional period in respect of GMAC’s claims” and:

“It would be wrong in principle, we consider, for GMAC (and others in the same position) to be required to bring a claim within a shorter period than that applicable to persons potentially entitled to make such a claim under domestic legislation. A person seeking to enforce a claim under EU law must not be treated in a less favourable way than a person seeking to enforce an equivalent right under domestic law. Accordingly, we conclude that the period from 26 November 1996 to 18 March 1997 was not an adequate transitional period within which GMAC could be required to assert its directly enforceable rights.”

67. At [213] they considered that, even if they were wrong to determine the appropriate period by reference to the period appropriate to a taxpayer seeking to rely on domestic legislation, the announcements referred to (the Budget News Release, the Budget Notice and the Finance Bill) did not give adequate notice of the end of the Old Scheme so as to provide sufficient time for those with accrued EU rights to exercise them even viewing those rights in isolation.

68. The UT said that they were influenced in reaching that conclusion by what others (including the House of Lords in *Fleming*) have said about the adequate length of a transitional period. They referred to the fact that in *Fleming*, Lord Neuberger considered that, on the basis of the limited argument and evidence which the House had received on the point, the duration of a transitional period would be between 6 months and 12 months:

“In the present case, we, too, have had only limited evidence and we bear in mind that the necessary transitional period is to be determined in relation to very different circumstances from those in *Fleming* and *Grundig*. But with those steers from the ECJ and the House of Lords, it appears to us that a period of 16 weeks (from, at earliest 26 November 1996 when the announcements were made) until 19 March 1997 (from which date it became impossible to make claims under the Old Scheme) was inadequate.”

69. At [214], they said that even if they had concluded that the transitional period was adequate in relation to accrued rights subsisting on 26 November 1996, the period for making a claim in respect of bad debts arising after that date became shorter as time went by and disappeared altogether on 18 March 1997.

70. They continued, at [215], that on the basis of the above conclusion, they did not accept that “nonetheless, GMAC’s claims are barred because they were not brought within a reasonable disapplication period”. They noted that in *Fleming* it was argued that the start date should be taken as the date of one of the decisions considered by the House of Lords. However, that was rejected by the majority since the ordinary reasonably well-informed taxpayer would not have appreciated the effects of those decisions and would not have appreciated his right to make a claim within a reasonable disapplication period. It might be argued that *Fleming* itself does provide an answer to that particular reason for the decision in favour of Mr Fleming and would thus provide a start date in relation to GMAC’s claims. But even if that is so, it does not provide a defence to those claims since they were in fact made before the decision in *Fleming*.

71. They concluded, at [216], that subject to the impact of *Allen*, GMAC’s claims were not barred by lapse of time.

72. Finally, at [217] to [233] the UT rejected HMRC’s argument that, by the time it made its claims, GMAC was barred from asserting any EU law right which it might have had based on the decision in *Allen* or that that case had any effect on their analysis as set out above.

#### **Decision in GMAC/BT UT - BT**

73. As regard BT, the UT said, at [238], that BT issues 1 and 2 “are closely connected” and that:

“It follows from our decision in the GMAC appeal that, in relation to a taxpayer’s directly enforceable rights in respect of supplies made during the period from 1 October 1978 to 1 April 1989, claims in respect of bad debts arising during that period are not time-barred as a result of section 39(5) FA 1997. On our analysis, although that section introduced an effective time bar to claims where there was not one previously, adequate notice was not given of the impending change with the result that claims which accrued prior to 1 April 1989 could still be made after 18 March 1997 unless an appropriate disapplication period had been specified and had expired. The approach in *Fleming* must be applied with the result that subject to one point, the claim made by BT in 2009 was still in time. We have rejected the submission that *Allen* would apply to impose a time-bar as a matter of EU law.”

74. At [23], they continued that it could be argued that *Fleming* itself provides the start date for the running of the disapplication period and that, when BT made its claim in March 2009, that period had expired since, “on any view, a period of over a year from the decision in *Fleming* (January 2008) and the making of the claim was more than adequate”. However, the problem with that argument “is that the majority in *Fleming* decided that a disapplication period had to be of a fixed duration and specified in advance”. They thought that the only way out of that difficulty facing HMRC is to say that *Allen* shows that the principle of certainty does not require a fixed period to be specified. But even if that is correct:

“it would only be, at the very earliest, once the decision in *Allen* had been published that taxpayers would know that instead of there being the need for a fixed period, the mere passage of reasonable time could bar their claims. Just as there had to be a disapplication period in relation to an inadequate transitional period, it must be the case, in our judgment, that a reasonable

period after the decision in *Allen* for bringing a claim must be allowed. The decision in *Allen* did not appear until December 2011; BT's claims were made two years before this. Accordingly, we conclude that BT's claims are not barred by lapse of time."

75. At [240] and [241] they considered an issue which did not arise in the GMAC appeal: the position as regards supplies made in the period from 1 January 1978 to 1 October 1978 when the Old Scheme was not in place but article 11C(1) was in place. They said that:

(1) Where the debt arises after 1 October 1978, they considered it clear that s 12 FA 1978 could apply even where the supply pre-dated 1 October 1978. On that footing, the necessary adaptation or moulding of s 12 could be effected to give effect to BT's EU right in respect of supplies made before 1 October 1978. In that case, the resulting position was no different from that in respect of supplies made after 1 October 1978.

(2) As concerns bad debts arising before 1 October 1978, the position was "marginally less clear". At the time when the EU right arose, s 12 was not on the statute book and effect could not, at that time, have been given to the EU right through the mechanism of s 12. However, once that mechanism came into being, the position was then precisely the same as that set out in (1). If they were wrong about that, then the mechanism has to be found elsewhere which they considered in relation to BT issue 3.

76. On BT issue 3 they said, at [242], that on the assumption that BT had an EU right when s 80 first came into force, for the reasons given in the GMAC appeal, they did not consider that s 80 applied at all, since the mechanism for giving effect to the EU right was to be found in s 22. There was no time-limit for making such a claim until s 39(5) came into force. If they were wrong in thinking that s 22 provided the appropriate mechanism for making a claim then some other route must be found:

"For reasons given in the GMAC appeal, one possible route is section 80 on the footing that BT has brought into account as output tax an amount which was not output tax due. So let it be supposed that, when section 80 first came into force, BT did have a directly enforceable right."

77. The UT explained the changes in time limits made to s 80 and the effect of 121 in extending the time limit subject to two conditions, namely, that (a) the claim was in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 and (b) a claim was made before 1 April 2009. They said:

"As to the first of those conditions, BT's claims, if they subsisted under section 80 in the first place, were clearly within the first of those circumstances. But, so far as we can see, no claim was made by BT for relief under section 80 before 1 April 2009 or indeed at all. The claim letter dated 30 March 2009 asserted a right to a refund. The whole thrust of the letter was that the Insolvency Condition was invalid. Further, a mistaken view was taken of the repeal of section 22, the complaint being made that bad debt relief in respect of pre-1 April 1989 supplies was being abolished by FA 1990. That complaint was misconceived but the fact that it was made indicates that BT's case was that relief should be granted as precisely that, namely bad debt relief. There was no suggestion that section 80 had any role to play or that there had been a payment of an amount which was not output tax due."

78. At [243] they concluded in relation to s 80 as follows:



“First of all, section 80 is not relevant at all because BT’s claims fall to be dealt with under section 22. Secondly, even if BT’s claims did fall within section 80(1), no claim under section 80(2) was made prior to 1 April 2009 so that the disapplication of the time limit in section 80(4) could not be relied upon. That leaves BT fixed with the ordinary time limit under section 80(4) and whether that is 6 years or 3 years, no claim was made within those periods and any claim would now be years out of time. It could not now be maintained, either, that the 3 or 6 year time limit should not be applied on the basis of the principle of effectiveness since section 121 provided the vindication of BT’s rights which EU law required.”

79. The UT then answered, at [244], the BT issues as follows:

“The answers to the Preliminary Issues are therefore as follows:

a. Issue 1: On the assumption that BT could otherwise have relied on an EU law right to bad debt relief, in respect of bad debts allegedly arising in the prescribed accounting periods running from 1 January 1978 to 31 March 1989, by virtue of Article 11C(1) of the Sixth VAT Directive, the exercise of that right in 2009 was not barred in accordance with the general principles of EU law but was no longer available as a result of section 39(5) FA 1997.

b. Issue 2: Section 39(5) falls to be disapplied, or construed, under EU law, in such a way as not to affect the exercise of BT’s right under EU law. This conclusion turns on our view that inadequate notice of the termination of the Old Scheme was given. Accordingly BT’s claims were not time-barred when they made them in the claim letter dated 30 March 2009.

c. Issue 3: Section 80 of the Value Added Tax Act 1994 and section 121 of the FA 2008 have no relevance to BT’s claim on the footing that its claims arise under section 22. If its claims arise, instead, under section 80, those claims were not made before 1 April 2009 and are now time-barred.”

## **Decision in BT CoA**

### *Grounds of appeal*

80. In the Court of Appeal, having set out a summary of the UT’s conclusion on the three BT issues, Rimmer LJ set out that HMRC challenged the UT’s conclusion on four grounds of appeal as follows:

“1. That the [UT] erred in holding that the general principles of EU law did not bar any claim by BT, in particular, by rejecting the submission that there was an obligation under those general principles to act within a reasonable time.

2. That the [UT] erred in holding that [s 39(5)], which brought the “Old Scheme” of bad debt relief to an end, falls to be disapplied or construed in such a way as not to affect the exercise of any rights that BT might have, in particular that it erred in holding that inadequate notice of the termination of the Old Scheme was given.

3. That, on the basis of the [UT’s] own expressed view, BT did not have any directly effective rights and the [UT] ought therefore to have taken that into consideration.

4. That the [UT] erred in holding that the Insolvency Condition was disproportionate, unreasonable or otherwise unjustified so as to infringe directly effective EU law rights.”

81. BT also appealed against the decision of the UT as regards BT issue 3. I note that the grounds of appeal, as set out in BT’s application for permission to appeal to the Court of Appeal (“**the CoA application**”), contain arguments which are in substance the same as some of the arguments which BT now submit remain to be heard by the tribunal. In the CoA application, BT said that the UT:

- a. failed to hold that the only relevant pre-condition to the claim being a s 80 claim was whether it was a claim for tax which was not output tax due, and that BT's claim was for just that;
- b. failed to hold that the availability or otherwise of a parallel domestic law claim via UK bad debt relief mechanisms.....did not preclude BT's claim from ranking as a section 80 claim;
- c. failed to hold that section 80 was the only domestic law right available to BT to make the claim, when it did, given that there was no parallel domestic law claim available under the UK bad debt relief provisions.....
- d. failed to follow the reasoning.....in *General Motors Acceptance Corporation (UK) PLC V Revenue & Customs* [2007] UKVAT V19989....where considering the route to claim monies overpaid under another part of the same underlying EU law provision that BT relied on herein to the effect that if and to the extent that a right to reclaim under a specific procedure is not used timeously (there regulation 38 of the Value Added Tax Regulations 1995), the claim thereupon became a section 80 claim, by reason of the fact that tax was thereafter overpaid;
- e. failed to conclude that where the initial domestic route for the reclaim of output tax... is not used timeously, then the taxpayer's claim falls under section 80 for a refund of overpaid tax;
- f. failed to hold that on a fair reading of section 121 of FA 2008, it was intended to cover just such a situation as that of BT;
- g. failed to hold (in the alternative) that, insofar as it was not the case that the claim fell within the UK bad debt relief provisions, then section 80 was clearly the route for the claim;
- h. apparently considered that it would have been necessary specifically to mention section 80 in the letter of claim for the claim to count as a section 80 claim, whereas there is no such requirement of specificity in section 80 or elsewhere;
- i. further, it failed to consider the wider correspondence between the parties around the time of the claim which would have shown clearly that the claim was, in fact, a section 80 claim submitted in accordance with HMRC's published "Fleming guidelines" and/or reached this view notwithstanding the absence of argument to this effect by HMRC."

*Legislation and factual background*

82. Rimmer LJ set out a full description of the UK legislation which included, at [29], details of the predecessor provision to s 80, namely, s 24 of the Finance Act 1989. He explained that it was BT's case on its cross-appeal that s 24 and the subsequent versions if it provided an alternative jurisdictional basis upon which it was entitled to apply for VAT relief in respect of the bad debts it had suffered during the relevant period. At [30], he set out that HMRC's submission was that s 24 and its successors have nothing to do with claims for bad debt relief but rather:

"were and are concerned only with cases in which an overpayment of tax had been made to the Commissioners and provide a restitutionary basis for the recovery of the excess. In a bad debt case, there was no payment of VAT that was not due, or therefore any overpayment of VAT. A failure to make a bad debt relief claim in a subsequent return still did not mean that there was any overpayment in the tax actually paid. If no relief claim was made, the tax paid was the tax due."

83. Rimmer LJ noted, at [46], that there were factual differences between the GMAC and BT cases, which were said to be of relevance to HMRC's challenge to the UT's answer to BT issue 2 which he identified as follows, at [47] and [48]:

(1) On the GMAC facts, the UT held that some of the hire purchase agreements could give rise to obligations running over several years and also to the possibility of a bad debt arising for the first time shortly before, or even after, 19 March 1997, *including* in respect of GMAC supplies made before 1 April 1989 (see [190] and [192] of *GMAC/BT UT*). These were material considerations in the UT's conclusion that s 39(5) should be disapplied in the GMAC case, "one which it then applied in answering [BT] issue 2 without, however, expressly advert[ing] to the different factual circumstances of the BT supplies".

(2) In relation to BT, HMRC's case was put on the basis (not challenged by BT) that the agreed documents showed that BT supplied its services and billed on a quarterly basis unless, in certain circumstances, it instead issued a monthly call bill. It follows that:

"the latest debts falling within its claim would have emerged at most a few months after March 1989 and years before 19 March 1997. On the face of it, by 19 March 1997 all debts owed to BT in respect of its pre-31 March 1989 supplies would have been either paid or statute-barred. The only possible (and hypothetical) exceptions would be any unsatisfied, but enforceable, judgment debts obtained by BT against customers in relation to whom the insolvency condition had not been satisfied."

84. He noted that HMRC's case was not, however, that statute-barred debts were not bad debts; it was that s 39(5) of the FA 1997 could not in practice have affected anything other than a stale bad debt relief claim that would, on BT's case, have arisen several years before 1 March 1997, when the subsection came into force.

85. Rimmer LJ rejected grounds 1, 3 and 4. As regards ground 3 he did so, at [57] to [60], essentially for the reasons set out by BT. He dealt with ground 4 at [62] to [73] concluding, at [71], that he had no doubt that the UT were correct:

"that the insolvency condition was disproportionate, unreasonable and unjustified and so infringed BT's directly effective EU law rights.....The problem with the insolvency condition in the Old Scheme was that the Scheme was identifying a bad debt by reference to the status of the debtor rather than by reference to a test under which the debt could reasonably be regarded as bad."

86. On ground 1, having set out the UT's analysis of BT issue 1 and HMRC's argument on appeal (based on the decision in *Allen* and other cases), Rimmer LJ said, at [84], that he would uphold the UT's conclusion on BT issue 1. He noted that "Mr Cordara made regular references to the claim being made under" s 80 "which the UT did not accept", and BT challenged that under its cross-appeal and that he would explain later why he considered the s 80 argument "to be mistaken". In the course of the discussion on this point, he noted, at [74], that the UT answered BT issue 1 on the assumption that BT had an EU right to claim "bad debt relief" under the Old Scheme and that that EU right "had to be enforced" under the Old Scheme and, at [75] that, at [165] of their decision, the UT said that;

"even though the Old Scheme's insolvency condition imposed an impermissible restriction on the right to relief, section 22 was nevertheless the domestic provision by which bad debt relief was to be delivered. *It had, therefore, to be read as providing the mechanism for a directly effective claim.* It is to be read as if it provided such relief by disapplying the insolvency condition." (Emphasis added.)

87. For the purposes of considering this issue, Rimmer LJ considered it important to identify how BT claimed to bring its claim for bad debt relief (disregarding the s 80 argument):

(1) At [86], he said that, as regards supplies made during the period from 1 January 1978 to 30 September 1978 during which there was no bad debt relief domestic legislation in place, BT was entitled nevertheless to enforce domestically its EU right under article 11C(1) as a claim of “an English common law restitutionary nature, in respect of which there would be a domestic limitation period of six years” .

(2) At [87], he said that, as regards supplies made from 1 October 1978 to 31 March 1989, BT was entitled to make bad debt relief claims successively under ss 12 and 22 in cases in which it could satisfy the Insolvency Condition, and in such cases it could make its claims either in its VAT return for the accounting period when it received the requisite insolvency document, or in any subsequent return (although the latter indulgence was removed in 1991). The time limits for making such claims were indisputably governed by the provisions of ss 12 and 22 (which themselves said nothing about time limits) and the regulations made under them (which did). No-one had suggested that there was anything wrong with those time limits from the perspective of EU law.

(3) At [88], he endorsed the UT’s approach as regards how effect was to be given to BT’s EU right in cases where Insolvency Condition was not satisfied. It could:

“as I would hold, and had it grasped the point at the time, also have made direct claims under article 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 sections 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. The adaptation and moulding required was, however, no more than was necessary to enable it to enforce its rights: it could not extend to incorporating time limits for making claims that were not already in the regulations. To the extent, therefore, that the regulations imposed time limits that were inapplicable to BT’s claims (those fixed by reference to the receipt of the insolvency document), they would be disapplied; but nothing would be added in their place. To the further extent, as followed, that no time limit was prescribed by the regulations for the bringing of the claims, BT would not have been subject to any time limit.”

88. At [89] he rejected HMRC’s argument that, by reference to EU law principles, the BT claim must be brought within a reasonable time. He thought that the error in that proposition is that:

“whilst BT would be directly enforcing its EU law rights, it would be doing so under the umbrella of domestic machinery that subjected it to no such limits; and the application or otherwise of limitation periods to the bringing of claims is a matter for the domestic law of the member state where the claim is brought. HMRC can, in my view, point to nothing in such domestic law that can justify its assertion that the direct enforcement by BT of its EU law rights under the provisions of sections 12 and 22 (as appropriately moulded) would have been subject to the condition that such claims must be

brought within a reasonable time. In particular, if the domestic legislation had properly implemented article 11C(1) but had expressly provided that refund claims could be brought without limit of time, that might have been unusual, but would not have been unlawful (compare the observations of Lord Scott of Foscote in *Fleming's case*.....at [20]). I can see no reason why the implied unlimited time for the bringing of BT's directly effective claims under the section 22 machinery is not equally lawful."

He noted the UT gave fuller reasons for the same conclusions and that he agreed with them.

89. At [92], Rimmer LJ turned to HMRC's ground 2. He said that he disagreed with the UT's conclusion that s 39(5) must be disapplied, or construed, under EU law, so as not to affect BT's exercise of its EU law rights (commenting "I do not myself understand how it could have been *construed* so as not to do so" ) on the basis that inadequate notice of the impending change proposed to be enacted by s 39(5) was given. He noted that the result was that the UT held that claims which accrued prior to 1 April 1989 could still be made after 18 March 1997 and, so it seems, at *any* time thereafter.

90. He noted that BT's essential submissions were that the UT's decision was correct for the reasons they gave but HMRC advanced cogent submissions as to why the UT's decision was wrong. At [94] he set out HMRC's four propositions as follows:

"(1) under EU law, a discretionary legal regime can be changed at will as long as the legitimate expectations of persons affected by the change are protected, such as by the provision of information indicating that a change in the law is foreseeable; or, where a change is sudden and unforeseeable, by a transitional period; (2) the relevant legitimate expectation is that of the *claimant* (in this case BT) to the protection of EU law, not that of another person; (3) a legitimate expectation cannot be claimed if a person, as a prudent and circumspect operator, had sufficient information to permit it to expect that (in this case) the Old Scheme could be withdrawn. In such a case, no transitional period is required; (4) on the facts, the termination of the Old Scheme was foreseeable and BT did not have a legitimate expectation on which it could rely in order to avoid the application to it of section 39(5). The net effect is that section 39(5) did not fall to be disapplied, or construed, in the way that the Upper Tribunal did."

91. HMRC cited *Gemeente Leusden* in support of the first two propositions (see [95] to [98]). As regards the third proposition, HMRC relied on the decision in *Plantanol* in particular at [43] onwards. Rimmer LJ cited many passages from this case at [101] which included the following (this is not the full citation):

'43. It must be recalled that the principles of legal certainty and protection of legitimate expectations form part of the Community legal order. On that basis, these principles must be respected by the Community institutions, but also by Member States in the exercise of the powers conferred on them by Community directives.....

44. It follows that national rules such as those at issue.....which are intended to transpose the provisions of Directives 2003/30 and 2003/96 into the domestic legal order, must respect those general principles of Community law.....

46. It should be recalled in that regard that, according to the case-law, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires on the one hand, that rules of law must be clear and precise and, on the other, that their application must be

foreseeable by those subject to them.....That requirement must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them.....

47. With regard to the requirement of clarity and precision, it must be held that, in the present case, the national rules which withdrew the tax exemption at issue in the main proceedings appear to comply with that requirement.....

49. It must, however, be recalled that, as the Court has already ruled, the principle of legal certainty does not require that there be no legislative amendment, requiring as it does, rather, that the legislature take account of the particular situations of traders and provide, where appropriate, adaptations to the application of the new legal rules (see *VEMW and Others*, paragraph 81). ...

51. With regard, more specifically, to the principle of the protection of legitimate expectations, it must however be pointed out that, in the main proceedings, the national legislature withdrew, before the date previously announced, a tax exemption scheme as regards which it had indicated on two occasions, by way of express legal provisions, that it would be maintained in force until a later date which had been clearly announced.

52. It must be accepted that a trader, such as the applicant in the main proceedings, who commenced his activities under the tax exemption scheme in favour of biofuels at issue in the main proceedings, and who, to that end, made costly investments, could see his interests considerably affected by the withdrawal of that scheme before the date announced, all the more so if that withdrawal takes place suddenly and unforeseeably, without leaving him enough time to adapt to the new legal situation.

53. It is clear from the Court's settled case-law that any economic operator on whose part the national authorities have promoted reasonable expectations may rely on the principle of the protection of legitimate expectations. However, where a prudent and circumspect economic operator could have foreseen that the adoption of a measure is likely to affect his interests, he cannot plead that principle if the measure is adopted. Furthermore, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the national authorities in the exercise of their discretionary power will be maintained.....

