Neutral Citation Number: [2022] EWCA Civ 232

Case Nos: A3/2019/0869
A3/2019/0872
A3/2019/0872(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)
Mr Justice Marcus Smith
[2017] EWHC 677 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2022

Before :

LORD JUSTICE NEWEY
LORD JUSTICE SINGH
and
SIR LAUNCELOT HENDERSON

- -

Between :

JAZZTEL PLC	**Claimant/ Respondent**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendants/ Appellants**

- -
- -

Rupert Baldry QC, Barbara Belgrano and Frederick Wilmot-Smith (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
Sam Grodzinski QC and Michael Jones QC (instructed by **PricewaterhouseCoopers LLP**) for the **Respondent**

Hearing dates : 1 - 3 February 2022

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Approved Judgment

Lord Justice Newey and Sir Launcelot Henderson :

I. Introduction and background

1. This appeal raises issues about the period of limitation applicable to a claim brought in the High Court by Jazztel plc ("Jazztel") in December 2013, seeking restitution of unlawfully levied stamp duty reserve tax ("SDRT") and allied relief against the Commissioners for Her Majesty's Revenue and Customs ("HMRC" or "the Revenue").

2. Jazztel is a UK public limited company with its registered office in London. It is the holding company of a group which has at all material times carried on business as a telecommunications service provider in Spain and a number of other countries worldwide. Jazztel was later renamed Orange Spain plc.

3. The unlawfulness under EU law of much of the SDRT which Jazztel sought to recover was finally established by the decision of the Court of Justice of the European Union ("the CJEU") on 1 October 2009 in Case C-569/07 HSBC Holdings plc and Vidacos Nominees Ltd v HMRC [2009] ECR I-9047, [2010] STC 58 ("HSBC Holdings"). In short, the CJEU held in that case, on a reference for a preliminary ruling by one of the Special Commissioners of Income Tax in the UK, that the charge to SDRT at the enhanced rate of 1.5% levied under section 96(1) of the Finance Act 1986, on the issue of shares into a clearance service by a person whose business is or includes the provisions of such services, was prohibited by article 11(a) of EC Council Directive 69/335 of 17 July 1969 concerning indirect taxes on the raising of capital (as amended) ("the Capital Duties Directive").

4. Article 11 of the Capital Duties Directive provided, at all material times, that:

> "Member States shall not subject to any form of taxation whatsoever:
>
> (a) the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities, or of the certificates representing such securities, by whomsoever issued;
>
> …"

5. In a subsequent decision of the Tax Chamber of the First-tier Tribunal, promulgated on 28 February 2012, it was held to be *acte clair* that the same principles rendered unlawful the similar charge to SDRT, at the same enhanced rate of 1.5%, imposed by section 93(1) of the 1986 Act in connection with the issue of depositary receipts for chargeable securities (for example, American Depositary Receipts or "ADRs") by a person whose business is or includes the issue of such receipts: see HSBC Holdings plc and The Bank of New York Mellon Corporation v HMRC [2012] UKFTT 163 (TC), [2012] SFTD 913 (Judge Mosedale sitting with Ms Anne Redston). This decision was not further appealed by HMRC, and it covers the remainder of the unlawfully levied SDRT which Jazztel sought to recover.

6. The 23 payments of SDRT claimed by Jazztel in its High Court claim are helpfully set out in a table at [23] of the reserved judgment of Marcus Smith J ("the Judge"), which

he handed down on 3 April 2017 after the trial of the action over four days in late January 2017 ("the Judgment"): see [2017] EWHC 677 (Ch), [2017] 1 WLR 3869. The Judge referred to these payments as Payments 1 to 23, and we will do likewise. They run in date from early 2000 to 7 May 2008. All of the payments apart from the last (Payment 23) were made more than six years before the issue of the claim form on 19 December 2013. The first payment of any significance was Payment 2, made on 7 January 2000, in the sum of £1,819,060.

7. Jazztel's case at trial, which the Judge accepted, was that all of the payments were made by it under an operative mistake of law, in the sense that Jazztel would not have made them but for its mistaken belief that they were due and owing under the relevant provisions of the SDRT legislation. HMRC do not challenge the Judge's findings of fact on this, or any other of the issues of fact which he had to consider.