54. As regards the expectation which a taxable person might have as to the application of a tax advantage, the Court has already held that when a directive on fiscal matters gives wide powers to the Member States, a legislative amendment adopted under the directive cannot be considered to be unforeseeable (Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 66). ...

57. However, it is for the national court to determine whether a prudent and circumspect economic operator could have foreseen the possibility of such a withdrawal in a context such as that of the main proceedings. As the case concerns a scheme laid down under national legislation, the procedures for dissemination of information normally used by the Member State which adopted it and the circumstances of the case must be taken into account when the national court makes an overall and specific assessment of the question whether the legitimate expectations of the economic operators covered by those rules were duly respected in the specific case (see, to that effect, "*Goed Wonen*", paragraph 45). ...

59. The possibility cannot be ruled out that those circumstances, or some of them, were such as to indicate, and this is a matter for the national court to consider in the framework of the main proceedings, that the national rules

which withdrew the tax exemption at issue and which entered into force in a very short period of time, did not receive, at that time, a sufficient degree of publicity among interested parties ... thereby making access to the applicable rules of national law more difficult for the persons subject to those rules. ...

67. It must therefore be concluded that it is by taking account of all the foregoing factors, and all other circumstances relevant to the case before it, that the national court must consider, in the context of an overall assessment in the specific case, whether the applicant in the main proceedings, as a prudent and circumspect operator, had sufficient information to permit it to expect that the tax exemption scheme at issue in the main proceedings could be withdrawn before the date initially laid down for its expiry.”

92. At [102], Rimmer LJ noted that HMRC said no suggestion has been made that it was not open to the UK to change the Old Scheme; or, for example, to modify its New Scheme by reducing, as it did, the original two year period to six months. In HMRC’s view:

“Prudent and circumspect economic operators – such as BT – were not justified in holding any expectation that the Old Scheme would be maintained forever. As the Court of Justice explained, the question is whether such operators could have foreseen the possibility of the change that happened. In that connection, it is relevant to consider the publicity about the change that was given to interested parties. But the question does not turn on whether an authoritative advance announcement was made. The question is whether, in all the circumstances, the operator would have had sufficient information to permit it to expect that a change was possible.”

93. As set out at [103], HMRC said that “on the facts, the termination of the Old Scheme was foreseeable and BT did not have any legitimate expectation on which it could rely in order to avoid the application to it of s 39(5)”.

94. Rimmer LJ noted, at [104], that the UT took a rather different view as set out at [149] to [151] of their decision and at, [105], that in response to those points HMRC said that:

“in addition to the changes introduced by the FA 1990, the consequential 1991 Regulations and guidance, by way of a change to the previous practice, required any claims for relief under the Old Scheme to be made in the return for the tax period when the relevant insolvency document was received – they could no longer be made in any subsequent return. Mr Lasok [counsel for HMRC] said the circumstances introduced by these changes made it clear to any prudent and circumspect operator that there would necessarily come a time when any claims he had or might have under the Old Scheme would come to an end, following which there was a likelihood that the Old Scheme would be repealed. The prudent and circumspect operator does not in such circumstances do nothing. He may have a considerable volume of small bad debts arising from his pre-April 1989 supplies and for him to do nothing may be to find that the Old Scheme has been repealed before he has done what might be open to him. As a prudent and circumspect operator, he will have known for years of his directly enforceable EU law rights (or at least that he has a good arguable case that he has such rights), and will know also that any such rights will have to be enforced under the umbrella of section 22. If he does not, he will foresee that a time may come when there may be a material adverse change in the law with regard to claims under section 22, and it will be too late for him to make his claim. Mr Lasok pointed out that the evidence was that BT destroyed documents relating to bad debts six years after they arose, which he said was not the conduct of an operator relying on the expectation that it could make a claim at any stage in the future.”

95. At [106] Rimmer LJ said that he regarded those submissions (seemingly all those set out at [94] to [105]) as compelling:

“My intuition is that there is something inherently wrong in BT’s complaint that, as from 19 March 1997, section 39(5) unlawfully deprived it of its right to enforce its directly effective rights under article 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.”

96. Rimmer LJ noted, at [107], that the UT did not accept HMRC’s arguments noting that the main corpus of the UT’s reasoning was addressed to the GMAC case and he set out details of their reasoning at [107] to [115]. He set out, at [116] and [117] that, at [240] and [241] of *GMAC/BT UT* (as set out at [75] above), the UT addressed BT’s claims in respect of the period 1 January 1978 to 30 September 1978, before the enactment of s 12 of the FA 1978 and he summarised the UT’s decision on that point.

97. At [118], he considered the period from 1 January to 30 September 1978:

“we had some generalised discussion about this during the argument, but it did not distinguish between the types of case referred to in [116] and [117] above [as the UT had at [240] and [241] (see [75] above)]. Given my overall conclusion in respect of the main part of BT’s claims, namely, that part relating to supplies made during the period 1 October 1978 to 31 March 1989, I regard it as unnecessary to deal separately with these two types of case. Either they are blighted by the same problem as relates to the main claim; or else the only right that BT ever had to claim relief in respect of these bad debts was a common law restitutionary claim, which is long since statute barred.”

98. At [119], he said that, in respect of supplies during the period 1 October 1978 to 31 March 1989, he disagreed with the UT that s 39(5) did anything amounting to an unlawful curtailment of the exercise by BT of its directly effective EU rights under the Old Scheme. At [120], he added that he admitted to having derived little assistance in the resolution of this issue from the European authorities and he regarded the case “as having little about it that is akin to what happened in *Fleming*”. He did, however, agree with HMRC’s counsel that:

“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, be likely to have foreseen its eventual repeal. I also accept his submission that a claim by a litigant to a national court inviting a 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.”

99. At [121], he summarised the essential question as being:

“whether BT is right that the enactment of section 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, 20 years earlier. I explained in [48] above how, having regard to the nature of BT's business, the badness of the latest bad debts to accrue would have been apparent to BT within (at most) months of the end of 1989 – and within several years before 19 March 1997 (and see also the last part of [105] above)".

100. On that question he concluded, at [122] and [123], as follows:

"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.

I do not understand how such unawareness can be a relevant consideration. 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. The suggestion that the four-month warning of the impending change in the law was too short a warning for BT or those in a like position, is one with which I also disagree. 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. The [UT's] further suggestion that the four-month warning was insufficient to enable traders to seek the opportunity, should they wish to, of satisfying the domestic insolvency condition may be correct as a matter of fact. But the more relevant question is, I consider, whether the enactment of section 39(5) is one that infringed BT's directly enforceable EU rights to claim bad debt VAT relief in respect of its supplies made prior to 31 March 1989. In my judgment, it did not."

101. At [125] Rimmer LJ turned to BT's argument that its claims were correctly to be regarded as having been brought under s 80 so that it enjoyed the extended limitation period conferred by s 121. He noted that the s 80 argument was advanced as an alternative basis for the enforcement of BT's directly effective rights (alternative, that is, to s 22) and, if well founded, it would follow that the tribunal had jurisdiction to hear BT's appeal.

102. He explained, at [126], that the UT's view:

"succinctly expressed in [181] [see [46] above], was that section 80 applies to cases where the taxpayer has brought into account as output tax an amount that was not output tax due. When GMAC (and likewise BT) made its supplies, it accounted for tax which was then due. The subsequent failure of the customer to pay for the supply gave rise to a bad debt, and a possible claim for bad debt relief, which would be for the repayment of all or part of the output tax originally paid by BT. The arising of such bad debt did not, however, mean that the output tax earlier paid was not output tax due within the meaning of section 80. It was and remained so, and the arising of the bad debt did not retrospectively change that."

103. At [127], he noted that HMRC supported the UT's reasoning and that he too agreed with it and he added that:

“Not even BT seems to have believed that section 80 was relevant. Its somewhat ill-drawn claim letter of 30 March 2009 was in respect of bad debt relief and made no suggestion that it had made any payment of tax which was not output tax due. This, I take it, is the sense of the second sentence of the [UT's] answer to preliminary issue 3.”

104. Kitchen LJ agreed with Rimmer LJ but added a few comments of his own. At [130], he said that:

“it cannot be disputed that the UK was entitled to change the conditions under which bad relief was available pursuant to the powers of derogation conferred by Article 11C(1), and specifically to impose a time limit within which claims in respect of such supplies had to be brought, subject of course to the general principles of legal certainty and the protection of legitimate expectations.”

105. At [131] he said the concern was “the legitimate expectations of BT as the taxpaying person” as to which the following points were particularly material, at [131] to [134]:

“First, the Finance Act 1990 closed the Old Scheme in relation to supplies after 26 July 1990. From that point it would have been apparent to a prudent operator that there would come a time when the provisions of that scheme would be perceived to have run their course and it was likely that the legislation underpinning that scheme would be repealed.

Further, BT is, as I have said, concerned in this claim with supplies to 31 March 1989. These supplies were generally billed on a quarterly basis and so the latest debts within its claim would have fallen due within a few months thereafter and many years before 19 March 1997. As Mr Lasok submitted and I agree, by March 1997, all debts owed to BT in relation to supplies made before 31 March 1989 were either paid or time barred, a fact reflected in BT's practice of destroying its documents after six years. So for BT, by March 1997, the Old Scheme had indeed run its course, subject to its right to enforce its directly effective rights under EU law through the machinery of section 22 of VATA 1983, as appropriately adapted and moulded.

Moreover, as Rimer LJ has explained, BT had had since 1978 the opportunity to exercise its directly effective rights under EU law in respect of each and every bad debt as and when it arose. Nevertheless I am prepared to accept that it had, or at least must be considered to have had, a legitimate expectation that it would not be deprived of those rights without being given notice which was adequate for traders in its position.

BT and other traders were, however, given notice of the closure of the Old Scheme by the Budget Notice and Budget News Release of November 1996 and by the publication in December 1996 of the bill which became the Finance Act 1997. As prudent and circumspect operators they knew or must be taken to have known they had a period of nearly four months until the Act came into force to make a claim in respect of their directly effective rights, and to do so using the machinery of the adapted and moulded section 22 (without the insolvency condition).”

106. He concluded, at [135], that in all these circumstances and approaching the matter, as HMRC invited the court to do, on the basis of “any legitimate expectation BT held or was entitled to hold” he believed:

“that it and other traders in a similar position should have anticipated the possibility of the repeal of the legislation underpinning the Old Scheme. Further, and far from there being any sudden and unexpected withdrawal of a

right to claim bad debt relief in respect of supplies made prior to 31 March 1989, prudent and circumspect operators in the position of BT had ample time to act in the light of the notice they were given.”

107. At [136], he added that:

“it is a curiosity of this case that BT was plainly not aware of its directly effective rights, as Mr Cordara frankly accepted. Accordingly, it did not as a matter of reality have any expectation as to its entitlement to bring such a claim, and providing it with a longer period of notice would not have made the slightest difference to it.”

108. Lord Justice Christopher Clarke agreed and also added a few comments of his own. He said the following at [139] and [140]:

“Whether the curtailment was an unlawful infringement of BT’s rights depends on its effect on a litigant in BT’s position. A prudent and circumspect operator in BT’s position must be taken to have realised (i) that it had, at least arguably, directly effective EU rights which would invalidate the insolvency condition under the Old Scheme; (ii) that the Old Scheme might well be wound up so as no longer to be available for any claim thereunder; and (iii) that the likelihood of such a winding up would increase as time passed following the introduction of the New Scheme.

BT could have made claims under the Old Scheme from October 1978 down to 19 March 1997. The Old Scheme became ineffective on the next day, as had been foreshadowed in the Budget News Release of 26 November 1996. In circumstances where the New Scheme had come into existence in 1990 and where it was apparent that the Old Scheme might well be brought to an end at some stage thereafter – as the United Kingdom was entitled to do – the notice of nearly 4 months was not too short.”

109. He continued, at [141], to note that the UT held that it was wrong for GMAC (and others in the same position) to be required to bring a claim within a shorter period than that applicable to persons potentially entitled to make a claim under domestic legislation, on the grounds that a person seeking to enforce a claim under EU law must not be treated in a less favourable way than a person seeking to enforce an equivalent right under domestic law. He summarised the UT’s reasoning on this at [142] (as contained in [211] and [212] of their decision) and, at [143], said he disagreed:

“I do not see why the fact that HMRC has sought (unsuccessfully) to contend that the Old Scheme was EU law compliant means that, when it comes to determining whether the taxpayer was entitled to a transitional period, it should be assumed that it was. The Court must proceed on the basis of the law as it has held it to be. The analysis contained in para 212 of the Tribunal’s decision thus involves the erroneous assumption that the Old Scheme was EU law compliant in order to determine whether adequate notice was given of its termination. EU law is, in this manner, invoked so as to require a notice to the taxpayer in order that he may be able to comply with a condition which is in EU law terms invalid. This appears to me to be a contradiction in terms. It is also unclear to me how precluding BT from claiming to enforce its EU rights under the Old Scheme (without the insolvency condition) after the coming into force of section 39 (5) involves treating it in a less favourable way than a person seeking to enforce an equivalent right under *domestic law*.”

110. He concluded at [144] that:

“The illegitimacy or otherwise of any restriction on BT’s EU rights which is said to arise from section 39(5) because the Old Scheme was abolished is not, in my view, dependent on whether four months was too short a period to

enable some taxpayers to satisfy the invalid domestic insolvency condition. The relevant question is whether the removal of the right to claim under the Old Scheme (ignoring the condition) was made without adequate notice. In my judgment, it was not.”

### **Refusal of permission to appeal to the Supreme Court**

111. BT submitted an application to the Supreme Court to appeal against the Court of Appeal’s decision (“**the SC application**”). This included points which are in substance the same as some of those which BT now submits remain to be considered by the tribunal in a full hearing of this appeal. In outline only (as the document extends to 13 pages), the main points of relevance are that:

(1) BT emphasised that its primary case had always been that no recourse was needed to the Old Scheme to give effect to its EU rights; those rights are effective in themselves. However, the UT preferred a route toward giving a refund which passed through the Old Scheme holding that the abolition thereof was ineffective in EU law for lack of sufficient notice. On BT’s secondary case the abolition of the Old Scheme (without replacing it) had the consequence of depriving BT of its EU rights and so the process of abolition had to be carried forward consistently with EU principles enunciated in cases such as *Marks & Spencer No 1*; *Grundig Italiana v Ministero delle Finanze* c-255/00 [2002] ECR I-8003; and *Fleming*. The Court of Appeal erred in failing to apply these principles properly or at all.

(2) BT said that the Court of Appeal’s conclusion that BT had an EU right meant BT had a right under EU law which was self-sufficient and independent of any domestic source of rights as reinforced by its conclusion on the proportionality issue and that there was no EU law time bar to the exercise of its rights. BT considered that, in view of those findings, BT had no need to “shoe-horn” its claim into the Old Scheme. The source of rights was article 11C(1); it needed nothing more to receive its refund which should simply have been allowed. On that basis, the repeal of the Old Scheme was irrelevant. Alternatively, if BT was unable to enforce its EU right without assistance from the UK “bad debt relief” rules, the principle of effectiveness required that that Old Scheme was operated to provide assistance to BT’s claims rather than rendering the claim impossible or excessively difficult as is the effect of the Court of Appeal’s view.

(3) BT said that if the Old Scheme was a relevant component of BT’s procedural ability to claim, the Court of Appeal should have concluded that the repeal of the Old Scheme did not end its ability to recover but that it returned it to the position of having a direct claim which did not touch/need statutory mechanisms.

(4) BT asserted that, alternatively, in practical terms the repeal (if it did affect BT’s rights) was analogous to the imposition of a domestic time bar and so attracted the case law on the giving of proper notice. Taxpayers would not have readily understood at the time the repeal was announced that their directly effective rights (of whose existence they were in any event unaware) would be affected by the repeal. As such, it vastly increased the levels of notice required of the repeal. Accordingly, the case law referred to above was of great relevance but was largely ignored by the Court of Appeal. It did not concentrate on the adequacy of the notice period and took into account a host of considerations and relied on a number of factors which were directly contradictory to the approach taken in *Fleming* to this question. It acted flatly

contrary to its own decision that there was no time bar under EU law and the approach in *Fleming*. The Court of Appeal should have deployed those principles and concluded that if the repeal was an event which did have the effect of ending recourse to the EU right then the circumstances of the repeal were not remotely sufficient to comply with EU law. In that context the use made by the Court of Appeal of the concept of any supposed “legitimate expectation” by BT was misplaced on the basis that (amongst other reasons):

(a) BT did not have to establish a “legitimate expectation” (it just had an EU right).

(b) BT never asserted it had any such expectation that the Old Scheme would not be repealed – it had no rights under that scheme which did not apply to it and it assumed it was neither here nor there whether it was repealed. This was later reinforced when BT stated that: “BT has always frankly considered that it had no legitimate expectation of any relevance to do with the terms of the Old Scheme, since it fell outside it”.

(5) BT later pointed out that the Court of Appeal overlooked the fact that there was yet to be any factual findings:

“There is a sharp factual issue as to whether BT behaved prudently in the period prior to bringing its claim which turns on its conduct and state of knowledge in the legal and factual context, including positions taken by HMRC in connection with the issues over time, eg as to the nature of what was said, and with whom the statements reached. Thus, no witness evidence has yet been received...”

(6) As regards the Court of Appeal’s rejection of BT’s cross appeal, BT stated that the central point relied on was that when BT initially paid over the money it did so under a proper legal obligation (see [126]):

“The Court of Appeal seems not to have appreciated that (i) BT’s reliance on s 80 was not confined to s 80(1) but included s 80(1B) nor (ii) to have factored in the [UT] decision to the effect that an unexercised Art 11 right in one period leads inexorably to s 80 claims arising in later ones”.

(7) BT said that the point is that while (on a narrow, non-purposive, interpretation) s 80(1) may be confined to situations where there is no legal obligation to bring the sum into account at the moment it is paid, s 80(1B) deals with situations where VAT paid is treated as not due “*otherwise than as a result of ...an amount that was not output tax having been brought into account as output tax.*” It is therefore dealing with situations where the money is paid correctly (for whatever reason) but later emerges to be an overpayment. The point was that s 80 has been progressively designated as the main UK gateway for all such EU right claims. This makes sense as otherwise the UK will have been drawing a discriminatory distinction between different form of repayment methodologies for no good reason contrary, to the conclusions of the CJEU in *Marks v Spencer No 2* C-3-09/06 [2008] ECR I -2283 at [45] to [52] where it was held that comparable refund claims must be brought into line with each other within the machinery afforded by Member States. Accordingly, a purposive approach should be taken to the construction of s 80 in order to ensure that it provides a level playing field between different types of refund. Also:

“it is clearly discriminatory for the wide range of refunds falling within s 80 to have been granted the benefit of a limited period of the reopening of the time bar under s 121 FA 2008 while that has not been

afforded to refund claims such as BT's (no rational distinction exists between the categories) and (ii) this is a fortiori given the point below, that HMRC has established that for a different part of Art 11 (agreed price reductions), an unexercised right to claim a refund does fall within s 80, and so within the longer time limit afforded by s 121....

(8) BT said that the provision was certainly treated as relevant to bad debt relief claims at the time when s 121 was introduced and the BT claims were treated as *Fleming* claims by HMRC. In a footnote it was stated that:

“The full correspondence shows express acknowledgments by the Commissioners that they understood that the claim was made as a Fleming claim. Ignorant of the full evidential situation, the UT wrongly concluded at para 242 of its decision that no s 80 claim had been made. However, it is the substance of the claim that is determinative, in any event, not how it is described.”

112. I note that in its notice of objections sent to the Supreme Court, the comments made by HMRC include the following:

(1) As regards BT's footnote comment (see [112(8)], HMRC stated: “BT made the same claim to the CoA. HMRC disagree. In any event, the position has now been determined twice by lower courts, whose reading of the documents has been the same”.

(2) HMRC said that at all material times under the UK bad debt relief schemes relief was made available on condition that a claim was made. Hence if no claim was made, there was no bad debt relief. BT has never disputed the lawfulness of that condition. BT's attempt to rely on section 80(1B) is of no assistance as that provision also applies only where a person has paid to HMRC an amount by way of VAT that was not due to HMRC.

(3) HMRC noted that BT complained that the Court of Appeal did not take into account its own particular facts but said it was precisely those facts which were important to the decision in BT CoA.

## **Part C – Other Caselaw**

### **Court of Appeal decision in GMAC**

113. GMAC also appealed to the Court of Appeal against the UT's decision in *GMAC/BT UT* and, in *GMAC CoA*, a differently constituted panel in the Court of Appeal reached similar conclusions on the compatibility issue and the time limit issue to those reached in the BT case. HMRC submitted that in *GMAC CoA* Mr Cordara, as counsel for GMAC, raised arguments which in substance are the same as some of those which BT raised (a) in the SC application as grounds for an appeal to the Supreme Court, and/or (b) in these proceedings as issues which remain to be considered by the tribunal. HMRC noted that those arguments were all rejected in *GMAC CoA* as can be seen from the details of this case set out below.

114. Floyd LJ gave the judgement with which the other members of the panel agreed. At [89] he essentially upheld the UT's conclusion that the Property Condition and Insolvency Condition in the Old Scheme were incompatible with article 11C(1).

#### *GMAC's arguments on the time limit issue*

115. On the time limit issue, having set out a summary of the principles set out by the Court of Appeal in *BT CoA* at [94] onwards and details of the decision in *Fleming*, Floyd LJ set out GMAC's arguments, at [114] to [125]. The arguments GMAC made, as recorded at [114] to [122], were as follows:

(1) It is plain that in *BT CoA* the Court of appeal found against BT on the issue of whether there had been adequate notice of the abolition of the ability to claim relief under the Old Scheme on the particular facts of the BT case and that GMAC's facts were significantly different. The UT in *GMAC/BT UT* was right to conclude that the notice period was inadequate (referring to [123] of the *BT CoA*). See [115] and [116].

(2) On the basis of *Deutsche Morgan Greenfell* [2006] UKHL 49: (a) a party who has a mistaken view of the law which is falsified by a subsequent decision of the courts is to be treated as having made a mistake, and (b) such a person cannot be said to have failed to use reasonable diligence to discover his mistake if the true state of affairs could not be discovered until the court had pronounced its judgment. See [117].

(3) GMAC's case does not depend on the principle of "legitimate expectations". It had a directly effective right to bad debt relief. "Legitimate expectations" are relevant where the member state offers a discretionary legal regime which it removes without adequate notice. That was the reverse of this case, because the UK offered no regime of use to GMAC at all. GMAC asked "how can the abolition of an incompatible provision destroy a directly effective EU law right?" In *Marks & Spencer* the court emphasised that even the proper implementation of EU law into domestic law does not destroy the EU law right. It follows *a fortiori*, that the EU law right is not destroyed by its incompatible implementation. The only way in which the right could be defeated was by a properly introduced time bar. See [118] and [119].

(4) The court in *BT* failed to consider the full range of alternative remedies open to or potentially open to a taxpayer "when concluding that section 39(5) .....did not result in a taxpayer being treated less favourably than a taxpayer seeking to enforce an equivalent domestic law remedy" (see [120]):

(a) One alternative to give effect to the EU law right is by moulding the New Scheme to make it applicable retrospectively to GMAC's claims. The legislative history showed that the UK was, from the inception of the Old Scheme in 1978 through to its final demise in 1997 moving step-wise towards a scheme which properly implemented article 11C(1), successively removing the Insolvency and the Property Conditions. Once it is recognised that the earlier schemes were non-compliant, the appropriate re-moulding is somehow to allow the New Scheme to apply to earlier supplies. If that were done GMAC would have been able to bring its claims under the New Scheme. See [121].

(b) An alternative remedy is a claim under s 80. But for the Property and Insolvency conditions, GMAC could have made a claim on its returns for the period when the debts became bad. As a result, it over-declared the amount of VAT due, and was entitled to reclaim it under s 80. In rejecting this approach, the UT was wrong to focus only on the VAT period in which the supply was made. Although GMAC's claim had not been formulated as a s 80 claim (indeed the 2006 letter had expressly stated that it was not such a claim), the content of the 2006 letter correctly conveyed the facts underlying the claim. See [122].

#### *GMAC's arguments based on Iveco UT*

116. At [123], Floyd LJ continued to note that GMAC also placed some reliance on the decision of the UT in *HMRC v Iveco Limited* [2016] UKUT 0263 ("*Iveco UT*"), a case concerning the time limits for recovery of overpaid VAT. Before turning to

Floyd LJ's comments on this decision, it is useful to set out what the UT considered and decided in *Iveco* as summarised in the later decision of the Court of Appeal in *Iveco CoA*.

117. In *Iveco UT* the appeal related to HMRC's refusal to make a repayment of VAT in respect of promotional payments (or rebates) made to customers between the beginning of 1978 and the end of 1989 which Iveco said served to reduce the price of the relevant vehicles, but in respect of which it did not make any VAT adjustment. Iveco sent a letter to HMRC claiming the repayment in November 2011.

118. At [9] and [10] of the Court of Appeal's decision in *Iveco CoA*, Newey LJ explained that (a) the relevant provisions in UK law which implemented article 11C(1) as regards price reductions (regulations which became regulation 38 in the Regulations 1995) were not introduced in the UK until 1 January 1990 and did not apply to rebates paid before that date and (b) the predecessor to s 80, s 24 FA 1989, was also not introduced until that time. I note that at that time s 24 provided that persons who had overpaid VAT could claim a repayment subject to a time limit of six years from the date of overpayment or, in the case of mistake, six years from the date on which the claimant discovered, or with reasonable diligence could have discovered, the mistake. The time limit was subsequently amended as set out above.

119. It was accepted that Iveco had a directly effective right in respect of the rebates under article 11C(1), namely, a right to reduce the value of its supplies for VAT purposes, during the relevant period and the issue was (a) how that was to be given effect in the UK and (b) whether the claim was time-barred. At [29] and [30] Newey LJ noted that the parties had different views on the effect of the accepted directly enforceable EU right:

(1) The taxpayer argued that the "taxable amount" in respect of a supply was not automatically reduced when the price was reduced by a rebate. Rather it "had a directly effective right to bring about a reduction in the "taxable amount" at a time of its choosing". It did not exercise this right until, at the earliest, November 2011, when it wrote to HMRC seeking repayment so there was "no question of any part of the claim being time-barred".

(2) HMRC submitted that the "taxable amount" fell to be reduced when a rebate was paid. It was open to the taxpayer to reflect that reduction in its VAT account at the time. If it failed to do so its entitlement was to seek to recover the VAT overpaid in consequence, not to reduce the "taxable amount" later on

120. As Newey LJ set out at [21] of *Iveco CoA*, in *Iveco UT*, the UT concluded as follows:

"i) Unless and until domestic legislation provided otherwise, Article 11C(1) gave rise to a reduction in the "taxable amount" when a reduction in price took place (paragraph 72 of the decision);

ii) That being so, when Iveco accounted to HMRC without making any deduction for price reductions, it paid an "amount to the Commissioners by way of value added tax which was not due to them" (within the meaning of section 24(1) of FA 1989 and section 80(1) of VATA 1994, as originally enacted) or, once section 80 of VATA 1994 had been revised, "brought into account as output tax an amount that was not output tax due" (within the meaning of section 80(1)) or "paid to the Commissioners an amount by way of VAT that was not due to them" (within the meaning of section 80(1B)) (paragraphs 51 and 67-69 of the decision);



iii) Iveco could have advanced all its claims during the *Fleming* window (paragraph 70). That window having closed, it is now too late for Iveco to make any claim (paragraph 73 of the decision);

iv) If it is not possible to achieve this result as a matter of conventional construction of Section 80 and there is a need to mould a legislative provision so as to provide taxpayers with a means of enforcing their rights under Article 11C(1), the moulding should be of Section 80 rather than Regulation 38 (paragraphs 71, 76 and 77 of the decision).”

v) As regards price reductions dating from 1983 or earlier, any claim would anyway be precluded because (i) Iveco would have had a restitutionary claim to recover overpaid VAT, (ii) that claim would have become time-barred by 1 January 1990 [at [10], Newey LJ noted that s 5 of the Limitation Act 1980 lays down a six-year limitation period for an “action founded on simple contract” and that it was common ground that this period applies by analogy to common law restitutionary claims to recover overpaid tax] and (iii) such claims will not have been revived when regulation 7 of the 1989 Regulations and section 24 FA 1989 came into force on that date (paragraph 95 of the decision).”

121. Turning back to *GMAC CoA*, at [123], Floyd J said the following as regards *Iveco UT*:

“.....The UT considered whether a claim to recover the VAT associated with the price reduction could be made under section 80, and the corresponding regulation, [regulation 38]. That regulation provided that the taxpayer should adjust his VAT account by making a negative entry in the VAT payable portion of his return. *The UT however indicated that they considered that if the facts justifying a reduction existed, then it could be said in accordance with section 80 that the taxpayer had (a) ... accounted ... for VAT for a prescribed accounting period .... and (b) in doing so, has brought into account as output tax an amount that was not output tax due.*” (Emphasis added.)

122. He continued that the UT in *Iveco UT* said this in relation to a particular hypothetical example at [21] which he set out. I have also set out below the UT’s comments at [19] and [20] because that sets out the premise on which the example operated and puts into context the comments in [21]. It is plain that the UT was addressing a simpler situation than the actual situation they were considering in *Iveco UT*, namely, the case where all events took place at a later time once the UK rules were in place and after the end of the extended time limit under s 121:

“19. We also think that it is helpful to give a brief explanation of how this legislation works in an ordinary case where all the relevant events take place after the end of the Fleming window [namely, following the end of the additional period for claims allowed by s 121]. Take a simple example where a trader (T) sells a car to a purchaser (P) for £10,000 plus VAT of £2,000. Two years later, and thus in a later accounting period, the original price is reduced by £1,000 to £9,000 and T pays P £1,000 plus the relevant proportion of the VAT, £200.

20. In these circumstances, T ought to apply Regulation 38, the provisions of which appear to be mandatory. T should adjust his VAT account by making a negative entry for the relevant amount of VAT (£200) in the VAT payable portion of his VAT account: see Regulation 38(3)(b). The entry is to be made, under Regulation 38(5) in that part of the VAT account which relates to the prescribed accounting period in which the decrease is given effect in T’s business accounts. If T would otherwise have to account to HMRC for more than £200 of VAT, then the amount otherwise owing to HMRC will be

reduced by £200. If T would otherwise account for less than £200 of VAT or no VAT then that will give rise to a negative balance in the VAT payable part resulting in a payment to T by HMRC.

21. If T [the taxpayer] fails to implement Regulation 38, that is not an end of T's claim to credit or repayment of £200. The result of failing to implement regulation 38 is that, in the case where the amount otherwise due exceeds £200, T has paid too much VAT in the prescribed period just mentioned. It is accepted by both HMRC and Ivecos that section 80 is applicable. In other words, the reduction in VAT which T could have achieved by using regulation 38 remains VAT which was not due to HMRC so that T can make a claim under section 80 to recover it. We consider that that is a correct and purposive approach to the legislation.”

123. At [124] Floyd LJ noted that GMAC submitted that it had said enough for a claim under s 80 to be recognised, and the claim fell within s 80 “because the UT in *Iveco* considered that the failure to follow Regulation 38 meant that the VAT accounted for in the subsequent claim was not output tax due”.

#### *Conclusions in GMAC CoA*

124. At [126] to [132], Floyd LJ set out a number of points he considered to be of importance:

(1) At [126], it was not GMAC's case that the UK had failed to put in place any scheme for bad debt relief, only that the scheme which had been put in place, because it included the Property and Insolvency Conditions failed the EU law test of proportionality and:

“It would not therefore be a correct exercise of the power to mould section 22 to conform with the Directive to set the section aside in its entirety. Rather, this aspect of the case has to be approached on the basis that there remains in place a scheme for the relief of bad debts but without those parts of it which fall foul of EU law.”

(2) At [127], it was common ground that “the right to claim a reduction in the case of non-payment is not absolute” and accordingly:

“It is open to member states to impose formal conditions on the exercise of the right, and to subject its exercise to reasonable time limits. It is also open to member states to make changes to the scheme, whether by changing the conditions, or by exercising, in a proportionate way, its power to derogate from the right. To that extent, therefore, the debate about whether the regime is a mandatory or discretionary one is not susceptible of a binary answer. It is mandatory in the sense that effect must be given to the EU law right, but the manner in which that is done, in terms of conditions and time limits, affords the member state a margin of discretion. Taxpayers cannot rely on the conditions for relief remaining the same.”

(3) At [128], it is clear that Member States cannot retrospectively alter the time limits for claiming relief without adequate notice to the taxpayer. He did not accept this can only be done by means of a formal transitional provision embodied in legislation, and he noted that neither the UT nor the Court of Appeal thought so in the proceedings relating to BT either: “What is adequate notice in the circumstances of an individual case is a matter for the national court to determine. In all cases the guiding lights are the principles of effectiveness and the protection of legitimate expectations”.

(4) At [129], “the time limit must be fixed in advance” but the statements relied on in the present case did not fall foul of this requirement: “Taxpayers

would understand that an announcement to end the old scheme in a pre-budget statement would take effect from the next Finance Act, and realise that steps needed to be taken to claim relief before that”.

(5) At [130] it is important to appreciate what section 39(5) did:

“It is true that it ended the old scheme, and, in respect of a given supply, did not give the taxpayer access to the new scheme. It was not therefore an alteration in the conditions for claiming bad debt relief for that supply, in the sense that the relief could continue to be claimed subject to the altered condition. Claiming relief in respect of that supply was no longer possible after the enactment of that section. The effect was, however, not different to an alteration in a time limit for making claims, which would also terminate the right to claim relief in respect of that supply. The imposition of procedural hurdles of this kind plainly lies within the discretion of the member state, provided it acts in accordance with the principles of effectiveness and protection of legitimate expectations.”

(6) At [131], for the reasons explained by the Court of Appeal in *BT CoA*, with which “I am in full agreement, there was in truth a prolonged crossover arrangement between the old scheme and the new scheme” and:

“Section 22 was repealed by the Finance Act 1990 in relation to supplies made after 26 July 1990 but was left in place in respect of supplies before that date with the rider that supplies between 1 April 1989 and 26 July 1990 could be made under either scheme. A supply which only had available to it a claim under the old scheme was therefore of considerable antiquity when section 39(5) was enacted in 1997. The four month notice period must, in my judgment, be seen in that context.”

(7) At [132], the UT was wrong to speculate that there might be bad debts accruing to GMAC after the enactment of section 39(5). What was relevant for the purposes of EU law was whether there had been “total or partial non-payment”. As HMRC explained, the last of the relevant supplies would have been on or before 31 March 1989, and the longest hire purchase contract would have its final payment five years later. That left three years even in this extreme case for GMAC to establish that it was unlikely to be paid. It was not relevant in this context to consider how long insolvency procedures might have taken.

125. At [133], against that background, Floyd LJ concluded that the exercise of GMAC’s EU law rights was not rendered excessively difficult or virtually impossible by s 39(5) on the basis that:

“GMAC had more than adequate time to exercise their EU law rights and were given adequate notice of the withdrawal of the scheme. It is no answer to say that GMAC’s claim would have been rejected by the Commissioners in the same terms as their actual claim was rejected when it was eventually made in in 2006. As I have said, this part of the case must be approached on the basis of EU law for which GMAC contend and which I have held to be correct.”

126. At [134], he rejected the need to find any other route to give effect to GMAC’s EU law rights and, in effect, dismissed GMAC’s arguments based on the decision in *Iveco UT*:

“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). I would simply record my view, which is in conformity with the view which GMAC expressed to the Commissioners in their original

claim, that section 80 is not the appropriate domestic provision for giving effect to bad debt relief. When GMAC accounted for VAT on the whole value of the supply it did not account for VAT which was not due. That did not change at the point when GMAC considered the debt to be bad. To that extent, to the extent they are different, I prefer the views of the UT expressed in the present case to those expressed in *Iveco*.”

### **Court of Appeal decision in Iveco**

#### *Conclusion*

127. I turn to the decision in *Iveco CoA* on which BT relies. The leading judgement was given by Newey LJ with whom the other members of the panel agreed. I have already set out the issues in the case and the UT’s decision at [116] to [120] above. Newey LJ concluded, at [47] and [48], as follows:

“...it was incumbent on the United Kingdom to implement Article 11C(1) by providing for a reduction in the “taxable amount” at or soon after the time when a rebate was paid. It failed to do so until the end of 1989, but suppliers were nonetheless entitled to rely on Article 11C(1) against the United Kingdom. It was therefore open to a supplier to “make a negative entry for the relevant amount of tax” (to adopt words subsequently used in regulation 7(3) of the 1989 Regulations) in his VAT account when he paid a rebate. If he did not make such an entry at the time, his right to rely on Article 11C(1) will have allowed him to say that each relevant “taxable amount” should be treated as having been reduced when it would have been if the United Kingdom had duly implemented Article 11C(1) (in other words, at or soon after the time when a rebate was paid) and that, on that footing, he had made overpayments.

I do not see why a supplier’s entitlement to rely on Article 11C(1) against the United Kingdom should permit him to reduce the “taxable amount” himself (and so trigger a repayment claim) years later. There is, to my mind, no reason why an ability to rely on a provision in implementation of which the United Kingdom ought to have provided for a “taxable amount” to be reduced at or soon after the time when a rebate was paid should translate into a right for the taxable person to reduce the “taxable amount” himself, whenever he chooses, potentially decades later and at a time which the United Kingdom could not have adopted had it duly implemented.....”

128. Newey LJ then said, at [54], that given the above conclusions, *Iveco*’s remedy, as regards pre-1990 rebates, was to claim to recover overpayments, which it could do under s 24 FA 1989 and, later, s 80.

129. These conclusions were largely based on decisions of the CJEU. Newey LJ considered the UK authorities to be of little assistance but, if anything, to support HMRC’s position. I have set out the reference to the UK cases nevertheless as BT relied on them in its arguments in this case.

#### *Analysis of UK case law –GMAC/BT UT*

130. The parties referred, in particular, to *GMAC/BT UT* and the later decision in *BT CoA*. Newey LJ explained that the parties took differing views of the passage at [184] in *GMAC/BT UT* which he set out at [32]. To recap, at [184] the UT considered the position should they be wrong that GMAC’s method for enforcing its EU right to relief for total or partial non-payment under article 11C(1) was under the Old Scheme. The passage at [184] is set out above but is repeated here for ease of reference:

“Once it had become apparent that the taxable amount should be reduced pursuant to art 11C(1), it would be open to the taxpayer to claim appropriate relief. If, as Mr Cordara submits, s 22 does not apply, there is no domestic provision which indicates how or when the relief is to be given. But it is

obvious, we think, that the onus is on the taxpayer to make a claim; in the absence of a claim, HMRC would have no way of knowing that a bad debt had arisen. *It follows, unless and until a claim is indicated, that it cannot be said that any relief is to be afforded and that it cannot be said that any amount has been brought into account as output tax that was not output tax due. Accordingly, s 80 [of VAT 1994] does not, in our judgment, in terms apply to GMAC's claims.*" (Emphasis added)

131. Newey LJ set out, at [33] and [34], the differing interpretations the parties put on this passage:

(1) Iveco argued that the UT recognised in this passage that GMAC could not be said to have accounted to HMRC for more VAT than was properly due unless and until a claim was made and noted that the Court of Appeal had endorsed that view.

(2) HMRC attributed the perceived need "to claim appropriate relief" to the fact that the UT was "dealing with bad debt relief, which has always depended on the creditor asking for it" (noting that the relevant legislation referred to the making of a claim).

(3) HMRC said that the UT could not have been proceeding on the basis that GMAC would have been able to trigger a reduction in "taxable amount" at a time of its choosing since it could not then have concluded (as it did) that BT's (similar) claims would be time-barred if they fell to be dealt with under s 80 (see [244(c)] of the decision): "Had it been the case....that no "taxable amount" was reduced until the taxable person claimed, there could have been no question of BT's claims being too late".

132. On that point Henderson J concluded simply, at [34], that:

"In all the circumstances, it seems to me that the [UT's] decision cannot of itself lend any support to Iveco's case".

133. I note that, as set out in Part D, BT also referred to what the UT said in *Iveco UT* about [184] of *GMAC/BT UT*. One of the panel members in the UT in *Iveco UT* was also on the panel in the UT in *GMAC/BT UT*. The UT said at [60] of *Iveco UT* that [183] to [185] of *GMAC/BT UT* "are not as coherent as they might be, especially when read with what was said about BT's appeal in [242] to [244] in relation to Issue 3". Having set out some explanation of what was meant at [181] to [185] of *GMAC/BT UT*, they concluded, at [63], that they were not bound by what was said in *GMAC/BT UT* about s 80: what was said was obiter and "we gain no assistance from what was said and propose to deal with the present case paying little regard to it".

#### *Analysis of UK case law –BT CoA*

134. Turning back to the Court of Appeal decision in *Iveco CoA*, Newey LJ said, at [35,] that HMRC focused on the comments of Rimmer LJ in *BT CoA* about the element of BT's claim that related to the period between 1 January and 30 September 1978, when the UK had not yet introduced any "bad debt relief" scheme implementing article 11C(1). As set out in full above, Rimmer LJ said:

(1) At [86], that BT was entitled nevertheless in respect of that period to enforce domestically its EU right under art 11C(1) by way of a claim of "an English common law restitutionary nature, in respect of which there would be a domestic limitation period of six years".

(2) At [118], there was some generalised discussion about this during the argument but no distinction was made (as the UT had made) between (a) bad debts arising before October 1978, and (b) bad debts arising after that date but on supplies made before it and, given the overall conclusion in respect of the

main part of BT's claims (that part relating to supplies made during the period 1 October 1978 to 31 March 1989) it was:

“unnecessary to deal separately with these two types of case. Either they are blighted by the same problem as relates to the main claim [namely that it was subject to s 39(5)]; or else the only right that BT ever had to claim relief in respect of these bad debts was a common law restitutionary claim, which is long since statute barred”.

135. Newey LJ accepted, at [36], that as HMRC submitted, these passages are inconsistent with the taxpayer's case “since they implicitly assume that BT's rights accrued when the bad debts arose, not when it put forward its claim in 2009” but acknowledged that *Iveco* emphasised that Rimmer LJ's comments were based on no more than “generalised discussion”.

*Analysis of UK case law – Court of Appeal decision in GMAC*

136. At [37], Newey LJ referred to what Floyd LJ said on the time limit issue at [133] and [134] of *GMAC CoA* (see [125] and [126] above). At [38], he noted that *Iveco* suggested that in those passages Floyd LJ was there preferring the view that the UT had expressed at [184] of *GMAC/BT UK*, which *Iveco* considered supported its view, to the view of the UT in *Iveco UT*. He did not consider, however, that Floyd LJ's comments were of any real assistance to *Iveco*. He thought it apparent from the context that the part of the UT's decision in *Iveco UT* that Floyd LJ had in mind was that quoted at [123] of his judgement (see [121] to [123] above) and he commented that:

“What, therefore, Floyd LJ was considering was whether a claim could be made under s 80 in circumstances where regulation 38 had already been enacted and, hence, article 11C(1) had been implemented. He concluded that the answer, as regards bad debt relief, was “No” and that the [UT] was mistaken if and to the extent that it said anything inconsistent with that in *Iveco*. To my mind, Floyd LJ's view is readily explicable in relation to bad debt relief, which has always been something that a creditor must claim. In any case, Floyd LJ is not, as I see it, to be taken to have approved [Iveco's] interpretation of paragraph 184 of the [UT's] decision in *GMAC UK plc v HMRC*.” (Emphasis added.)

*Conclusion on UK caselaw*

137. At [39] Newey LJ concluded that the UK case law was “of rather limited assistance”, but that, in so far as it was of help to either party, it tended to favour HMRC because Rimmer LJ's judgment in *BT CoA* was consistent with their submissions. He seemed here to refer to Rimmer LJ's comments as regards the period when the UK had not yet enacted any bad debt relief provisions (see [134] and [135] above).