8. At this point, we need to explain the various ways in which it was in principle open to Jazztel to recover its mistaken overpayments of SDRT, and the periods of limitation which were applicable to the relevant claims both before and after the enactment of section 320 of the Finance Act 2004.

9. The first, and most obvious, way to recover overpaid SDRT was by making a statutory repayment claim under regulation 14 of the Stamp Duty Reserve Tax Regulations 1986, S.I. 1986/1711 ("the SDRT Regulations"). At all material times, regulation 14 provided as follows:

> "*Overpayments*
>
> 14(1) If on a claim it is proved to the Board's satisfaction that too much tax has been paid in respect of any relevant transaction … the excess (and any interest paid thereon) shall be repaid by the Board.
>
> (2) A claim under this regulation shall be made within a period of 6 years beginning with the later of –
>
> (a) the date on which the payment was made, and
>
> (b) the relevant accountable date."

No special form has ever been prescribed by HMRC for the making of a claim under regulation 14, so a claim may be made (for example) in correspondence. A claim must be made, however, within the specified period of six years beginning with the date on which the payment was made (nothing turns in the present case on the alternative date from which the six year period may begin to run, namely the "relevant accountable date" as defined in regulation 2). The six year period has subsequently been reduced to four years with effect from 1 April 2011, but the change did not apply retrospectively to payments made before that date, so for present purposes it can be ignored.

10. It is also common ground, although we were not taken to the relevant legislation, that a repayment of overpaid SDRT under regulation 14 carries simple (but not compound) interest at a specified rate.

11. Apart from the statutory remedy, it has long been an established principle of EU law that a Member State is required to repay tax levied in breach of EU law. In the UK, such claims are often referred to as *San Giorgio* claims, named after the seminal decision of the European Court of Justice (as the CJEU then was) in Case C-199/82 Amministrazione delle Finanze dello Stato v San Giorgio SpA EU:C:1983:318, [1983] ECR 3595. According to the settled jurisprudence of the CJEU, in the absence of EU rules on the recovery of unlawfully levied tax, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing such actions, provided, first, that such rules are no less favourable than those governing similar domestic actions (the principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness): see, for example, Case C-362/12 Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners EU:C:2013:538 and 834, [2014] AC 1161 ("FII (CJEU) 3") at paragraphs 30 to 32 of the judgment of the Court.

12. Under English law, there are two alternative causes of action which a taxpayer may invoke in order to bring a *San Giorgio* claim. The first is a common law cause of action in unjust enrichment for the recovery of unlawful tax, under the principle first established by the House of Lords in Woolwich Equitable Building Society v IRC [1993] AC 70 ("Woolwich"). We will refer to such claims as "*Woolwich*" claims. The second is a cause of action in unjust enrichment based on a mistake of law, under the principles established by the House of Lords in Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 ("Kleinwort Benson") and Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners [2006] UKHL 49, [2007] 1 AC 558 ("Deutsche Morgan Grenfell").

13. For limitation purposes, there was a crucial distinction between the two causes of action. *Woolwich* claims are subject to the normal limitation period for claims in unjust enrichment, which is the period of six years running from the date of payment, on the basis that they are founded on simple contract within the meaning of section 5 of the Limitation Act 1980: see Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2020] UKSC 47, [2022] AC 1, at [7] per Lord Reed PSC and Lord Hodge DPSC giving the judgment of the majority with which Lord Lloyd-Jones and Lord Hamblen JJSC agreed. We will refer to this decision as FII (SC) 2, as this was the second occasion on which the Supreme Court had considered issues arising in the FII Group Litigation.

14. By contrast, however, *Kleinwort Benson* claims can normally benefit from the extension to the usual six year limitation period which applies to an "action for relief from the consequences of a mistake" within the meaning of section 32(1)(c) of the 1980 Act, with the consequence that the limitation period does not begin to run "until the plaintiff has discovered the … mistake … or could with reasonable diligence have discovered it": see FII (SC) 2, at [8]. The same reasoning could not be applied to *Woolwich* claims, because one of the points determined in the first case in the FII Group Litigation to reach the Supreme Court was that "in order for a claim to fall within the ambit of section 32(1)(c) of the 1980 Act, a mistake must constitute an essential element of the cause of action, and not merely form part of the context": ibid, at [14], referring to Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2012] UKSC 19, [2012] 2 AC 337 ("FII (SC) 1").