*European case law*

138. Newey LJ then turned, at [40], to the EU authorities, and set out details of the decision of the CJEU in *Freemans plc v Customs and Excise Commissioners* (Case C-86/99) [2001] STC 960 on which HMRC relied. In that case, *Freemans* sold goods through an agent who bought them at the prices given in a catalogue but whose account was credited with a sum equal to 10% of each payment, which he could then withdraw, set off against an outstanding balance or use against new purchases; he was not, however, entitled to pay, from the outset, the catalogue price less the 10% discount. Under the UK's domestic legislation, the “taxable amount” fell to be reduced only when an agent used his discount by withdrawing it or setting it against what he would otherwise owe. *Freemans* argued that the “taxable amount” was never

more than the catalogue price less the discount or, alternatively, that the “taxable amount” had to be reduced when the discount was credited to an agent’s account.

139. Newey LJ recorded that the CJEU decided that the taxable amount “is the full catalogue price of the goods sold to the customer, reduced accordingly by the amount of that discount at the time when it is withdrawn or used in another way by the customer”, (see [36]) and set out the explanation of this conclusion (at [35] of the CJEU’s decision) as follows:

“at the time when it credits the amount in question to the agent’s account established in its books, Freemans has not yet actually paid the ... discount to the agent. Where the agent does not use that amount, Freemans disposes of it by adding it to its profit and loss account. It is only when the customer uses the....discount that the discount is actually paid, so that, as art 11C(1)....provides, the taxable amount for the corresponding purchase must be reduced accordingly under conditions to be determined by the member states.”

140. He also set out the following passage at [31] of the CJEU’s decision:

“it must be stated that art 11C(1).... must be interpreted as meaning that, in a sales promotion scheme such as that at issue in the main proceedings, the taxable amount constituted by the full catalogue price must be reduced as soon as the agent withdraws or uses in another way the amount with which her separate account has been credited.”

141. He set out, at [41], that (a) HMRC argued that the *Freemans* case shows that, unless and until implementing legislation has modified the position in a permissible way, a “taxable amount” is reduced under EU law as and when the price is reduced, but (b) *Iveco* pointed out that the issue in *Freemans* was whether the “taxable amount” was reduced in accordance with the UK implementing legislation or at an earlier stage; it was not a case where there had been no implementation of article 11C(1) in the UK.

142. Newey LJ thought, at [41], that there was some force in *Iveco*’s submission but said that there could be:

“no question of the United Kingdom having been free to delay substantially the time at which a “taxable amount” was to be reduced as a result of a rebate. The fact that Article 11C(1) provided for the “taxable amount” to be reduced “under conditions which shall be determined by the Member States” will have given the United Kingdom a margin of discretion, but a limited one.”

143. He also considered, at [42], the decision of the CJEU in *Minister Finansów v Kraft Foods Polska SA* (Case C-588/10) [2012] STC 787 which concerned Polish legislation under which a taxable person could not reduce a “taxable amount” unless the purchaser had acknowledged receipt of a correcting invoice. The CJEU decided that, although Member States had a margin of discretion as to the formalities that taxable persons were to comply with (see [23]), in such circumstances “VAT neutrality is affected when it is impossible or excessively difficult for the supplier of goods or services to obtain such acknowledgment of receipt within a reasonable period of time” (see [38]). Thus, as the CJEU said in [40]:

“If it is impossible or excessively difficult for the supplier of goods or services to recover, within a reasonable period, the excess VAT paid to the tax authorities on the basis of the initial invoice because of the [relevant] condition....., the principles of VAT neutrality and proportionality require the member state concerned to permit the taxable person to establish by other means before the national tax authorities, first, that he has taken all the steps

necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and that he is aware of it and, second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice.”

144. He then cited in full, at [43], the following passages taken from a little earlier in the CJEU’s judgment:

“26. As to whether the principles of VAT neutrality and proportionality preclude such a requirement, it must be noted that art 90(1) of the VAT Directive [i.e. the Principal VAT Directive] *requires the member states to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person* (see *Goldsmiths (Jewellers) Ltd v Customs and Excise Comrs* (Case C-330/95) [1997] STC 1073, [1997] ECR I-3801, para 16).

27. *That provision embodies one of the fundamental principles of the VAT Directive, according to which the basis of assessment is the consideration actually received and the corollary of which is that the tax authorities may not in any circumstances charge an amount of VAT exceeding the tax paid by the taxable person* (see, to that effect, *Goldsmiths* (para 15)).

28. It is also apparent from case law that measures to prevent tax evasion or avoidance may not, in principle, derogate from the basis for charging VAT except within the limits strictly necessary for achieving that specific aim. They must have as little effect as possible on the objectives and principles of the VAT Directive and may not therefore be used in such a way that they would have the effect of undermining VAT neutrality, which is a fundamental principle of the common system of VAT established by the relevant European Union legislation (see, to that effect, *Goldsmiths* (para 21); *Staatssecretaris van Financien v Stadeco BV* (Case C-566/07) [2009] STC 1622, [2009] ECR I-5295, para 39 and the case law cited: and *Vandoorne NV v Belgium* (Case C-489/09) (27 January 2011, unreported), para 27).

29. Consequently, if reimbursement of the VAT becomes impossible or excessively difficult as a result of the conditions under which applications for reimbursement of tax may be made, those principles may require that the member states provide for the instruments and the detailed procedural rules necessary to enable the taxable person to recover the unduly invoiced tax (*Stadeco* (para 40) and the case law cited).

30. Moreover, as regards the possibility, under art 183 of the VAT Directive, of providing that excess VAT is to be carried forward to the following tax period or refunded, the court has made it clear that the conditions for the refund of excess VAT cannot undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part (*EC Commission v Hungary* (Case C-274/10) (26 May 2011, unreported), para 45).

31. The court has stated that such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that excess VAT. This implies that the refund is to be made within a reasonable period of time (*EC Commission v Hungary* (para 45)).”

145. He referred, at [44] and [45], to the highlighted passages above and also noted that “the margin of discretion which Poland enjoyed because article 90(1) of the Principal VAT Directive provided for the “taxable amount” to be reduced “under conditions which shall be determined by the Member States” was a restricted one and



did not allow Poland to impose conditions preventing a taxable person from obtaining a refund within “a reasonable period of time”.

146. He noted, at [46], that the UK legislated for a supplier who had granted a rebate to make a negative entry in the tax payable portion of his VAT account relating to “the prescribed accounting period in which the ... decrease is given effect to in the business accounts of the taxable person” (see regulation 24(5) of the 1989 Regulations). In his view, had the UK instead provided for a rebate to be reflected in the supplier’s VAT account very much later, it would “plainly have failed to implement article 11C(1) properly” noting that:

“There is nothing in the wording of Article 11C(1) to suggest that a reduction in the “taxable amount” could legitimately be deferred to any great extent (the more so since the French language version uses “est réduite” in place of “shall be reduced”), and it would be wholly inconsistent with the “precise and unconditional nature of the obligation” imposed by Article 11C(1), the “fundamental” principle that it embodies and the importance of VAT neutrality to allow a Member State to evade Article 11C(1) by delaying a reduction substantially. To the contrary, a refund must be made available within a reasonable period of time (compare paragraph 31 of the judgment in the *Kraft Foods* case).”

#### *Conclusion in Iveco CoA*

147. He then concluded, at [47] and [48] as set out at [127] above and said he would add the following comments, at [49]:

(1) There could be no objection to HMRC taking issue with Iveco’s contentions: Cases such as *Fantask A/S v Industriministeriet* illustrate that a Member State can properly contend that a claim based on its failure to implement a directive properly is time-barred.

(2) He could not see why, as Iveco argued, the timing of the outcome required by article 11C(1) (i.e. the reduction of the “taxable amount” in the case of a rebate) “must depend upon the exercise by the individual of their directly effective rights”:

“A supplier is entitled to rely on Article 11C(1) in relation to the period between 1978 and 1989 notwithstanding the United Kingdom’s failure to implement it, but nothing in Article 11C(1) indicates that the taxable person is intended to be able to determine the point at which a “taxable amount” is to be treated as having been reduced as a result of a rebate, let alone that he should be free to do so many years later.”

(3) It was not correct, as Iveco suggested, that HMRC’s case was that s 80 had served to reduce the relevant “taxable amounts”. Their case was that s 80 provided a remedy where, independently of that provision, a supplier could show that it had overpaid.

(4) The ability of a supplier who had paid a rebate to recover the VAT that he would not have paid if the price had been reduced from the start cannot have depended on the UK introducing provisions such as regulation 38 or s 80:

“Since Article 11C(1) conferred directly effective rights, a supplier must have been able to rely on it, and to obtain appropriate redress, in advance of any implementing legislation and, in fact, regardless of whether any steps were ever taken to implement Article 11C(1). Any other conclusion would... be inconsistent with the directly effective nature of the supplier’s rights.”

148. He summarised the position, at [50], as follows:

“In short, it seems to me that, on the assumption that Iveco paid rebates between 1978 and 1989 without making adjustments in respect of them in its VAT accounts, it was at once (or at least after the expiry of a relatively short period) entitled to maintain that the relevant “taxable amounts” should be treated as having been reduced and, accordingly, that it had overpaid.”

149. Finally, given his conclusions, at [52] to [54], he rejected Iveco’s submission that it was therefore necessary to look for a vehicle to achieve the reduction in the “taxable amount” and that was to be found in regulation 38. He noted that HMRC argued that by 1990, when the relevant UK law came into force, Iveco was too late to pursue any claim arising from rebates between 1978 and 1984, since the restitutionary claim that (on HMRC’s case) it would previously have had would by then have become time-barred. However, in their view, in so far as Iveco still had a claim, its remedy was, to be found in s 80. HMRC submitted that that provision was designed to apply where there had been an overpayment and could have afforded Iveco redress here. They:

“drew an analogy with *Birmingham Hippodrome Theatre Trust Ltd v HMRC* [2014] EWCA Civ 684, [2014] STC 2222 and the *Leeds City Council* case, each of which proceeded on the footing that s 80 was applicable to overpayments flowing from failure to implement a directive correctly. In the *Leeds* case, Lewison LJ noted (at paragraph 13) that Section 80 “is intended to be a complete statutory code for the repayment of overpaid VAT”.”

150. However, in Newey LJ’s view, at [54]:

“Its remedy, as regards pre-1990 rebates, was to claim to recover overpayments, which it could do under section 24 of FA 1989 and, later, section 80 of VATA 1994. Section 24(1) provided for HMRC to be liable to a person who had “paid an amount to the Commissioners by way of value added tax which was not due to them”, and section 80 VATA 1994 contained almost identical wording until 2005. Viewing matters in the way I do, the words were apt to apply. In 2005, section 80 of VATA 1994 was amended by the Finance (No. 2) Act 2005, but one or other of subsections (1) and (1B) (I do not think it is necessary to decide which) will then have been applicable. On this basis, Iveco’s claim must be time-barred in its entirety. It had to be brought by, at the latest, the end of the *Fleming* window in 2009.”

151. He added, at [56] and [57] that the restitution issue was accordingly academic; “Whether or not claims relating to pre-1984 rebates survived to 1990, they (like claims arising from later price reductions) must be time-barred now”. He did not therefore need to address the merits of the issue.

## **Part D – Submissions**

### **HMRC’s case**

#### *Overview*

152. HMRC submitted that the appeal should be struck out on the basis that it had no reasonable prospect of success for the following reasons:

(1) In their answers to the BT issues, the Court of Appeal clearly decided that the BT claims were out of time for all the reasons set out in their judgement in *BT CoA*. That decision is binding on BT in these proceedings such that, under the doctrine of cause of action estoppel forming part of the res judicata principle, BT cannot raise the issues it seeks to raise:

(a) The decision in *Johnson v Gore Wood* [2002] 2 AC 1, HL sets out the proper approach to the principles of res judicata (see, in particular, pages 23, 38D-F, 29H and 31 of that decision and see also Halsbury’s

Laws Civil Procedure at [1603], [1605], [1606], [1623] and [1624]). Those principles have been set out more recently by the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 (“*Virgin*”). It is apparent from the caselaw that in this case, the cause of action doctrine is engaged and not the issue estoppel doctrine. However, even if issue estoppel is in point, that principle also operates to prevent BT raising the points it seeks to raise.

(b) The principles of res judicata can apply in VAT cases on the authority of *Building Societies Ombudsman Company Ltd, R on the application of v HMRC* [2000] STC 892 at [81] to [84] (“*BSOC*”).

(c) HMRC accept that, in certain circumstances, the concept of issue estoppel does not apply in VAT cases but those circumstances do not apply here (see *Littlewoods Retails Ltd v HMRC* [2014] EWHC 868 (Ch) (“*Littlewoods*”).

(2) In any event, even if BT were to be permitted to raise all issues of fact and law it wishes to raise in a full hearing in this tribunal, the tribunal would inevitably have to dismiss the appeal given it would have to apply the determinations made by the Court of Appeal in *BT CoA* as well as those made in other relevant cases (such as *GMAC CoA*). None of the issues of fact or law BT wishes to raise give rise to any prospect of BT’s appeal succeeding.

I have set out details of the relevant caselaw on the res judicata principle at [153] to [171] below. HMRC’s detailed submissions on the decision in *BT CoA* are reflected in my conclusions at Part E.

#### *Caselaw on res judicata*

153. In the *Virgin* case Lord Sumption summarised the law on res judicata in terms with which the other four members of the Supreme Court all agreed: see [17] to [26], and [42]. In the course of this explanation, Lord Sumption explained the difference between cause of action estoppel, issue estoppel and abuse of process.

154. At [17] he said that res judicata is a “portmanteau term” which is used to describe a number of different legal principles with different juridical origins. He described the principles of relevance in this case as follows:

(1) “Cause of action estoppel” refers to the principle that “once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings”.

(2) “Issue estoppel” refers to the principle that “even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties”.

(3) There is also the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, “which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones”.

(4) There is “the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles...”

155. At [18] he set out the principle stated by Wigram V-C in *Henderson v Henderson* at [115] of that decision:

“...where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not

(except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, *but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...* Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule.”

156. At [19] he said that Wigram V-C’s statement of the law “is now justly celebrated” and that this principle “is probably the commonest form of res judicata to come before the English courts”. He noted that in later cases this has been cited to be the authority for the “wider sense” of res judicata and classified as part of the law relating to abuse of process.

157. At [20] he referred to *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (“*Arnold*”) where the issue was whether in operating a rent review clause under a lease, the tenants were bound by the construction given to the very same clause in earlier litigation between the same parties over the previous rent review. The Court of Appeal had subsequently, in other cases, cast doubt on that construction. The House of Lords approached the matter, therefore, on the footing that the law (or the perception of the law) had changed since the earlier litigation. Lord Sumption set out Lord Keith of Kinkel’s explanation in *Arnold* of the distinction between cause of action estoppel and issue estoppel:

“Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened. (104D-E)

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. (105E)”

158. Lord Sumption noted that the situation in *Arnold* was treated as one of issue estoppel but he thought that the real issue was whether the flexibility in the doctrine of res judicata which was implicit in Wigram V-C’s statement extended to an attempt to reopen the very same point in materially altered circumstances. Lord Keith of Kinkel, with whom the rest of the panel agreed, held that it did.

159. At [21], he set out that in *Arnold*:

(1) Lord Keith regarded the principle stated by Wigram V-C that res judicata extended to “every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought

forward at the time” applied to both cause of action estoppel and issue estoppel. Cause of action estoppel, as he had pointed out, was “absolute in relation to all points decided unless fraud or collusion is alleged”. But in relation to points not decided in the earlier litigation, *Henderson v Henderson* opened up:

“the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action” (105B).

(2) Lord Keith considered that in a case where the earlier decision had decided the relevant point, the result differed as between cause of action estoppel and issue estoppel:

“There is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different.” (108G-H)

(3) Lord Keith set out that the relevant difference between cause of action estoppel and issue estoppel is that:

“in the case of cause of action estoppel it was in principle possible to challenge the previous decision as to the existence or non-existence of the cause of action by taking a new point which could not reasonably have been taken on the earlier occasion; whereas in the case of issue estoppel it was in principle possible to challenge the previous decision on the relevant issue not just by taking a new point which could not reasonably have been taken on the earlier occasion but to reargue in materially altered circumstances an old point which had previously been rejected”.

(4) Lord Keith formulated the latter exception at 109B as follows:

“In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result.”

(5) Lord Sumption said that this enabled the House of Lords to conclude that the rejection of the court’s construction of the rent review clause in the subsequent case-law was “a materially altered circumstance which warranted rearguing the very point that he had rejected”.

160. Lord Sumption concluded, at [22], that *Arnold* is authority for the following three propositions:

“(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.”

161. At [23] and [24], Lord Sumption rejected the submission that recent case-law has re-categorised the principle in *Henderson v Henderson* so as to treat it as being concerned with abuse of process and to take it out of the domain of res judicata altogether so that the basis on which Lord Keith qualified the absolute character of res judicata in *Arnold* by reference to that principle is no longer available, and his conclusions can no longer be said to represent the law.

162. He noted that the principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. He then referred to the well-known authority on this principle, *Johnson v Gore-Wood & Co* [2002] 2 AC 1 where Lord Bingham held that the principle in *Henderson v Henderson* was “both a rule of public policy and an application of the law of res judicata” and expressed the relationship between the two at page 31 as follows:

“*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”

163. Lord Sumption explained that the rest of the panel, apart from Lord Millett, agreed in terms with Lord Bingham’s speech on this issue and Lord Millett agreed in substance in his comments at 58H-59B as follows:

“Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it. In *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in *Manson v Vooght* [1999] BPIR 376, 387, it is not concerned with cases where a court has decided the

matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.”

164. At [25], Lord Sumption said that it was clearly not the view of Lord Millett that because the principle in *Henderson v Henderson* was concerned with abuse of process it could not also be part of the law of res judicata. Nor is there anything to support that idea in the speech of Lord Bingham. The focus in *Johnson v Gore-Wood* was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run. He said:

“Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court’s procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank* at p 110G, “estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process”.”

165. At [26], he concluded that the distinction made by Lord Keith in *Arnold* “remains a compelling one” and:

“Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims.”

166. The comments of Rix LJ in the *BOSC* case indicate that res judicata principles can apply in a VAT context but they were not part of the binding decision in that case. As noted, HMRC accepted that, on the authority of the decision in *Littlewoods*, issue estoppel does not apply in VAT cases to some extent but submitted that that decision does not affect cause of action estoppel.

167. In *Littlewoods*, Henderson J (as he then was) accepted that there are limits on the operation of issue estoppel in VAT cases on the basis that the principle set out by the Privy Council in *Caffoor v Income Tax Commissioner* [1961] AC 584 (“*Caffoor*”) in relation to the operation of issue estoppel in direct tax cases also applies to VAT. As set out by Henderson J at [169] and [170], in *Caffoor*:

- (1) The trustees of a trust established in Ceylon were assessed to income tax for the tax year 1949/50 on the basis that a statutory exemption from liability to income tax did not apply but, on appeal, the Board of Review (broadly the equivalent to the tribunal) held that the income did fall within the statutory exemption.
- (2) Precisely the same issue then arose on appeals from assessments on the trustees for the five succeeding tax years.
- (3) The trustees argued that the issue had already been conclusively determined in their favour by the previous decision of the Board of Review.

168. At [171] Henderson J set out that Lord Radcliffe rejected the trustees' argument as follows:

“..... The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it (see section 75). Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning upon the construction of the Ordinance or of other statutes or upon the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly submitted to determination.”

169. Henderson J concluded at [175] that there was no doubt that the *Caffoor* principle remains good law in England and Wales, at least in relation to income tax, corporation tax, capital gains tax and other annually assessed (or, nowadays, self-assessed) taxes, “where the basic question for determination is the correct amount of tax payable for the relevant year or period of assessment”. He noted that the principle has been consistently applied at first instance by the High Court in a number of cases. At [190] he said that in the light of the statutory scheme of VAT he could:

“see no good reason why the *Caffoor* principle, with suitable modifications, should not apply to it in a similar way, at least where the dispute relates to the amount of VAT chargeable on supplies of goods or services in one or more (usually quarterly) periods, or to assessments (whether of VAT, interest, penalties or surcharges) made for particular periods, or to claims for the repayment of VAT originally paid in respect of particular periods. In all these cases, the periodic framework in which the issue arises may be reasonably regarded as analogous with the yearly assessment of income tax and other direct taxes, although there is of course no equivalent to years of assessment as such, and no limit to the number of VAT accounting periods which may be aggregated in a single assessment or determination. To my mind, however, these are differences of machinery rather than substance, and the more significant points are that VAT is in essence a transaction-based tax which is returned and accounted for on a periodic basis.”

170. He then considered whether the EU case law has any impact on the issue concluding, at [197], that the CJEU has held, in terms, that:

“res judicata (in the sense of issue estoppel) cannot prevent application of the EU doctrine of abuse of rights in the field of VAT on a year by year basis. In such circumstances, the principle of legal certainty is trumped by the principle of effectiveness. The Court did not decide, no doubt because it did not need to, whether the same reasoning would apply in relation to other alleged breaches of EU law, but it must in my view be strongly arguable that the same approach should be adopted whenever an issue of liability to VAT arises....”.

171. HMRC submitted that it is plain that the decision in *Littlewoods*, as based on the *Caffoor* principle, does not give an escape valve from the application of res judicata principles in this case. The circumstances in which, in line with that principle, it was held that issue estoppel does not operate in VAT cases are very different from the circumstances in this case: namely, where the Court of Appeal has determined how the VAT rules apply as a matter of law in relation to the relevant bad debts in all the relevant periods under consideration. In this case, the limitation on the operation of issue estoppel held to be applicable in *Littlewoods* would be in point only if, for



example, at some future point, HMRC were to re-visit BT's VAT position in relation to bad debts in subsequent VAT periods.

### **BT's submissions**

172. BT argued that, as the UT recognised at [1] of *GMAC/BT UT*, the BT issues to which the Court of Appeal provided answers address only some of the issues in this appeal. Moreover, the UT and the Court of Appeal could only properly address pure questions of law; it is clear that the BT issues were transferred to the UT on the basis that it (and, hence, the Court of Appeal) were not to consider any analysis of the facts. The Presidents of the tribunal and of the UT were very clear that they did not want the UT to have to deal with questions of fact. Moreover, in BT's view, it is apparent from the correspondence between the parties leading up to the transfer of the BT issues (as summarised at [8] above), that the parties did not intend that the issues of "due notice", "legitimate expectation" and whether the BT claims were made outside the applicable time limits under s 80 and s 121 were to be transferred to the UT and the Court of Appeal for determination (particularly given the factual content of these issues).