15. The *Deutsche Morgan Grenfell* litigation soon made it apparent, if it had not been before, that mistake-based *San Giorgio* claims brought in reliance on the extended limitation period in section 32(1)(c) of the 1980 Act had the potential to expose the public purse to huge liabilities, since in such cases, where the mistake of law upon which they were based had only recently come to light in the case law of the CJEU, the claim could in principle go back as far as 1973 when the UK's membership of the EU (at that time the European Economic Community) began. Furthermore, it was then generally thought, in reliance (inter alia) on the decision of the House of Lords in the *Sempra Metals* case, that a claimant would be entitled to recover compound interest on such a claim from the original date of payment to the date of ultimate recovery: see Sempra Metals Ltd v IRC [2007] UKHL 34, [2008] 1 AC 561 and the judgment of Henderson J in Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2008] EWHC 2893 (Ch), [2009] STC 254, at [405] to [406].

16. It was against that background, while the *Deutsche Morgan Grenfell* litigation was still making its way through the English courts, that on 8 September 2003 the Paymaster General (Ms Dawn Primarolo MP) announced in Parliament that legislation would be included in the Finance Bill 2004 to limit the period for claiming repayments of overpaid tax to six years from the date of the original payment. In a written Ministerial Statement released on the following day, she explained:

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

Draft clauses were published at the same time, and in due course the draft legislation was enacted as section 320 of the Finance Act 2004, which received Royal Assent on 22 July 2004.

17. Section 320 provided:

> "**320 Exclusion of extended limitation period in England, Wales and Northern Ireland**
>
> (1) Section 32(1)(c) of the Limitation Act 1980 … (extended period for bringing an action in case of mistake) does not apply in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners of Inland Revenue. This subsection has effect in relation to actions brought on or after 8th September 2003.
>
> …
>
> (6) The provisions of this section apply to any action or claim for relief from the consequences of a mistake of law, whether expressed to be brought on the ground of mistake or on some other ground (such as unlawful demand or *ultra vires* act).

> (7) This section shall be construed as one with the Limitation Act 1980 …"

18. It can be seen, therefore, that section 320, as enacted, was expressly made retrospective in its effect in relation to any actions brought on or after the date of the Paymaster General's announcement to Parliament on 8 September 2003.

19. In view of the retrospectivity of section 320, and the complete absence from it of any transitional provisions to protect the position of taxpayers with accrued *San Giorgio* claims which depended on section 32(1)(c) of the 1980 Act for their vindication, and of which they had apparently been deprived overnight on 8 September 2003 by the enactment of section 320, it is unsurprising that the compatibility of section 320 with EU law was itself soon challenged in the context of the FII Group Litigation. The absence of transitional provisions was particularly striking, because the need to include an adequate transitional period in domestic legislation of a Member State curtailing a limitation period for the recovery of unlawfully levied tax had already been clearly stated by the CJEU in the *Marks & Spencer* case (to which we will need to return) in July 2002: see Case C-62/00 Marks & Spencer plc v Customs and Excise Commissioners EU:C:2002:435, [2003] QB 866 ("Marks & Spencer"). The Revenue sought to justify this omission, however, by deploying arguments that the unheralded curtailment of the limitation period for mistake-based *San Giorgio* claims involved no breach of the EU law principles of effectiveness, legal certainty and the protection of legitimate expectations, because of the continuing availability from 8 September 2003 of the alternative *Woolwich* cause of action, with its six year limitation period which in itself was clearly compatible with EU law.