173. BT submitted that, in a full hearing of its appeal, the tribunal should approach the answers to the BT issues provided by the Court of Appeal in the same way as answers provided by the CJEU on a referral to it. On that basis, the answers can be applied by the tribunal only in the light of the facts it finds on the evidence yet to be presented. Where the Court of Appeal has determined the BT issues by reference to assumed facts or hypothesis they cannot be applied to BT's appeal unless and until they are proven in a hearing in the tribunal.

174. BT made various assertions in relation to HMRC's behaviour in relation to agreeing the BT issues. BT suggested that HMRC were uncooperative, they "entirely scuppered" efforts to provide a statement of agreed facts to the UT, they "just would not entertain" a statement of facts prepared by BT and that, whilst the original questions were reasonably clear, HMRC wanted to narrow the scope and, in particular, "absolutely refused", even to pose the question as to whether or not the Insolvency Condition was valid. The result was, so BT said, that the questions put to the UT ended up being made on certain suppositions and presented in a way that was not very succinct or clear. BT said that at the time it considered that it was better to go with some questions than none at all.

175. BT also noted that HMRC opposed its application for the facts to be determined by the tribunal prior to the hearing in the Court of Appeal and that the tribunal's refusal of its application led to the Court of Appeal considering the BT issues in a factual vacuum. BT explained that its application was not heard until 7 October 2013 and the tribunal's decision was released only on 23 October 2013 by which point the Court of Appeal hearing was imminent; it started on 29 October 2013.

176. Overall, the suggestion was that BT has been treated unfairly, in particular, as regards what it considers to be the unsatisfactory framing of the BT issues which it attributes to HMRC's actions, HMRC's "refusal" to agree a statement of facts and BT's inability to air the factual issues in the tribunal. BT asserted that it was a matter of HMRC's choice that, in its view, as is entirely unsatisfactory and unfair, the relevant factual matters (in, particular, as regards whether the BT claims were made under s 80) were not dealt with properly in the proceedings in the UT and Court of Appeal. BT seemed to be of the view that this should weigh in favour of the tribunal adopting its view of the scope of the BT issues and its stance that this appeal should proceed to a full hearing.

*BT's stance on res judicata*

177. On the res judicata and issue estoppel issues, BT said the following:

(1) It follows from the points made above, that the doctrine of cause of action estoppel does not apply. BT's whole cause of action has not been completely addressed by the Court of Appeal. In effect, the whole appeal is still before the tribunal. Moreover, the general applicability of res judicata in public law cases and revenue cases in particular is not the same as in general private civil litigation (see Spencer Bower Fourth Edition at 1301 and Halsbury's Laws Fifth Edition volume 12A ("**Volume 12A**") at 1626).

(2) The self-assumed burden on HMRC is to demonstrate that it would be an abuse of process for the appeal to be heard (see Volume 12A note 4).

(3) Only issue estoppel could be in point but it is highly questionable that that doctrine applies at all in these circumstances (see Volume 12A at 1605) given that (a) the Court of Appeal's views were given in a factual vacuum (by preference of HMRC) and (b) any factual assumption made by the Court of Appeal (even if expressed as a purported conclusion) is not binding (see Halsbury's Laws volume 11 at 25 and note 15) given the pure question of law before the Court of Appeal and the lack of any evidence presented to it. By definition preliminary issues do not involve all the issues. They do not attract any *Henderson v Henderson* type obligations especially where one side prevented the issues being as wide as the other wished. There is no authority that a party may not raise other issues in the wake of findings on a first set of preliminary issues.

(4) Before treating the decision of the Court of Appeal as functioning as an issue estoppel, the following points must be considered:

(a) It is necessary to identify a clear issue as set out in the BT issues. Answers outside the scope of the BT issues put to the Court of Appeal are by definition obiter.

(b) The conclusion must be within the jurisdiction of the Court of Appeal. Factual findings and answers to questions not asked are, therefore, excluded (see Volume 12A at 1603).

(c) There is a well-established exception to the doctrine where subsequent relevant events, factual or legal come to pass which alter the position (see Spencer Bower at 8.31 and Volume 12A at 1603 and 1606). That has occurred here in the shape of the *Iveco CoA* and *ITC* decisions. *Iveco CoA* establishes that a failure to make a claim under article 11C(1) matures automatically into an overpayment of tax for the purposes of s 80 in the next accounting period thereby demonstrating that a purported claim in respect of bad debt relief made many years after the event is to be treated as a s 80 claim (in particular under s80(1B)). *ITC* establishes that all restitutionary claims in VAT should pass through s 80.

(d) An overarching principle is that estoppels must be "certain to every intent" (see Volume 12A at 1632 and note 2) and "plain and obvious" leaving nothing to be disposed of (Volume 12A at 1624 note 8). That is far from the case here for the reasons set out below.

*Summary of asserted outstanding issues and of HMRC's responses*

178. A summary of the particular issues of law and fact which BT consider to be still outstanding (and which it considers give a reasonable prospect of its appeal succeeding) is set out below together with a summary of HMRC's response to each point, as set out in italics below each of BT's arguments:

(1) BT: Whether or not the repeal of the Old Scheme for bad debt relief was done with due notice to taxpayers generally and BT in particular. This is a mixed question of fact and law. No evidence at all has been received as to the process of notification. As noted, this question and the “legitimate expectation” issue were alluded to by the Court of Appeal of their own volition and did not form part of the BT issues. The Court of Appeal’s view on those issues, therefore, must be disregarded by the tribunal or, at least, only considered in the light of all the evidence once presented. That this was the intention and scope of the transfer of the BT issues to the UT for determination must be respected by the tribunal to ensure that justice is done.

*HMRC: This point was within the ambit of the BT issues and has been decided by the Court of Appeal (see [123], [135] and [140] of BT CoA). The Supreme Court refused BT permission to appeal against these conclusions despite BT’s claim that the Court of Appeal erred on the basis that the question required a factual enquiry.*

(2) BT: Whether or not BT’s legitimate expectations have been recognised and respected in respect of *all* aspects of its claim (whether on withdrawal of the Old Scheme or otherwise). Again, this is question of mixed fact and law, no evidence has been presented and this question was not before the UT and the Court of Appeal.

*HMRC: This was decided by the Court of Appeal (see [120] to [123] of BT CoA). The test set out was an objective one that does not involve evidence of the subjective views or beliefs of a particular operator such as BT. See also the comments in Fleming at [64] for the rejection of a subjective intention as a basis for disapplication of primary legislation. In the SC application, BT disavowed any reliance on this point.*

(3) BT: The extent to which the withdrawal of the Old Scheme has any relevance to the BT claim and subsequent appeal given that BT could never have made a valid claim under the scheme before it was withdrawn. The Court of Appeal was wrong to assume, as it appears to have done, that this was the only gateway for BT to claim relief and that the BT claims were made under the Old Scheme; it was not. The BT claim was made under an EU right. The Court of Appeal held that EU law claim to be in time as a matter of EU law. Its holding that there was no “legitimate expectation” that the Old Scheme would be abolished was beside the point as explained below.

(4) BT: Establishing the correct route to a remedy for BT in light of the finding that the Insolvency Condition represented a breach of EU law. This is a question of fact and law and arises in the context of other potential routes to give effect to BT’s EU right which were not considered by the Court of Appeal as the potential availability of other routes did not form part of the BT issues. The Court of Appeal did not deal with the possibility that the BT claims were to be treated as made under the New Scheme which was in force when the BT claims were made and which was EU law compliant.

*HMRC: Both this point and that in (3) were decided by the Court of Appeal (see [85] to [88] and [118] of BT CoA). This is a pure question of law and again BT’s application for permission to appeal to the Supreme Court against this was rejected.*

(5) Whether the correct route is under s 80 and whether BT make a valid claim under those provisions in time. The UT and Court of Appeal dedicated very little time to this issue and had very few factual reference points. As a

factual matter the wording of the BT claim supports that it was made under s 80 as does the wider context which BT has not yet had the opportunity to provide through witness evidence. In any event the timing point was not before the courts for decision as noted above. These points are expanded on below.

*HMRC: This was decided by the Court of Appeal (see [126] of BT CoA) and BT's application to appeal against this was rejected by the Supreme Court.*

(6) Whether or not BT acted as a reasonably diligent taxpayer when seeking to exercise its directly effective rights under EU law. This question was not before the Court of Appeal for decision.

*HMRC: This test, if different from the "due notice" and "legitimate expectation" test applied by the Court of Appeal, is an impermissible attempt to raise a point in the tribunal that was not raised in the Court of Appeal.*

(7) BT: Whether BT has or had been discriminated against in terms of its treatment by the Commissioners in respect of its claim for overpaid VAT and/or the exercise of its EU right.

*HMRC: The question whether BT has been discriminated against as regards the Insolvency Condition has been resolved in favour of BT. Any alleged discrimination based on differences in treatment of claims under s 80 and under the UK "bad debt relief" provisions was rejected by the Supreme Court when it refused to give permission to appeal. It is not clear that this was raised before the Court of Appeal but it could and should have been if it were to be taken. In any event, there is now a decision by the CJEU which means that this point has in effect been decided against BT (see below).*

(8) BT: Whether (a) as a matter of fact BT did make a claim under s 80 for repayment of overpaid VAT and such a claim was made in time and (b) payments on account of VAT were made to HMRC that were not in respect of VAT due at the time when paid for the purposes of s 80. As noted, BT's stance is that it has at least an arguable position that its EU right is to be given effect under s 80 on the basis that the BT claims were in fact made under that provision and the Court of Appeal's judgement in *Iveco CoA* has now established that s 80 is the correct route for a person in BT's position to obtain relief.

*HMRC: Whether BT purports to have made the BT claim under s 80 is irrelevant given the Court of Appeal's conclusion that it could not be such a claim in law. BT included a footnote in the SC that the Court of Appeal had erred in its application of the facts but the application for permission to appeal was refused. The decision in *Iveco CoA* does not assist BT's case and does not detract from the conclusions reached in both *BT CoA* and *GMAC CoA*. HMRC's further points on this are set out below.*

#### *BT's detailed submissions*

179. BT expanded on the above points as follows:

(1) Whilst HMRC assert that BT did not overpay VAT in terms of the express wording of the UK legislation in s 80, that is not the test. The test is whether BT overpaid VAT as a matter of European law, and if so, how BT is to give effect to its EU right. BT has plainly demonstrated that it has overpaid VAT as a matter of EU law. In *Iveco CoA* it was clearly held that such an EU right is to be given effect under s 80.

(2) The UT and Court of Appeal confused the factual background in the *GMAC* litigation with BT's own fact pattern and, in particular, the basis of the

BT claims. BT's position has always been that it made its claim under s 80 whereas (due to its different factual position) GMAC's emphasis was on the "bad debt relief" provisions and the effect of s 39(5). BT's case simply has not been considered yet on its own particular fact pattern and as regards any "legitimate expectation" that it may have had, if still relevant, in that context.

(3) As a factual matter the wording of the BT claim supports that it was made under s 80, as does the wider context in which the BT claims were made, which BT has not yet had the opportunity to provide through witness evidence. As noted, the UT was not charged with making findings of fact and also arguably did not even make a purported finding in respect of the nature of the BT claims given the UT said "so as far as we can see" when making the relevant statements. To re-characterise the BT claims as made under Old Scheme, which had been long repealed when the claims were made, is unfair because BT never believed it had a claim under that scheme. Moreover, HMRC treated the BT claims as s 80 or "Fleming" claims.

(4) The Court of Appeal took a subjective approach to the "legitimate expectation" test in terms of what BT ought to have known and the position of BT's advisers. The tribunal still needs to consider what knowledge BT ought to have had at the relevant time and, in light of the developing caselaw, when BT could reasonably have identified a mistake. BT intends, therefore, to produce extensive evidence of BT's knowledge at the time and of industry and professional experts who may reasonably comment on the knowledge that might be expected of a reasonably diligent and prudent taxpayer (in the light of the law) at the relevant time. This evidence will demonstrate that BT did act as a reasonably diligent and prudent taxpayer when it sought to exercise its rights in 2009 as set out below. In this regard, BT produced a witness statement from Mr Rhys Smithson, the Indirect Tax Director at BT dated 14 July 2017. In outline, Mr Smithson set out (a) that BT did not consider that it could make the BT claims under the Old Scheme but that it could make them under s 80, (b) that BT considered that the BT claims were in fact made under that provision, (c) that HMRC accepted that the BT claims were s 80/"Fleming claims", and (d) other matters in support of the position set out at (5) and (6) below.

(5) The Court of Appeal criticised BT on the basis that it ought to have appreciated that it had an EU right sooner than it did. However, in BT's view, the introduction in 1997 of (a) s 39(5) and (b) the three year time limit in s 80 (which, under s 47 FA 1997, applied from 18 July 1996) barred a claim for relief by BT before it could reasonably have determined that the UK legislation was incompatible with EU law and that it may have an EU right. (BT might otherwise have a claim in restitution to the High Court but that is not a point for consideration here):

(a) Neither it nor any other reasonably diligent taxpayer could reasonably have concluded that it had an EU right until, at the earliest, when the decisions in *Elida Gibbs Limited v HMRC* [1996] STC and *Goldsmiths (Jewellers) Limited v CCE* [1997] STC were made on 24 October 1996 and 3 July 1997 (being the cases which, in BT's view, resulted in the three-year cap for the making of claims under s 80).

(b) It was not until the three-year time limit in s 80 was in effect lifted as a result of *Fleming* that BT could bring a claim for the recovery of overpaid VAT arising during the relevant period as now recognised by it as having been "overpaid" in breach of EU law.

(c) When the BT claims were made, it was thought that the time bar issue under s 80 was settled following the *Fleming* litigation (and the subsequent extension of the time limit under s 121) but the question of what effect s 39(5) had had not then been considered at any judicial level. The tribunal first considered this in relation to GMAC in its decision released on 6 May 2010.

(6) BT did not say it had any “legitimate expectation” that the Old Scheme would continue forever which was impacted by s 39(5); that was GMAC’s “legitimate expectation”. In 1997, BT would not have been interested in whether it had a further four months in which to bring a claim for “bad debt relief” under the Old Scheme, because it considered only the s 80 route was available, which, at that time was already closed to it (due to the three-year time limit then in place). BT was reasonable in adopting that position because HMRC has now stated in *Iveco CoA* that s 80 was the correct mechanism for bringing such claims. Hence, any “legitimate expectation” BT may have had would have been in relation to s 80, as it stood at that time. However, that is not relevant because any potential prejudice to taxpayers, such as BT, has already been addressed by the UK extending the three-year time limit for claims under that section (ultimately by s 121).

(7) BT made the following criticisms of the approach of the UT and the Court of Appeal to BT issue 3:

(a) The Court of Appeal only dedicated three paragraphs in answer to the s 80 point and:

“There is no clear indication in that judgment as to exactly what it considered, how much weight it attached to any of those documents or evidence, and it looks as if it did not really apply its mind to any of the additional materials presented to it (being additional to those presented to the UT). If it did not apply its mind to the relevant materials, then one has to question the reliability of that decision, so as to be bound by the policy of *res judicata*, issue estoppel or cause of action estoppel.”

(b) Neither the UT nor the Court of Appeal applied their minds to what constitutes a claim for the purposes of s 80 but there is now further authority on that issue (see *Bratt Autoservices Company Ltd v HMRC* [2018] EWCA Civ 1106). BT complied with the relevant requirements (in regulation 37 of the Regulations 1995) and could clearly satisfy HMRC under their *Fleming* guidelines, that it had a claim, and of the amount of that claim.

(c) The Court of Appeal did not give proper consideration to s 80 in the form in which it was in place when the BT claims were made. At that time, it had been amended to include s 80(1B) but the Court of Appeal only referred to s 24 of the Finance Act 1989 (which did not include equivalent wording). Given the Court of Appeal never actually applied its mind to the correct legislation, it cannot be argued that this point is *res judicata* or subject to issue estoppel.

(8) It is “somewhat circular” to say that s 80 does not apply to provide relief in these circumstances because the Court of Appeal made that conclusion in *BT CoA* when, in that case, the Court of Appeal was not drawn to the same points by HMRC as those that HMRC made in *Iveco CoA*. The s 80 issue was

approached by HMRC in *BT CoA* in a completely conflicting way to their approach in *Iveco CoA* (see below).

(9) HMRC were concerned to say that the BT claims did not constitute claims under s 80 because of the size of the claims. In their very first submissions before the Court of Appeal, HMRC drew attention to the value of the BT claims. The size of the BT is simply a reflection of the fact that BT is a large supplier, who makes large returns for VAT and is also a large payer of tax across the board. For example, BT paid taxes in 2018 of just over £4 billion. Any objective test as regards a taxpayer's "legitimate expectation" (although it is disputed that it is an objective test) should be applied in the same way in respect of all taxpayers; it should not matter whether or not the claim is for a large or small sum. The question arises of why HMRC did not seek to apply the time bar in s 80 in BT's case. The reason is that, if BT are able to rely on s 80, the BT claims are clearly in time. However, when it has genuinely overpaid VAT (as it is now clear that it has) and made a claim which conformed with all the relevant requirements, like any other taxpayer BT expects to be refunded.

180. BT submitted that, even if, contrary to its view *res judicata* principles are in point, they should be permitted to bring their argument based on *Iveco CoA*. That is on the basis that, for the reasons set out above, only issue estoppel can be relevant and that permits new matters such as this to be raised, in particular, given that the law in this area is uncertain and developing. In BT's view, the decision in *Iveco CoA* establishes that BT had a s 80 claim all along. Applying the principles in that case, it was entitled, under article 11C(1), to a reduction in the "taxable amount" when the bad debts arose thereby meaning that it had paid tax which was "not due" for the purposes of s 80 (and, in particular, for the purposes of s 80(1B)).

181. In support of this, BT made the following main points:

(1) Article 11C(1) is stated to apply in precisely the same way as regards each of the five events it applies to. When any of those events occurs, the requirement is that "the taxable amount shall be reduced". It would be extraordinary if, as a matter of EU law, it is permissible for Member States to apply wholly different tests for how this requirement operates as regards these events. However, that is precisely the situation currently in the UK given the different outcomes in the Court of Appeal as regards rebates and bad debts/total or partial non-payment:

(a) In the proceedings in relation to both GMAC and BT, HMRC's stance was based on the premise that, where a taxpayer has an EU right under article 11C(1) as regards total or partial non-payment, the reduction in the "taxable amount" arises only as and when a claim is made for relief. On that basis, HMRC argued, as was accepted by the Court of Appeal, that the output tax paid by BT in respect of the consideration it did not recover from its customers on the relevant supplies *was not* tax which was not due within the meaning of s 80; rather, in their view, it was tax that *was and always remained due*.

(b) HMRC's stance in *Iveco CoA*, which was accepted by the Court of Appeal, was that the opposite position applies as regards rebates. It was held that Iveco's EU right under article 11C(1) entitled it to a reduction in the taxable amount, broadly, when a rebate was paid and not, as Iveco argued, only when it submitted a claim for repayment to HMRC. It was held, that, on that basis, Iveco had accounted for tax on the consideration for the supply, which was then rebated to the customer, which was not due

within the meaning of s 80 so that in principle Iveco was entitled to a refund under that provision (although its claims was out of time).

(c) Accordingly, HMRC has successfully raised in the Court of Appeal in *Iveco CoA* precisely the same arguments that BT raised in the Court of Appeal in *BT CoA* (albeit that Iveco's claims related to rebates and BT's to bad debts). It was BT's stance that its EU right in respect of the BT claims entitled it to a reduction in the taxable amount when the bad debt arose, so that, accordingly, it had overpaid VAT which *was not due* for the purposes of s 80.

(2) BT relied in particular on HMRC's contentions set out at [32] to [36] of *Iveco CoA* and the Court of Appeal's conclusions on them (see [130] to [135] above). In its view, these passages plainly demonstrate that (a) HMRC is "endeavouring to ride two horses which are going in different directions" in its differing approach to the appeals by GMAC and BT and by Iveco and (b) Newey LJ accepted that the same analysis as he adopted in relation to rebates applied to bad debts. BT said the following:

(a) HMRC contended in *Iveco CoA*, in effect, that in *GMAC/BT UT* the UT did not consider that GMAC and BT had the ability to trigger a reduction in the "taxable amount" at a time of their choosing but rather their rights in that respect accrued when the bad debt arose (see [34]). In stating that the relevant comments in *GMAC/BT UT* did not provide support for Iveco's contrary view (that there was no reduction in the taxable amount until a claim was made), Newey LJ, in effect, accepted that an EU right under article 11C(1) in respect of bad debts accrues when the bad debt arises.

(b) Moreover, Newey LJ agreed with HMRC's contention that the approach in *BT CoA* is inconsistent with Iveco's case, since the Court of Appeal implicitly assumed that BT's EU right accrued when the bad debts arose and not when BT made the BT claims in 2009 (see [36]).

(c) Newey LJ therefore concluded that this case law supported HMRC's stance (see [39]).

(3) BT also noted that a number of Newey LJ's remarks were in general terms and were not confined only to a rebate situation, such as the sentence, at [48]: "I do not see why a supplier's entitlement to rely on Article 11C(1) against the UK should permit him to reduce the taxable amount himself and so trigger a repayment claim years later".

(4) Finally BT referred to the UT's decision in *Iveco UT*, where Warren J (who was also part of the panel in *GMAC/BT UT*) said that the somewhat different conclusion the UT reached in *GMAC/BT UT* was lacking "in overall coherence" (see [60] and [62]) and that its comments were obiter meriting "little regard" (see [68]).

182. BT submitted that the wide applicability of s 80 has been confirmed by the Supreme Court in *ITC*. In that case they held that all claims made by taxpayers of a restitutionary nature are to be treated as funnelled through s 80.

183. BT added that if HMRC are correct that s 80, as a whole, has no relevance to BT's claim, then BT's claim equally cannot be subject to the "ouster clause" of s 80(7). On that basis, BT has a claim in restitution before the High Court which is not out of time. That is a reason why these points need to be considered in detail. It is in HMRC's own interests to accept that s 80 applies as otherwise the clock will start



ticking on restitutionary claims at six years from when somebody acting diligently could have identified the mistake in law which, at the earliest, would be when the Court of Appeal made its decision in *BT CoA*.

184. In BT's view any issues regarding the scope of the tribunal's jurisdiction to finally determine the appeal are entirely separate from the SC application whereby BT applied for permission to appeal against the Court of Appeal's decision. That separate procedure does not supplant the jurisdiction of the tribunal and the overriding objectives that bind it under the Rules. To the extent that the utilisation of the procedure under rule 28 may give rise to unjust or unfair outcomes, the operation of that rule may need to be revisited. If the tribunal is to derive little assistance from the BT issues in the light of the facts the appeal it will need to consider the answers given in that context and apply its own mind to the rightful and just disposal of the appeal

185. BT emphasised that it is clear that it has overpaid tax and it has not been treated fairly as regards its appeal. The tribunal is seized of the whole appeal and has to apply the overriding objectives to dispose of a case fairly and justly including by enabling the parties to participate fully in the proceedings. In terms of its evidence and the way in which this appeal has been processed through the system, BT has not been able to participate fully, in particular, when it was denied the opportunity for the facts to be found by the tribunal before the BT issues were heard by the Court of Appeal. There is clearly a reasonable case to be argued, and a reasonable prospect of success of BT succeeding on its overall appeal in this tribunal.

#### **HMRC's further submissions**

186. HMRC made the following main points in response to BT's arguments:

(1) There is no basis for BT's assertion that any factual matters determined in the proceedings before the UT and Court of Appeal were not within the remit of the BT issues transferred to the UT:

(a) It is correct that a transfer of preliminary issues to the UT was thought of as a way to avoid the need for detailed factual findings or to minimise any factual disputes. However, nothing in rule 28 states that only preliminary issues of law can be transferred to the UT. Although that would be the most usual situation, quite often matters which usually involve limited questions of fact, such as limitation issues, are dealt with as preliminary issues. When the Presidents of this tribunal and the UT agreed to the transfer, the only requirement was that the parties were to produce agreed issues acceptable to the Judge; there was no requirement that the issues were to be confined solely to preliminary issues of law.

(b) It is inherent in the questions posed under the BT issues that the matters which BT assert are not included in the BT issues are included. Moreover, the correspondence that took place between the parties when agreeing the BT issues plainly demonstrates that BT was fully aware that the BT issues covered these matters.

(c) HMRC did not somehow force BT to proceed with the transfer of the BT issues to the UT without fact finding on the nature of the BT claims. At the time, HMRC's concern was that the Insolvency Condition issue and related discrimination argument should not be presented to the UT without there being any factual determination. Whilst BT's application for the facts to be heard in the tribunal was rejected, it was open to BT to appeal against that decision but it did not do so.

- (2) In any event, many of the matters BT refer to as factual matters, such as the nature of the BT claims and the “legitimate expectation” test, primarily raise objective questions of law.
- (3) Moreover, there is no conceivable factual finding that would be relevant that could possibly undermine the clear determinations made by the Court of Appeal in *BT CoA*. The only factual findings that are needed are those regarding the date of the BT claims, the terms of the claim letter, and the relevant legislative landscape; all those have been determined.
- (4) Whichever res judicata principle is in point, BT is estopped from raising the points it seeks to raise:
- (a) In effect BT assert that the Court of Appeal made a wrong decision in *BT CoA* but, even if that is right, a wrong decision is as binding as a correct one for this purpose.
  - (b) Even if the doctrine of issue estoppel is in point, there are no special circumstances and there is no supervening decision of a court which entitles BT to raise its arguments.
- (5) The decision in *Iveco CoA* does not suggest that the decisions in *GMAC CoA* and *BT CoA* were wrong as regards the conclusion that, for the purposes of s 80, there is no overpayment of tax in bad debt cases (see [38] and [39]). There is nothing in that decision which casts doubt on the ability of the UK to put in place a regime for the relief of bad debts which requires a claim to be made. The comments in *Iveco CoA* at [34] to [36] do not support BT’s assertions. The decision in *ITC* is not relevant. In effect, I have addressed HMRC’s further submissions on these points in my conclusions.
- (6) On the position as regards whether the BT claims were made under s 80 as a matter of fact and law:
- (a) The UT’s finding that the BT claims were not, as a factual and legal matter, made under s 80 must encompass both sub-s(1) and sub-s(1B).
  - (b) BT appealed to the Court of Appeal against the UT’s finding on this point on raising all the points it now argues.
  - (c) As regards the “factual issue” as to whether BT made a claim under s 80:
    - (i) BT raised no issue about factual findings relating to the nature of the BT claim when the parties were agreeing the scope of the BT issues. BT did raise this after the hearing in the UT but it did not appeal against the tribunal’s refusal of its application for the tribunal to conduct a hearing to make factual findings.
    - (ii) In any event, determining the nature of the BT claims is not purely a question of fact. It raises an objective legal question as regards the correct legal construction of the relevant letter in which the BT claims were made. The transcript of the hearing in the Court of Appeal shows that when pressed on this point, BT accepted that this is a matter of legal analysis.
    - (ii) Moreover, BT had the chance to appeal to the Court of Appeal on the basis that it was procedurally unfair for the UT to have made the relevant findings without considering the background facts. That issue was set out in BT’s skeleton argument and was developed in oral argument before the Court of Appeal as shown in the transcript of the hearing.

(iii) It is plain that the Court of Appeal did not dismiss BT's appeal so far as it related to the UT's factual finding in ignorance of the underlying BT claims; it is evident from the transcript that the Court of Appeal were taken to the relevant letter and they commented on it (see [127] of *BT CoA*).

(iv) BT made a loosely articulated appeal against the Court of Appeal's decision on this point in a footnote in the SC application but the Supreme Court refused permission to appeal.

(v) The case of *Bratt Autoservices Company Ltd v HM Revenue and Customs* [2018] EWCA Civ 1106 simply demonstrates further that the Court of Appeal regard the issue of whether a claim is correctly made under s 80 as being one of law.

(c) The Court of Appeal's decision on this point must also be taken to encompass both s 80(1) and s 80(1B) given that it upheld the UT's decision. In any event the reasoning adopted as to why s 80 is not in point, applies equally to s 80(1B).

(d) The argument that s 80(1B) applies as a matter of law was raised in the SC application but the appeal was refused. In any event, the Court of Appeal has held in *GMAC CoA*, perhaps with the benefit of fuller argument, that s 80 is not the provision that gives effect to an EU right as regards a claim for bad debt relief. If BT now proposes to raise some variant of the s 80 legal argument already raised, that should have been raised before both of those courts; at the very least, it would be abusive for it to be raised now.

(7) On the discrimination point, the recent decision by the CJEU in *Compass Contract Services Ltd v HMRC* (Case C-38/16) [2017] BVC 30 ("*Compass*") has settled that there is no discrimination in circumstances such as these.

187. In *Compass*, as set out at [18] and [19], the question the CJEU considered was whether the principles of fiscal neutrality, equal treatment and effectiveness preclude UK legislation which, following the *Fleming* litigation, in s 121, in effect, set a different transitional period for the introduction of the three-year time limit as regards (a) claims for repayment of overpaid VAT and (b) claims for the deduction of input VAT:

(1) On the one hand, under s 121(1) that three-year limitation period did not apply to a claim for repayment of overpaid VAT for an amount brought into account, or paid, for a prescribed accounting period ending *before 4 December 1996* if the claim was made before 1 April 2009.

(2) On the other hand, section 121(2) provided that the limitation period did not apply to a claim for deduction of input VAT that became chargeable in an accounting period ending *before 1 May 1997* if the claim was made before 1 April 2009.

188. The CJEU explained, at [20], that *Compass* had made a claim for repayment of overpaid VAT which was rejected on the basis of s 121(1) but which would have been in time if the longer period specified in s 121(2) was applicable.

189. At [25], the CJEU set out that according to settled case-law:

“a breach of the principle of equal treatment as a result of different treatment presupposes that *the situations concerned are comparable, having regard to all the elements which characterise them.....*The elements which characterise various situations, and hence their comparability, must in

particular be determined and assessed in the light of the subject matter of the provisions in question and of the aim they pursue, whilst account must be taken for that purpose of the principles and objectives of the field to which the measure at issue relates.” (Emphasis added.)

190. In assessing whether the situations were comparable:

(1) At [30] and [31], the CJEU noted that the claim for repayment of overpaid VAT concerns “the right to recovery of sums paid but not due which, according to settled case-law, helps to offset the consequences of the tax’s incompatibility with EU law by neutralising the economic burden which that tax has wrongly imposed on the trader who, in fact, has ultimately borne it”. Therefore, at [31]:

“the element which characterises such a right to repayment, and from which it originates, is an overpayment to the tax authorities by a taxable person of an amount of VAT in breach of EU law. It is specifically the fact that the VAT is not due which underlies the right to recover and ensures, in accordance with conditions laid down in the national law of each Member State, having regard to the principles of equivalence and effectiveness, that the economic burden arising from that payment is neutralised in respect of that taxable person.”

(2) At [33], they said that the right of taxable persons to deduct VAT due or paid on goods purchased and services received as inputs from the VAT which they are liable to pay “is a fundamental principle of the common system of VAT established by EU law” and “an integral part of the VAT scheme and in principle may not be limited”. They continued, at [34], that the deduction rules “are intended to free the taxable person completely of the burden of the VAT accruing or paid in all its economic activities. The common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT, are taxed in a neutral way”. They noted, at [35], that it has been held that the right to deduct can be exercised only in respect of taxes actually due and cannot be extended to VAT invoiced though not due and paid to the tax authorities. Therefore, at [36]:

“unlike the element characterising the right to repayment of overpaid VAT, the right to deduct VAT, which is a right inherent in the VAT scheme established by the common system of VAT, is based on the existence of a tax that is due.”

191. At [37] and [38] the CJEU concluded that:

“...whilst the right to repayment of overpaid VAT is intended to remedy a situation which stems from an infringement of EU law by permitting the beneficiary of that right to neutralise an economic burden which is wrongly imposed, the right to deduct input VAT stems from the actual application of the common system of VAT, so that the VAT payable or paid is not borne by the taxable person in his economic activities that are subject to VAT, thus ensuring neutrality of taxation of those activities.

As the Advocate General observed in point 60 of his Opinion, such a difference in the nature of the rights at issue and the objectives pursued justifies the existence of legal rules specific to each of those two rights, *inter alia*, as regards their content and the conditions for their exercise, such as the limitation period for actions to enforce those rights and, specifically, the date from which such a period applies.”

## **Part E – Decision**

### **Overview of the issues**

#### *Parties’ arguments*

192. On the face of it, the Court of Appeal's determination in *BT CoA* that the BT claims were blocked by s 39(5) has, in effect, decided this appeal in favour of HMRC. In summary, as set out in full in Part D:

(1) BT's stance, however, is that, given only preliminary issues were transferred to the UT for decision (and, hence, were before the Court of Appeal), essentially (a) the whole case remains before the tribunal for it to decide at a full hearing, (b) whilst, in making its decision, the tribunal would have to take account of the Court of Appeal's findings on the BT issues, there are a number of remaining issues of law and fact for the tribunal to hear and decide on, and (c) there is at least a reasonable prospect that BT's case in respect of those remaining issues will result in its appeal succeeding before the tribunal notwithstanding the Court of Appeal's findings.

(2) HMRC's view is that, on the contrary, if this appeal were to be heard in a full hearing in the tribunal, it would inevitably fail. There simply are no issues of law or fact the outcome of which could result in BT succeeding in this appeal:

(a) all the issues which BT assert remain to be decided by the tribunal have already been determined definitively by the Court of Appeal in *BT CoA* and/or in other relevant caselaw such as *GMAC CoA*; and/or

(b) BT would be estopped from raising those issues before the tribunal under the principles of *res judicata*, whether cause of action estoppel or issue estoppel applies (although in HMRC's view cause of action estoppel is in point) or, at least, it would be an abuse of process for BT to be allowed to raise them.

(3) BT submitted that the issues it raises (a) were not within the scope of the BT issues in the first place, so that the Court of Appeal have exceeded their jurisdiction in purporting to decide them, and/or (b) would not be blocked by *res judicata* principles on the basis that, if those principles apply at all (which BT considered to be doubtful), only issue estoppel is in point which plainly permits BT to raise points emerging from new matters such as, in particular, its argument based on the decisions in *Iveco CoA* and *ITC*.

#### *The issue*

193. I accept that, subject to the outcome of this hearing:

(1) Given that preliminary issues by definition do not necessarily comprise all the issues in a case, in principle it would remain for the tribunal to decide this appeal at a full hearing at which BT would be entitled to raise any relevant issue (whether of fact or law) which, in broad terms, can properly be regarded as falling outside the scope of the BT issues determined by the Court of Appeal in *BT CoA* but within the scope of the appeal proceedings.

(2) At any such hearing, therefore, the tribunal would have to decide the appeal by interpreting the Court of Appeal's determinations in respect of the BT issues and applying them in the same way as it would apply any relevant decision made by a higher tribunal or court which is binding on it, in the light of its own findings on any relevant factual and legal issues.

194. At the heart of the dispute between the parties, however, is their fundamentally different views of what falls within or outside what I have loosely termed the "scope" of the BT issues determined by the Court of Appeal. That requires an assessment of the interrelated questions as to (a) what was properly before the Court of Appeal for decision and what that court has decided, and (b) the extent to which, under *res*

judicata principles, the answers provided by the Court of Appeal to the BT issues are binding on BT or to which, in any full hearing in the tribunal, BT could re-raise points already raised or raise new arguments relevant to those issues.

*Decision in BT CoA*

195. To recap, in summary, the relevant determinations made by the Court of Appeal are as follows (as set out in full in Part B):

(1) The exercise of BT's EU right in respect of bad debts arising in relation to supplies made in the period from 1 October 1978 to 31 March 1989 by making the BT claims in 2009 was barred under s 39(5):

(a) As the UT had held, BT's EU right was to be given effect under the Old Scheme as moulded and adapted as appropriate as the Old Scheme was not compatible with article 11C(1) as regards the Insolvency Condition (see [74] to [88] of *BT CoA*).

(b) Contrary to the UT's view, s 39(5) did not infringe BT's EU right by blocking its ability to make a claim for relief under the Old Scheme in respect of the relevant supplies with effect from 19 March 1997. Therefore, it was not correct that s 39(5) fell to be disapplied, or construed, under EU law, in such a way as not to affect the exercise of BT's EU right.

(c) The decision in (b) was made on the basis that, as a matter of EU law, the UK was entitled to change the conditions under which relief for bad debts/total or partial non-payment was available pursuant to the powers of derogation conferred by article 11C(1), and specifically in effect to impose a time limit within which claims in respect of such supplies had to be brought. That was subject to the general principles of legal certainty and the protection of "legitimate expectations" but there was no breach of those principles.

(2) In assessing whether there was any breach of the principles of legal certainty and the protection of "legitimate expectations", Rimmer LJ accepted HMRC's submissions that it was necessary to assess what a prudent, circumspect economic operator, in BT's circumstances, would have expected and how it would have acted in light of the various changes to the UK "bad debt relief" provisions, the publicity regarding the abolition of the Old Scheme and how the bad debts arose. His main conclusions were as follows (at [92] to [123] as set out in full at [89] to [100] above):

(a) 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, be likely to have foreseen its eventual repeal.

(b) Assessing the issue on the basis of the facts affecting BT, he noted that the bad debts which were the subject of the BT claims all arose from supplies made 20 years earlier and that, having regard to the nature of BT's business, the badness of the latest bad debts to accrue would have been apparent to BT within (at most) months of the end of 1989 - and within several years before 19 March 1997.

(c) It was, therefore, open to BT from 1978 to 1997 to make claims for relief under the machinery of the Old Scheme in respect of each bad debt as it arose. In making such claims BT would have had to show that the Insolvency Condition was incompatible with its EU law rights but the

case must be approached on the basis that it could and would have done so.

(d) It appeared the only reason BT did not make any claim for relief at an earlier point was because it was unaware that it was open to it to do so but that was not relevant given “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”.

(e) The four-month warning of the impending change in the law (in the Budget Notice and Budget News Release) which was then enacted in s 39(5) was not too short a warning for BT or those in a like position.

(2) Rimmer LJ considered that the BT claims relating to supplies made in the period 1 January to 30 September 1978 (when no UK “bad debt relief” provisions were in place) were blighted by the same problem as those relating to the main claim (that they were blocked by s 39(5)) or that the only right that BT ever had to claim relief in respect of these bad debts was a common law restitutionary claim, which was long since statute barred (see [118] as set out at [97] above).

(3) The two other members of the panel, Kitchen LJ and Clarke LJ, agreed with Rimmer LJ’s conclusions as summarised above but added some comments of their own on the “due notice” and “legitimate expectation” issue.

(4) Kitchen LJ agreed that it was the “legitimate expectations” of BT that were relevant, as is apparent from his subsequent comments, as assessed by reference to the thoughts and actions attributable to a prudent and circumspect operator. He made the following main points, at [131] to [134] (see [104] to [107] above):

(a) From when the FA 1990 closed the Old Scheme in relation to supplies after 26 July 1990, it would have been apparent to a prudent operator that there would come a time when the scheme would be perceived to have run its course and it would be repealed.

(b) By March 1997, all debts owed to BT in relation to supplies made before 31 March 1989 were either paid or time barred, a fact reflected in BT’s practice of destroying its documents after six years so that for BT, by March 1997, the Old Scheme had run its course, subject to its right to enforce its EU right through the machinery of the Old Scheme, as appropriately adapted and moulded.

(c) BT had had since 1978 the opportunity to exercise its EU right in respect of each and every bad debt as and when it arose but it at least must be considered to have had, a legitimate expectation that it would not be deprived of that right without being given notice which was adequate for traders in its position.

(d) BT and other traders were, however, given adequate notice by the Budget Notice and Budget News Release and by the publication in of the bill which became the Finance Act 1997. As prudent and circumspect operators they knew or must be taken to have known they had a period of nearly four months until the Act came into force to make a claim in respect of their EU rights, and to do so using the machinery of the adapted and moulded s 22.

(e) Accordingly, BT and other traders in a similar position should have anticipated the possibility of the repeal of the legislation underpinning the

Old Scheme and prudent and circumspect operators in the position of BT had ample time to act in the light of the notice they were given of the abolition of the scheme.

(f) As BT was plainly not aware of its directly effective rights, it did not as a matter of reality have any expectation as to its entitlement to bring such a claim, and providing it with a longer period of notice would not have made the slightest difference to it.

(5) Clarke LJ made the following main points at [139] and [140] (see [108] to [110] above):

(a) The issue depended on the effect of the abolition of the Old Scheme on a litigant in BT's position.

(b) A prudent and circumspect operator in BT's position must be taken to have realised (i) that it had, at least arguably, an EU right which would invalidate the Insolvency Condition; (ii) that the Old Scheme might well be wound up; and (iii) that the likelihood of such a winding up would increase as time passed following the introduction of the New Scheme.

(c) BT could have made claims under the Old Scheme from October 1978 down to 19 March 1997. The Old Scheme became ineffective on the next day, as was foreshadowed in the Budget News Release. Given the New Scheme had come into existence in 1990 and it was apparent that the Old Scheme might well be brought to an end at some stage thereafter - as the UK was entitled to do - the notice of nearly 4 months was not too short.

(6) In dismissing BT's cross-appeal on BT issue 3, Rimmer LJ dismissed BT's assertion that the BT claims were correctly to be regarded as having been brought under s 80 and that it had the benefit of the extended limitation period conferred by s 121. At [126], Rimmer LJ essentially adopted the UT's analysis at [81] of *GMAC/BT UT*, namely, that s 80 did not apply on the correct interpretation of its terms, as the tax which BT accounted for on the consideration for the relevant supplies which it could not recover was not tax which was not due within the meaning of s 80 (see [126] as set out at [102] above).

(7) Rimmer LJ also commented, at [127] (see [103] above), that not even BT "seems to have believed that section 80 was relevant" as its "somewhat ill-drawn letter was in respect of bad debt relief and made no suggestion that it had made any payment of tax which was not output tax due". He said that he took this to be the sense of the second sentence of the UT's answer to BT issue 3, namely, that : "If [BT's] claim arises, instead, under s 80, it was not made before 1 April 2009 and was time-barred." The other Lord Justices on the panel did not add their own comments on this issue.

### *Conclusion*

196. I have concluded that BT's appeal has no reasonable prospect of success (as that term is interpreted in the cases set out in Part A) on the basis that, for all the reasons set out below:

(1) BT has no reasonable prospect of succeeding in an argument that the determinations made by the Court of Appeal in *BT CoA*, as summarised above and set out in detail in Part B, were not made by that court acting within its jurisdiction. See the analysis at [197] to [214].



(2) On the basis that all relevant determinations made by the Court of Appeal in *BT CoA* were within its jurisdiction to make, there is no reasonable prospect that BT's appeal would succeed in any full hearing of this appeal even if it were able to raise all the points it states must be considered at any such hearing. The points which BT wishes to make, which it sees as giving its appeal a reasonable prospect of success, have already been rejected by the Court of Appeal in *BT CoA* in forming its binding determinations (whether expressly or impliedly) and in some cases, substantially the same arguments have been considered and rejected by the Court of Appeal in *GMAC CoA*. See the analysis at [215] to [225] below.

(3) In any event, BT's appeal would have no reasonable prospect of success, if it is arguable that any of the points it wishes to raise in a full hearing in this tribunal were not determined by the Court of Appeal in *BT CoA* on the basis that they were not raised specifically or that, as in the case of some of the points it wishes to make in relation to s 80, they are based on new matters which it is permissible for BT to raise (in the form of the decisions in *Iveco CoA* and *ITC*). That is on the basis that (a) BT has no arguable case that it would not be estopped or prevented from raising these points at a full hearing in this tribunal under *res judicata* principles (whichever category of that doctrine is in point), and/or (b) as regards the decisions in *Iveco CoA* and *ITC*, in any event, those cases add no further support to the arguments on the s 80 issue which BT has already raised and which have been rejected by the Court of Appeal. See the analysis at [227] to [232] below.

### **Scope of the BT issues**

197. I have decided that BT has no arguable case that the UT and Court of Appeal were precluded from considering the factual and other matters which BT assert they were not entitled to consider. It is *not* the case that, as BT argued, on the transfer of the BT issues to the UT:

(1) The UT was charged only with deciding pure questions of law and thereby so was the Court of Appeal, so that they have exceeded their jurisdiction in dealing with factual matters, such as (to the extent that in any event, raises factual issues) whether the BT claims were made under s 80.

(2) The issues relating to whether there was any breach of the principles of legal certainty and the protection of "legitimate expectations" and whether any time limit applied if the BT claims were made under s 80 were excluded from the ambit of the BT issues (regardless of the extent to which those questions raise matters of fact or law).

I refer to the matters which BT argued are not included in the scope of the BT issues as "**the disputed matters**".

### *Procedural background – effect of the transfer of the BT issues to the UT*

198. Whether to hear a matter as a preliminary issue is a case management decision for the relevant tribunal or court. In *Wrottesly v HMRC* [2015] UKUT 637 (TCC), the UT set out how this issue is to be approached which includes an explanation of why preliminary issues are often points of law, at [28]:

"(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.

(2) The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a

point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a “knockout” one.

(3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.

(4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way- (3)(a) above.

(5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

(6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.

(7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

(8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely, to enable the tribunal to deal with cases fairly and justly.”

199. The effect of the transfer of preliminary issues to the UT for determination under rule 28 is to remove the transferred issues from the tribunal’s jurisdiction in the sense that, (a) it is then for the UT, rather than the tribunal, to determine those issues (and, in the usual way, for the higher courts to do so, on any further appeal), and (b) as noted above, the tribunal’s role is confined to applying the binding determinations made by the UT or relevant higher court in deciding the overall outcome of the appeal in the same way as it would apply any relevant decision of a higher tribunal or court.

200. Usually, it is the role of the tribunal, as the judicial forum of first instance in tax disputes, to find the facts relevant to an appeal made to it on hearing evidence from the parties. Given the tribunal’s fact-finding role, it is to be expected that parties will usually make an application under rule 28, whether for the transfer to the UT of the whole case or of a preliminary issue, and that any such application will be approved, where the issue or case raises wholly or largely legal issues without the need for extensive fact finding (and as noted, often preliminary issues are in any event points of law only).

201. However, it is notable that the reference in rule 28 of the Rules is to the transfer to the UT of “preliminary issues”; any transfer is not expressly restricted to legal issues only. As noted, there is no general rule that matters dealt with as “preliminary issues” may only be questions of law although, in practice, they often are confined to questions of law and the UT has urged the exercise of caution in dealing with mixed questions of law and fact as preliminary issues. As HMRC submitted, the tribunal and courts do consider as preliminary issues matters which raise relatively limited factual questions, such as issues in relation to limitation periods.

202. In this case, leaving aside for a moment the dispute regarding the precise scope of the BT issues, it is reasonable to assume that, given the nature of preliminary

issues, the parties expected that the transfer of the BT issues to the UT for determination would enable these appeal proceedings or, at least, aspects of these appeal proceedings to be determined in an efficient manner by referral to a higher authority than this tribunal.

*Jurisdiction of the UT and the Court of Appeal*

203. In general terms it is open to the parties in tribunal and court proceedings to raise arguments on the jurisdictional scope of the relevant forum in which an issue is to be heard and it is for that forum to decide the point. It follows from the fact that, on a transfer of preliminary issues under rule 28, the UT (and, on any appeal, the higher courts) become the forums with jurisdiction to determine those issues that (a) those forums must also have jurisdiction to decide on the precise scope of what is before them for decision, and (b) accordingly, the tribunal does not have jurisdiction to decide on that scope. Indeed, deciding on the scope and correct interpretation of the preliminary issues transferred is an integral part of the UT/court determining those issues. It is fully open to the parties to make representations on the scope of the transferred preliminary issues in the course of the proceedings and, their redress, should they consider that the UT or other relevant court have addressed matters which were not transferred to them for decision, is to seek to appeal against the relevant decision on the basis that they have erred in doing so. I note that it is apparent from the correspondence that, at the relevant time, BT anticipated that the parties would make submissions on the scope of the questions put in the BT issues (see [8(7)] above).

204. In other words, in my view, the proceedings before the UT and the Court of Appeal have themselves settled conclusively both (a) the ambit of what was to be determined on the transfer of the BT issues to the UT, and (b) the answers to what was properly to be determined. On that basis, the tribunal must take the determinations made by the Court of Appeal to be properly within the ambit of that court's jurisdiction for the purposes of assessing, (a) what, if anything would remain to be considered by the tribunal at a full hearing of this appeal before it, and (b) whether *res judicata* principles would apply to prevent BT from raising any of the arguments it wishes to raise in any such hearing.

*Tribunal's decision on the scope of the BT issues*

205. If, contrary to my view, as BT argued, it is the tribunal's task to decide what was properly within the scope of the BT issues, for all the reasons set out below, the outcome would be the same as under the analysis set out above.

206. I note that the parties jointly applied for the BT issues to be transferred to the UT in a form which they presented to the Presidents of the tribunal and UT as agreed between them and that the Presidents simply agreed to the transfer of those issues in that form. BT's main arguments were that (a) the Presidents of the tribunal did not intend factual matters to be included in the scope of the BT issues as BT considered is apparent from the relevant correspondence, (b) the true agreement and intention of the parties, which BT asserts is to be divined from the correspondence between the parties in which they negotiated the formulation of the BT issues, was that the disputed matters were not to be transferred to the UT, (c) it somehow has a bearing that BT was, so it says, (i) unfairly treated by HMRC who acted unreasonably as regards agreeing the BT issues, and (ii) denied the opportunity for facts to be found in the tribunal before the hearing in the Court of Appeal took place (as the tribunal refused its application for that to take place).

207. With that background in mind, it seems to me that the tribunal should approach the question of determining the scope of the BT issues much as it would approach the

construction of a contractual document at any rate, as regards addressing, in the terms raised by BT, the question of what the parties intended the BT issues to cover. On that basis, the tribunal's task is essentially to ascertain the objective meaning of the language used in the BT issues, as the embodiment of the agreement between the parties on what was to be transferred to the UT for determination (as then sanctioned by the Presidents of the tribunal and the UT), having regard to the principles of contractual construction.

208. I note that in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [2017] 4 All ER 615, in considering how contractual construction is to be approached, Lord Hodge explained, at [10], that, it has long been accepted that ascertaining the objective meaning of language "is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning" and a court "may have regard to the factual background known to the parties at or before the date the language was agreed but excluding evidence of the prior negotiations". He referred to the earlier comments of Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at pages 912-913 as follows:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) ...Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, [the background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification...."

209. I also note Lord Hodge's comments in *Wood v Capita* include:

(1) At [11], that:

"where there are rival meanings [to the language in question], the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But....the court must consider the quality of drafting of the clause....and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest..."

(2) At [13], that the extent to which "textualism" and "contextualism" assist the court in construing a contract will vary according to the particular circumstances:

"Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance....."

210. The above comments were made in the different context of how to approach the construction of commercial contracts. However, in my view, similar principles must

apply to ascertaining the scope of the BT issues, to the extent that, on BT's own argument, that depends on ascertaining the true agreement between the parties as to what was to be referred to the UT. I do not see how a determination of what the parties intended can be made at this stage fairly and justly other than by an objective assessment of the meaning of the BT issues which carries with it the need to take into account the context in which the BT issues were agreed between the parties (including whether both parties were acting with professional advice) but not the previous negotiations of the parties and their declarations of subjective intent. Moreover, given the impact which the Court of Appeal's answers to the BT issues have on the parties, in making an objective assessment, it is entirely appropriate that the tribunal should be alive to the possibility that, with hindsight, a party may have agreed to something which does not suit its interest.

*Scope of the BT issues – ascertaining their plain meaning*

211. In my view, having regard to their plain meaning, according to how a reasonable person would interpret the BT issues as assessed in the context of the dispute between the parties in these appeal proceedings, the disputed matters are included in the scope of the BT issues:

(1) The consideration of (a) in BT issue 1, whether BT's assumed EU right under article 11C(1) in respect of the relevant bad debts was subject to s 39(5), and (b) in BT issue 3, whether "BT's claim" was subject to s 80 and s 121, necessarily requires consideration of the nature of BT's EU right (on the assumption it had one) and of the BT claims, whether that requires a factual or legal analysis.

(2) The question in BT issue 2 is very broadly framed by reference to whether "EU law requires s 39(5) to be disapplied or construed *under EU law, so as not to affect* the exercise of" BT's EU right (assuming it had one). I cannot see how the courts were to address this other than by applying the EU law principles they regarded as relevant (such as, those of legal certainty and the protection of "legitimate expectations") in the context of the facts they considered relevant. The question was not posed in the abstract in legal terms only but by reference to whether EU law required s 39(5) "to be disapplied..." specifically in relation to BT as regards the exercise of its EU right (assuming it had one).

(3) A consideration of whether BT's claim was subject to s 80 *and s 121* necessarily requires consideration of the time limits set out in s 80 as, in effect, amended by s 121. I am at a loss to see how else the UT or the Court of Appeal could be expected to address that question in any meaningful sense.

*Scope of the BT issues – agreement between the parties*

212. There is nothing in the circumstances surrounding the agreement of the BT issues to detract from the conclusion that the BT issues should be interpreted according to their plain meaning:

(1) First, as explained above, in applying the usual principles of contractual construction to ascertain the agreement between the parties as to what the BT issues comprised, it is not permissible to take account of the parties' negotiations as set out in the relevant correspondence.

(2) However, even if, contrary to my view, it is appropriate to have regard to the parties' negotiations and evidence of their subjective intentions at the time, the relevant correspondence, details of which are summarised at [8] above, does not demonstrate that either party intended that, contrary to their plain meaning, the disputed matters were not to be included in the scope of the BT issues (and see also the comments at [214(1)] below):

(a) There was no mention in the correspondence that the nature of the BT claim was a factual matter which was to be excluded from the scope of the BT issues.

(b) HMRC's primary concern appeared to be that the compatibility issue should not be considered by the UT without consideration of the full factual background but that was resolved by it being assumed in the BT issues that BT had an EU right in respect of the BT claims.

(c) In a letter of 9 September 2011 from BT to the UT, BT contemplated that some issues of fact may yet require some determination by the UT (or perhaps remission back to the tribunal) (see [8(3)] above).

(d) There was a dispute over the inclusion in what became BT issue 2 of specific reference to "due notice" and "legitimate expectation". BT asserted that the fact that those terms were in an earlier draft but were not included in the final version means that the parties did not intend the UT to consider those issue. It is apparent from the correspondence that this wording was deleted from BT issue 2 as BT objected to its inclusion. However, it is also apparent that BT fully expected that these points would be raised by HMRC at the hearing before the UT. It was the way that these issues were put in the draft that BT objected to, in particular, as the wording, in its view, suggested that it was agreed that BT had a "legitimate expectation" as regards the Old Scheme which BT did not accept. See in particular, at [8] above, details of an email from Ms Frawley to HMRC of 23 January 2012.

(e) When the agreed BT issues were submitted to the Presidents of the tribunal and the UT, neither party appears to have made any representation or raised any concern that all factual matters which the BT issues may raise were to be excluded from the scope. Indeed, as noted, the correspondence indicates that in fact the parties contemplated that they would make submissions on the scope of the BT issues at the hearing before the UT thereby indicating that they thought it was for the UT to decide the scope of what was put to them for decision (whether that related to matters of fact or law).

(3) The relevant correspondence demonstrates that there were disagreements between the parties on how the BT issues should be framed. However, the fact is that BT ultimately agreed to the joint application for the transfer of the BT issues to the UT of its own volition, as is apparent from the correspondence, acting with professional expert advice (not only of its own internal legal personnel but also of the external counsel who acted for them throughout these proceedings). BT cannot now seek to resile from the consequences of that agreement, according to the meaning of the BT issues as objectively ascertained, on the grounds, so it seems to be saying, that it did not really want to agree to the BT issues in their final formulation and that it somehow had no real choice but to agree to that formulation. In that context, I note also that it was open to BT at any point before the transfer was finally approved simply to withdraw its consent to the joint application.

(4) BT's concern that factual matters were not included in the scope of the BT issues, as expressed following the hearing in the UT, which culminated in it applying to the tribunal for a hearing to consider the facts, cannot shed light on the objective assessment of the parties' intentions at the time the BT issues were agreed. Moreover, I note that, on the tribunal refusing BT's application, BT had

the usual form of redress available to it in that (a) it could have sought to appeal against the tribunal's decision (and, if necessary from a timing perspective, could have applied for the proceedings in the Court of Appeal to be stayed) but it chose not to do so, and (b) it was open to it to raise this issue in the proceedings before the Court of Appeal and it did raise that it considered that the facts relating to the BT claims had not been fully considered.

*Scope of the BT issues – decision by the Presidents of the tribunal and UT*

213. No detailed reasons were set out by the Presidents of the tribunal and UT in respect of their decision to give permission for the transfer of the BT issues to the UT. The expressed condition of approval in the correspondence of 30 September 2011 (see [8] above) was simply that the preliminary issue was acceptable to the President of the UT although it was stated that the transfer would not be approved if the UT was to be expected to find the facts. The direction for the transfer was not made until 24 January 2012 and no material written correspondence was produced to the tribunal relating to the intervening period which sheds any light on the thoughts of the President of the tribunal or the President of the UT as regards the scope of BT issues.

214. Even if it is open to the tribunal to consider the surrounding circumstances in assessing the scope of the preliminary issues transferred to the UT, I do not accept that there is any basis for taking these to demonstrate that the Presidents of the tribunal and UT sanctioned the transfer of the BT issues to the UT on the basis that the UT was not to consider any factual matter at all:

(1) From the surrounding circumstances, the most that can be said is that it is reasonable to suppose that the transfer of the BT issues to the UT for determination was made on the basis that the parties and the Presidents expected that the UT could determine the BT issues with only a limited need for the UT to consider factual matters in light of (a) the procedural background set out above (see [198] to [202] above), (b) the correspondence between the parties at the time (see [8] and [212] above), (c) the correspondence from the tribunal/UT in which it was stated that a transfer of the case to the UT would not be accepted if fact finding was required (see [8] above), and (c) the parties' subsequent failed attempt to agree a statement of facts for presentation to the UT (see [8] above).

(2) That does not provide sufficient basis to detract from the natural conclusion to be drawn from the fact that the Presidents agreed to the transfer of the BT issues, as "preliminary issues", as drawn up by the parties; namely, that they simply agreed to the UT providing the answers to the questions posed according to their plain meaning, whether that required considering issues of fact or law (and, in my view, in any event, on the basis that it was ultimately for the UT and, on any appeal, the Court of Appeal to determine that meaning). This is reinforced, in particular, by the fact that when the agreed BT issues were submitted to the Presidents of the tribunal and the UT there does not appear to have been any suggestion by either party that they did not want the UT to consider any factual matters thereby raised.

**Applicability of decisions in BT CoA and GMAC CoA**

*BT's arguments on the issues for the tribunal to decide*

215. To recap, as set out in full in Part D, BT asserted that the tribunal needs to consider the following matters at a full hearing:

(1) The "due notice" issue and all its "legitimate expectations" (not just as regards the Old Scheme) in the light of its evidence.

- (2) The extent that the withdrawal of the Old Scheme has any relevance to the BT claim given that BT could never have made a valid claim under it.
- (3) That it cannot be assumed that the Old Scheme was the only gateway for BT to make a claim for relief and/or was the gateway that BT used.
- (4) All routes to provide BT with a remedy as regards its EU right beyond those considered by the Court of Appeal, although the only route BT suggested, is the New Scheme.
- (5) Whether the correct route for it to obtain relief is under s 80 and whether BT make a valid claim under that provision in time in the light of BT's evidence. BT asserted that the Court of Appeal did not properly consider this issue. It also said that the decision in *Iveco CoA* and *ITC* have provided it with a new basis for its argument that s 80 is in point given those decisions had not been made when the BT issues were heard in the Court of Appeal.
- (6) Whether or not BT acted as a reasonably diligent taxpayer when seeking to exercise its EU right in the light of the evidence.
- (7) Whether BT has been discriminated against in terms of the treatment of its claim for overpaid VAT and/or the exercise of its EU right.

In the discussion below, I refer to the points in (5), (6) and (7) as “**the s 80 issue**”, “**the diligent taxpayer argument**” and “**the discrimination argument**” respectively

216. I note the following as regards the Court of Appeal's determinations in *BT CoA*:

(1) In my view, in *GMAC/BT UT* the UT decided, in effect, that the Old Scheme was *the* gateway for BT to exercise its EU right and, accordingly that s 80 (and by implication, any other provision) was not relevant as it was not necessary to find any other route to provide BT with the means to enforce its EU right:

(a) It is apparent from the whole tenor of the UT's discussion on the use of the Old Scheme, that it considered that, as a matter of law, the Old Scheme was *the* route for GMAC/BT to use to enforce their EU rights (see, in particular, [160] to [179] of *GMAC/BT UT* as set out at [38] to [44] above).

(b) The UT specifically reflected this in its conclusions on BT issue 3, where they stated that s 80 was “not relevant at all” because BT's claims fell to be dealt with under the Old Scheme and that s 80 and s 121 had “no relevance to BT's claim” on the footing that the claims arose under s 22 (see [243] and [244] as set out at [78] and [79] above). In answering BT issue 3, the UT, therefore, proceeded to consider the position if, contrary to their view, the Old Scheme did not apply and s 80 was in point, in which case they thought that BT had not made a claim for that purpose within the applicable time limit.

(2) The Court of Appeal essentially approved the UT's approach in Rimmer LJ's comments at [74] to [88] of *BT CoA* (as set out at [86] and [87] above). Rimmer LJ said that he would uphold the UT's decision on BT issue 1 (although I note that, as regards BT issue 1, only the UT's finding that the BT claims made in 2009 were not barred under general principles of EU law was subject to appeal by HMRC). In effect, the upholding or approval of the decision on that point, in combination with the Court of Appeal's determination that s 39(5) validly put an end to the Old Scheme (and, accordingly, that the BT claims were out of time) sufficed to decide this appeal in favour of HMRC.



(3) Moreover, in *GMAC CoA* the Court of Appeal took the same view as the UT in *GMAC/BT UT*. Floyd LJ commented, at [134] of that decision, that, given his findings on giving relief to GMAC’s claims under the Old Scheme, “it was not necessary to find some other route” (such as under s 80).

(4) In any event, in considering BT’s cross appeal in respect of BT issue 3, the Court of Appeal upheld the UT’s finding (at [181] of *GMAC/BT UT*) that as a legal matter, on the correct interpretation of its terms, s 80 does not apply to relieve claims for bad debts/total or partial non-payment (see [126] and [127] of *BT CoA*). In other words, the Court of Appeal determined that, even if it was open to BT to seek to use a route other than the Old Scheme to enforce its EU right, on the correct interpretation of s 80, it did not apply to claims in respect of bad debts/total or partial non-payment such as the BT claims. As set out below, I consider that the Court of Appeal’s decision in this respect applies in relation to all relevant parts of s 80 (including sub-s(1B)).

217. As regards the issues in [216(2)] to [216(5)], it is evident from those determinations, therefore, that:

(1) The Court of Appeal undoubtedly considered that the Old Scheme was relevant even though BT could not have obtained relief under it as it was drawn; hence, the need for the appropriate moulding and adaptation of it (see [86] and [87] above).

(2) The question of what UK gateway BT thought it was using to obtain relief in respect of the relevant bad debts is irrelevant given that in upholding the UT’s view on this, the Court of Appeal’s found that, as a matter of law, the gateway for BT to use was the Old Scheme (see [86] and [87] above) and that, in any event, the only other gateway suggested (s 80) was not applicable according to its terms of reference.

(3) It is implicit in the decision that, as a matter of law, the Old Scheme provided the route for BT to enforce its EU right that the New Scheme did not provide that mechanism. In any event, whether relief could be provided under the New Scheme was raised specifically by Mr Cordara, as counsel for GMAC, in *GMAC CoA* (see [115(4)(a)] above) and it is clear from the Court of Appeal’s conclusion that GMAC’s recourse was under the Old Scheme that this argument was rejected (see [113] to [126] above).

(4) There is no outstanding question as to whether s 80 is the correct route for BT to obtain relief; it has plainly been found not to be the correct route. Moreover, there is nothing of relevance for the tribunal to decide in relation to s 80 which could assist BT’s case even if, contrary to my view, any factual issue as to whether the BT claims were made under s 80 was not properly before the UT (and, hence, the Court of Appeal) for decision. Given the Court of Appeal’s decision that s 80 does not apply as a matter of the interpretation of its terms, any findings by the tribunal as to whether or not the BT claims otherwise satisfy the requirements for there to be a valid claim under s 80 and whether BT thought it was making the BT claims under s 80 are irrelevant. BT’s other points on the s 80 issue are addressed below.

218. As regards the “due notice” and “legitimate expectation” issue, I cannot see how BT’s proposed evidence could assist BT’s case in the light of the Court of Appeal’s determinations. The proposed evidence is aimed at demonstrating that (a) BT had no “legitimate expectation” in respect of the Old Scheme as it did not any time consider that was the route for it to enforce its EU right, (b) it could not reasonably be expected to have been aware that it had an EU right which it could enforce in the UK, broadly,

until such time as it made the BT claims, (c) it considered the BT claims were to be made under s 80, and (d) it was reasonable for it to form that view and for it to make the BT claims only in 2009 (see [179(4) to [179(6)] above). However:

(1) It is inherent in the Court of Appeal's findings that BT's EU right is to be given effect under the Old Scheme, that it considered the "due notice" and "legitimate expectation" tests to be relevant only as regards the abolition of that scheme. It is not a question of assessing BT's "legitimate expectation" in some other respect, such as in relation to s 80, given the determination that, as a matter of law, the Old Scheme (and not s 80) provided the mechanism for BT to enforce its EU rights.

(2) These tests, as set out by the Court of Appeal, require an objective assessment of what a reasonable and circumspect operator, albeit one in BT's circumstances, would consider and do. It is not a question of assessing BT's own thought processes at the time but of assessing what BT ought to have considered and done, as such an operator, in the circumstances BT was in at the relevant time.

(3) The Court of Appeal (i) considered they had all the factual information they needed to enable them to assess what such an operator would consider and do, and (ii) on the basis of that information, concluded, in effect, that, contrary to BT's stance, such an operator would have realised that it had EU rights which it could enforce under the Old Scheme in ample time for it to make claims for relief under that scheme prior to its abolition:

(a) The Court of Appeal made their assessment by reference to: (i) the law in place at the relevant time, the various changes made to the UK "bad debt relief" regime and the introduction of s 39(5) which in effect abolished the Old Scheme (as announced in the Budget Notice and Budget Press Release), and (ii) how BT's bad debts arose. As set out full above, I have concluded that it was within the Court of Appeal's remit to consider these issues in the light of the factual circumstances it considered relevant. I note that, in any event, the factual matters the Court of Appeal referred to can hardly be controversial (albeit the legal conclusions it drew from these matters are disputed) given changes to the law and notices issued in respect of that are matters of public record and the Court of Appeal specifically noted that how BT's bad debts arose was not disputed (see [46] to [48] of *BT CoA* as set out at [83] above).

(b) As set out in full above, the Court of Appeal concluded that, in the light of those facts, such an operator (i) would have realised that it could have enforced its EU rights using the Old Scheme when the relevant bad debts arose in the period from 1978 to 1997, (ii) would have anticipated the repeal of the Old Scheme, and (iii) was given adequate notice of its abolition. Moreover, two of the Lord Justices noted specifically that the fact that at the relevant time BT was not aware that it could enforce its EU rights under the Old Scheme was not a material factor.

(4) I note that a different panel reached the same conclusion for substantially the same reasons as regards GMAC's similar circumstances in *GMAC CoA*.

(5) I note also that similar points to those which BT has made in this case as regards its "legitimate expectation" (see [179] above) were raised by Mr Cordara on behalf of GMAC in *GMAC CoA* (see [115(3)]). Again, given the outcome of that case, the Court of Appeal implicitly rejected those arguments.

219. From BT's submissions at [179] above and the nature of its proposed evidence, it appears that the diligent taxpayer argument is a less clearly articulated version of an argument Mr Cordara is recorded as raising, as counsel for GMAC, in *GMAC CoA*:

(1) In that case, as set out, at [117] of *GMAC CoA*, the relevant argument was explained as follows:

“In order to deflect what he saw as a criticism of his clients in not making their claims sooner, Mr Cordara cited *Deutsche Morgan Greenfell*.... for the propositions: (a) that a party who has a mistaken view of the law which is falsified by a subsequent decision of the courts is to be treated as having made a mistake, and (b) that such a person cannot be said to have failed to use reasonable diligence to discover his mistake if the true state of affairs could not be discovered until the court had pronounced its judgment.”

(2) It is implicit in the decision in *GMAC CoA* that this argument was rejected. It is not clear if this was specifically raised in *BT CoA* but in any event, it is implicit in the Court of Appeal's similar conclusions in that case, that this is not a relevant consideration.

220. As regards the discrimination argument:

(1) As HMRC submitted, the question whether BT has been discriminated against as regards the Insolvency Condition has been resolved in favour of BT.

(2) It is not clear that any alleged discrimination based on differences in treatment of claims under s 80 and under the “bad debt relief” provisions was raised specifically before the Court of Appeal in *BT CoA*. However, it is implicit in the Court of Appeal's decision that, as a matter of law, the correct route for BT to obtain relief in respect of the relevant bad debts was the Old Scheme and that s 39(5) validly blocked the BT claims, as made in response to questions which were broadly framed by reference to the position under EU law, that they did not consider there was any principle of EU law (whether relating to discrimination or otherwise) which affected those conclusions. It seems to me that BT may have an arguable position that the decision in *Compass* has not necessarily, in effect, decided this point but, given my other conclusions on this point, that does not take its case any further forward.

221. BT made a number of criticisms of the approach the UT and the Court of Appeal took to BT issue 3, namely, that they were confused about the factual background and failed to distinguish between the different factual backdrops to the BT claims and the GMAC claim, they did not consider the s 80 point adequately, they did not apply their minds to what constitutes a claim for this purpose and they did not consider specifically s 80(1B) noting, in particular, that the Court of Appeal only referred to the earlier legislation which did not include that provision:

(1) In general terms, I cannot see any grounds for the tribunal to disregard the answers to the BT issues provided by the Court of Appeal on the basis of assertions that they did not properly consider the issues (even if that is correct). The task for the tribunal is to assess the scope and effect of the Court of Appeal's determinations and apply them accordingly. BT had the opportunity to seek to appeal against the Court of Appeal's determinations in the usual way but the SC application was rejected. The Court of Appeal's determinations, therefore, stand as they are and are binding on the tribunal.

(2) It seems to me that, in upholding the UT's view on s 80, the ambit of Rimmer LJ's conclusion is broad enough to apply to any part of s 80 which is specified to apply only when a taxpayer has accounted for VAT which is *not*

*due* (whether as output tax (under s 80(1)) or VAT which is not output tax which is not due (under s 80(1B)). I note that:

(a) Whilst Rimmer LJ did not set out in the decision all the versions of s 80 in place at the relevant time and made no express reference to s 80(1B), he did appear to have later versions of s 80 in mind. At [29] and [30] (see [82] above), he explained that it was BT's case that "s 24 *and the subsequent versions of it* provided an alternative jurisdictional basis upon which it was entitled to apply for VAT relief in respect of the bad debts it had suffered during the relevant period" and that HMRC's submission was that "s 24 *and its successors* have nothing to do with claims for bad debt relief" (in each case, emphasis added).

(b) It is apparent that he also had in mind that HMRC's case on this point was put in broad terms when, at [30], he described their argument, that those provisions (s 24 *and its successors*):

"were *and are* concerned only with cases in which an overpayment of tax had been made to the Commissioners and provide a restitutionary basis for the recovery of the excess. In a bad debt case, there was *no payment of VAT that was not due, or therefore any overpayment of VAT*. A failure to make a bad debt relief claim in a subsequent return still did not mean that there was any overpayment in the tax actually paid. If no relief claim was made, the tax paid was the tax due." (Emphasis added).

(c) In his conclusions at [126] and [127], as based on [181] of *GMAC/BT UT*, he noted that "HMRC supported the UT's reasoning", seemingly referring to their argument as described at [30] in broad terms that bad debt relief cases do not involve "payments of VAT that was not due", and that "he too agreed with it [the UT's reasoning]".

(3) In any event, even if Rimmer LJ is not to be taken as having formed his conclusions on s 80 in respect of both s 80(1) and s 80(1B), it is evident that the the Court of Appeal's reasoning as based on that of the UT (at [181] of *GMAC/BT UT*), as to why s 80(1) was not in point applies in precisely the same way as regards the applicability of s 80(1B).

(4) The Court of Appeal specifically highlighted the relevant factual differences between BT's and GMAC's circumstances (see [46] to [48] of *BT CoA* as set out at [83] above).

(5) As noted, as the Court of Appeal determined that, as a matter of law, s 80 does not apply to the BT claims, it is irrelevant whether or not the BT claims otherwise satisfied the requirements to be regarded as validly made under s 80. In any event, as HMRC pointed out, the transcript of the hearing demonstrates that (a) the letter in which the BT claims were set out was before the Court of Appeal and that BT made submissions in respect of what factual matters should be taken into account, and (b) when pressed BT accepted the point that the determining the nature of the BT claims is not purely a question of fact but a matter of the correct legal construction of the relevant letter. I note also that the Court of Appeal specifically commented on the letter in which the BT claims were made at [127].

(6) Moreover, it is apparent from the CoA application that the Court of Appeal had before it all the arguments on s 80 which BT submitted it should be able to raise in any full hearing in this tribunal. The CoA application included arguments that (a) s 80 applied for the reasons which BT now asserts are

supported by the decision in *Iveco CoA*, (b) the UT wrongly appeared to consider that it was necessary to refer specifically to s 80 in the claim letter for it to constitute a claim under that section, and (c) the UT failed to consider the wider correspondence at the time of the BT claims in deciding that no claim was made under s 80 (see [81] above).

222. In my view, BT has no reasonable prospect of succeeding in an argument that, on the basis of the decision in *Iveco CoA*, its EU right is to be given effect under s 80. BT's full arguments on this are set out at [180] and [181] above:

(1) For the reasons already given, in my view, the s 80 issue is irrelevant given that in *BT CoA* the Court of Appeal appeared to endorse the UT's view that, as a matter of law, the Old Scheme provides *the* mechanism whereby BT could have obtained relief for its EU right and the Court of Appeal took the same view as regards GMAC's position in *GMAC CoA*.

(2) In any event, even if BT could have the right to enforce its EU right under more than one route, in *BT CoA*, the Court of Appeal also decided that s 80 was not capable of applying to provide relief for BT's EU right on the correct interpretation of its terms.

(3) Moreover, in *GMAC CoA* the Court of Appeal reached the same conclusions on the s 80 point as those reached in *BT CoA* (for essentially the same reasons as given in *BT CoA*) having had the benefit of Mr Cordara's arguments on s 80 in the light of the decision in *Iveco UT* (see [116] to [123] and [126] above).

(4) I cannot see that the decision in *Iveco CoA* casts any doubt on the conclusions reached in either *BT CoA* or *GMAC CoA*.

(5) The most that can be taken from the decision in *Iveco CoA* is that, arguably, the reasoning adopted as to how effect is to be given to an EU right under article 11C(1), supports BT's reasoning as regards the basis on which it considers s 80 applies to give effect to its EU right in respect of the relevant bad debts. However, Mr Cordara has already presented that reasoning in BT's case and in substance the same reasoning in GMAC's case (as noted, with reference to the decision in *Iveco UT*) in the relevant proceedings in the Court of Appeal and, on each occasion, it has been rejected.

223. I note the following as regards BT's arguments on the judgement in *Iveco CoA*:

(1) The decision relates only to the payment of rebates in relation to supplies made in the period when article 11C(1) had not been implemented in the UK as regards rebates. Newey LJ's comments, including those framed in general terms, plainly have to be viewed in the context of the particular matter before the Court of Appeal for decision.

(2) At [38] and [39] (see [136] and [137] above), Newey LJ expressly acknowledged that s 80 does not apply to claims for relief in respect of bad debts as regards periods in which the UK bad debt relief provisions were in place. In considering *GMAC CoA*, he noted that Floyd LJ considered "whether a claim could be made under s 80 in circumstances where regulation 38 had already been enacted and, hence, article 11C(1) had been implemented" and that "the answer, as regards bad debt relief, was "No"". He then commented that "this view is readily explicable in relation to bad debt relief, which has always been something that a creditor must claim" (emphasis added).

(3) As HMRC submitted, the passages which BT rely on in *Iveco CoA*, as supporting its position that it could enforce its EU right in respect of the

relevant bad debts under s 80, do not cast doubt on the clear findings made in *BT CoA* and *GMAC CoA* to the contrary:

(a) BT argued that, in his comments at [34] to [39] on the passages there cited from *GMAC/BT UT* and *BT CoA*, Newey LJ accepted, in effect, that an EU right under article 11C(1) to a reduction in the taxable amount in respect of total or partial non-payment cases accrues when the bad debt/non-payment arises (in the same way as he held that an EU right under that article in respect of rebates accrues, broadly, when the rebate is made).

(b) However, even if that is the implication of his comments, it does not follow, as BT seemed to think, that, in making those comments, Newey LJ can be taken to endorse the view that it follows inevitably from any such conclusion that, contrary to the express statements made elsewhere in *GMAC/BT UT* and *BT CoA* (and *GMAC CoA*), for periods when the Old Scheme was in place, tax which a taxpayer accounted for on the consideration for a supply which it could not recover constitutes tax which *was not due* within the meaning of s 80. Quite to the contrary, Newey LJ's comments on *GMAC CoA*, at [38] and [39], plainly demonstrate that was not what he was saying. Moreover, as noted, the position in relation to bad debts was not before the Court of Appeal for decision.

(c) I also note that Rimmer LJ's comments in *BT CoA* were made as regards the position which would apply if, as regards the period from 1 January to 1 October 1978 when the UK had no "bad debt relief" provisions in place, BT had a restitutionary claim for relief in respect of the relevant bad debts. I cannot see, therefore, that in accepting that comments made in that context supported HMRC's stance in *Iveco CoA*, Newey LJ can be taken to be making any comment at all on the position that was held in *BT CoA* to apply in periods when the Old Scheme had effect (namely, that BT's EU right was to be given effect under that scheme and not under s 80).

(4) In my view, the outcome of BT's appeal in this case cannot be affected, as BT suggested, by whether (a) in the relevant proceedings, HMRC have raised inconsistent arguments in relation to rebates and bad debts, or (b) the Court of Appeal's decisions on the application of s 80 to rebates and bad debts contain inconsistencies in analysis:

(a) The fact is that the Court of Appeal has made decisions which are binding on this tribunal that (a) in the circumstances *Iveco* was in, s 80 applies to enable a taxpayer to enforce its EU right under article 11C(1) as regards rebated consideration for a supply, and (b) in the circumstances *GMAC* and *BT* were in, s 80 does not apply to enable a taxpayer to enforce its EU right under article 11C(1) where it is unable to recover consideration due to it for a supply. For all the reasons set out above, the relevant determinations made in *BT CoA* (and *GMAC CoA*) are clear and are not disturbed by the decision in *Iveco CoA*.

(b) In any full hearing of this appeal in the tribunal, the tribunal would be obliged to apply those clear and binding determinations made in *BT CoA* regardless of any asserted inconsistencies in the Court of Appeal's underlying analyses in that case and *Iveco CoA*. I simply cannot see that it is open to the tribunal not to apply the clear and binding determination in *BT CoA* as regards s 80 on the basis that the reasoning used in reaching

that conclusion conflicts with the reasoning used in another decision of the Court of Appeal relating to different circumstances (even if that is correct).

(c) The tribunal has no jurisdiction to explore any asserted differences in HMRC's approach and submissions made in these different scenarios "as a matter of public policy". Moreover, the binding nature of the Court of Appeal's determinations as regards this tribunal cannot somehow be affected, as BT suggested, if HMRC put its analysis on article 11C(1) in a different way in the BT proceedings compared with the way it did so in the Iveco proceedings (even if that is correct). (I note that BT said that it was not suggesting that HMRC intended to mislead the Court of Appeal in either set of proceedings.) The fact remains that BT had the full opportunity to put all its argument on s 80 to the Court of Appeal but those arguments were rejected.

(5) In my view, it has no bearing on this issue that in *Iveco UT*, Warren J (who was also part of the panel in the UT case in *GMAC/BT UT*) considered that the UT's comments at [184] and related passages of *GMAC/BT UT* lacked "overall coherence" and were not helpful to determining the issue in Iveco's appeal proceedings (see [133] above). The passage at [181] of *GMAC/BT UT* (see [46] above), on which the Court of Appeal relied in making its determination on s 80 in *BT CoA* (at [126] and [127]) plainly still stands.

224. I cannot see that the decision in *ITC*, a case relating to very different circumstances to those in this appeal, has any bearing on the outcome of this case. It appears that BT relied on the following general comment that:

"it was common ground that, for persons who have accounted to the Commissioners for VAT that was not due, section 80 and the associated regulations provide a code for the recovery of VAT which is exhaustive and excludes other remedies such as a common law claim based on unjust enrichment.....".

225. This simply leaves open the question of when persons are to be regarded as having accounted to HMRC for VAT that "was not due" for the purposes of s 80. As set out repeatedly above, the Court of Appeal has decided in both *BT CoA* and *GMAC CoA* that VAT accounted for in respect of consideration which a supplier cannot recover from its customer is not VAT that *was not due* for this purpose.

#### *Other points raised by BT*

226. On the other points raised by BT:

(1) Whether BT are able to bring other proceedings for restitution in a different forum has no bearing on the outcome of the proceedings in this tribunal.

(2) I cannot see any basis for the suggestion that in the proceedings in the tribunal and those before the UT and the Court of Appeal BT has not been treated fairly, in that somehow it has not been treated in the same way as other taxpayers, and/or that it has been denied the ability to participate fully. BT appears to have had every opportunity for its arguments to be heard at each stage of the relevant proceedings in relation to this appeal. As in all such proceedings, BT's form of redress where any application it makes is refused or its arguments are not upheld by a tribunal or court, is to seek to appeal against the relevant decision. The tribunal has no jurisdiction as regards any complaint in respect of HMRC's conduct in its dealings with BT, if that is BT's complaint.

(3) In my view, contrary to BT's stance, the contents of the SC application and the Supreme Court's refusal of the application are relevant in the sense that:

(a) In refusing the SC application, the Supreme Court chose, in effect, to approve the Court of Appeal's determinations given that its refusal rendered them the final, definitive word on the scope of the matters raised by the BT issues and the correct answers to them notwithstanding BT's fulsome arguments that the Court of Appeal had erred (see [111] above). See also the comments at [203] and [204] above.

(b) As regards res judicata principles, the question arises as to why the arguments which BT raised in the SC application could not have been raised at an earlier stage in the proceedings before the UT and Court of Appeal (if indeed they were not raised) - I can see no reason. Moreover, their inclusion plainly indicates that BT itself considered they were integral to determining the BT issues.

### **Res judicata**

227. This scenario does not fit neatly within any of the categories referred to within the umbrella of res judicata as explained by Lord Sumption in the *Virgin* case. However, for the reasons set out below, my view is that these principles apply and, whichever sub-set of the principle is in point, BT is estopped from or should not be permitted to raise the arguments it seeks to raise on the basis that to permit it to do so would be an abuse of process.

228. I can see no reason why the principles underpinning the res judicata rules, namely, that there should be finality in litigation and that a party should not be twice vexed in the same matter, are not applicable as regards the determinations made by the Court of Appeal in *BT CoA*. I agree that, as HMRC argued, this situation does not fall within the exception from the res judicata principle which applies in some circumstances in VAT cases as set out in *Littlewoods* (on the basis of the *Caffoor* principle which is applied in direct tax cases).

229. As noted, it is reasonable to suppose that the purpose of the transfer of the BT issues to the UT for determination, as made following a joint agreed application by the parties was to obtain definitive, binding answers from a higher authority than the tribunal on the questions raised in the BT issues on the basis that may resolve this appeal or, at any rate, aspects of this appeal, efficiently. It would be wholly out of kilter with the principles underpinning the res judicata rules, if this appeal were to be heard in full in the tribunal, for either party to be able to raise (a) points which have already been determined by the Court of Appeal in answering the questions posed under the BT issues, and/or (b) points which are integral to the BT issues which were not decided because they were not raised in the proceedings in the UT or Court of Appeal but which, with reasonable diligence, could have been raised in those proceedings. In other words, the determination of the BT issues by the Court of Appeal has raised a form of cause of action estoppel which prevents either party challenging the determinations made by the Court of Appeal to this extent.

230. It seems to me that the circumstances in this case have a greater similarity to those where cause of action estoppel generally operates (namely, where there is a single set of proceedings between the parties) than those where issue estoppel generally operates (namely, where there are two sets of proceedings and some issue common to both is decided on the earlier occasion):

(1) Essentially, there is only one set of proceedings between the parties which, as at the time of this hearing, had not yet been fully determined. As described above, in effect, certain matters were carved out of the appeal



proceedings in the tribunal for a higher level of tribunal or court to decide, pending which the tribunal proceedings were stayed. Subject to the outcome of this hearing, it would remain for the tribunal to apply the resulting determinations made by the Court of Appeal in deciding the overall outcome of the appeal on also determining any other outstanding relevant legal issues and making any necessary factual findings.

(2) As a matter of principle, the fact that the UT and Court of Appeal were asked to decide only preliminary issues (as part of the overall process required for deciding this appeal) does not render their findings any less binding or capable of being subject to cause of action estoppel than if they had been charged with deciding the full case. That is subject to the proviso that, of course, given the nature of the transfer of preliminary issues, any estoppel can only apply as regards the BT issues, in effect, as though they each individually or together form a cause of action.

(3) The view that the stricter cause of action estoppel rule is more appropriate than the issue estoppel rule is supported by the comments in *Arnold* (as cited by Lord Sumption in *Virgin*) that there is “room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different”. There is plainly only one subject matter in issue here.

231. As regards cause of action estoppel:

(1) In my view, it is apparent from the discussion above that the points which BT wishes to raise in any full hearing in this tribunal all relate to matters which have already been conclusively determined by the Court of Appeal.

(2) If, contrary to my view, any of the points have not been conclusively determined by the Court of Appeal because those matters were not specifically raised before that court or the UT or there is doubt as to the extent to which they were raised (such as, whether s 80(1B) applied, whether the New Scheme applied and as regards the discrimination and diligent taxpayer arguments), those matters are plainly integral to the determination of the BT issues and could with reasonable diligence have been raised by BT in the UT and/or the Court of Appeal. BT has had the full opportunity to raise all relevant matters in the proceedings in the UT and Court of Appeal. All of the issues it wishes to raise arise from underlying circumstances (whether of fact or law) which a professionally advised taxpayer could reasonably be expected to be cognisant of when the proceedings in the UT and Court of Appeal were taking place. I note that Mr Cordara, who has acted as counsel for BT and GMAC throughout raised some of these points in *GMAC CoA* and that many of them were raised in the SC application – I can see no reason why they could not have been raised sooner (if indeed they were not).

(3) If I am wrong and issue estoppel is in point, the same points apply as made in relation to cause of action estoppel at (1) and (2) above. I note that this doctrine does not prevent a party raising a point, as it was put in *Arnold*, “in the special circumstance that there has become available to a party further material relevant to the correct determination of a point” involved in the proceedings, “whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced” in those proceedings. In my view, however:

(a) Leaving aside the decisions in *Iveco CoA* and *ITC* for the moment, as is apparent from the discussion of BT's arguments and the conclusion in (1) and (2) above, none of the arguments raised by BT emanate from any special circumstance.

(b) The decisions in *Iveco CoA* and *ITC* provide new material which could not have been cited in the proceedings in the UT or Court of Appeal (as the decisions were made time after those proceedings concluded). However, they are not relevant to the correct determination of the question of whether s 80 applies, in short, given they do not relate to circumstances such as those in this appeal. In any event, for all the reasons set out above, those decisions do not provide any further support for the arguments on s 80 which BT has already raised in the proceedings before the Court of Appeal in *BT CoA* (as set out in the grounds of appeal set out in the CoA application (see [81] above)) and in *GMAC CoA* (see [113] to [126] above) and which were in each case rejected.

232. Finally, in my view, in any event, it would be an abuse of process for BT to be permitted to raise the arguments it wishes to raise for all the reasons set out above in relation to cause of action and issue estoppel.

### **Part F - Order for the appeal to be struck out**

233. For all the reasons set out above, HMRC's application for this appeal to be struck-out is approved and **IT IS HEREBY DIRECTED** that this appeal shall be struck out with immediate effect on the date of the release of this decision.

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

**TRIBUNAL JUDGE**  
**RELEASE DATE: 29 June 2020**