20. The Revenue's arguments on this point were rejected by Henderson J at first instance, but found favour with the Court of Appeal. When the case reached the Supreme Court in 2012 in FII (SC) 1, it decided to refer the question to the CJEU for a preliminary ruling since there was a division of opinion between the members of the Court and the answer could not be regarded as *acte clair*. The first question referred was framed as follows:

> "Where under the law of a Member State a taxpayer can choose between two alternative causes of action in order to claim restitution of taxes levied contrary to articles 49 FEU and 63 FEU and one of those causes of action benefits from a longer limitation period, is it compatible with the principles of effectiveness, legal certainty and legitimate expectations for that Member State to enact legislation curtailing that longer limitation period without notice and retrospectively to the date of the public announcement of the proposed new legislation?"

See paragraph 24 of the judgment of the CJEU in FII (CJEU) 3.

21. The CJEU answered this question in the negative, holding that legislation such as section 320 not only infringed the principle of effectiveness, but was also contrary to the principles of legal certainty and legitimate expectations. We will need to return to some aspects of the Court's reasoning later in this judgment, but for now it is enough to record that it dealt with the principle of effectiveness at paragraphs 30 to 43 of its judgment, and the principles of legal certainty and the protection of legitimate

expectations at paragraphs 44 to 49. In particular, with regard to the absence of transitional arrangements, the Court followed its earlier reasoning in Marks & Spencer, and said at paragraph 39:

> "The fact that in the *Marks & Spencer* case the taxpayer had only one legal remedy, whilst in the case in the main proceedings the taxpayer has two such remedies, cannot, in circumstances such as those in issue before the referring court, lead to a different conclusion."

The present proceedings

22. The CJEU delivered its judgment in FII (CJEU) 3 on 12 December 2013, a week before Jazztel issued its claim form in the present case on 19 December 2013. The particulars of claim, which were subsequently amended in immaterial respects in January 2017, pleaded the unlawfulness under EU law of the relevant charges to SDRT, the making of the Payments, and Jazztel's alleged mistaken belief that (a) the statutory provisions were lawful, (b) they imposed a liability on the relevant clearance services and depositary to pay the disputed SDRT, and (c) by reason of (a) and (b), and Jazztel's contract with the clearance services and the depositary, Jazztel was obliged to make the payments. Repayment of the unlawfully levied tax was claimed on the basis of the *Woolwich* and *Deutsche Morgan Grenfell* causes of action, together with compound interest. In addition, there was a claim for damages for breach of duty in accordance with the principles of EU law recognised in the *Francovich* litigation (Case C-479/93 Francovich v Italian Republic [1995] ECR I-3843, given effect in English law in R v Secretary of State for Transport, Ex p Factortame Ltd (No 5) [2000] 1 AC 524).

23. In their defence, HMRC admitted some of the payments, but joined issue with Jazztel on a number of factual points upon which nothing now turns. HMRC also pleaded that a number of substantial repayments of unlawfully levied tax and simple interest had already been made to Jazztel in response to statutory claims under regulation 14 of the SDRT Regulations; the main reason why these claims were still included in the action was Jazztel's desire to recover compound interest, and perhaps damages as well.

24. In relation to the mistake-based restitution claims, HMRC denied that Jazztel "was mistaken in any respect". Further, even if a claim for mistake could be made out on the facts, HMRC pleaded in paragraph 26.2 that:

> "any claim for relief, to the extent that it relates to a payment to HMRC/the Inland Revenue prior to 19 December 2007 [*i.e. 6 years before the issue of the claim form*] is time barred by virtue of changes made to section 32 of the Limitation Act 1980 by section 320 of the Finance Act 2004 (save to the extent that section 320 operated unlawfully to curtail the Claimant's rights under EU law)."

25. The apparent admission at the end of paragraph 26.2, quoted above, was the subject of a request for further information asking to what extent it was *admitted* that section 320 "operated unlawfully to curtail the Claimant's rights under EU law". This elicited the response on 9 April 2015 that:

> "It is admitted that section 320 of the Finance Act 2004 operated unlawfully to the extent it curtailed completely as at 8 September 2003 the Claimant's right to claim repayment of SDRT paid before 8 September 1997 and claimed more than 6 years after the date of payment."

26. In response to a further question asking to what extent it was *denied* that section 320 so operated, and on what basis, HMRC replied on the same date:

> "It is denied that section 320 of the Finance Act 2004 operated unlawfully to curtail the Claimant's right to repayment of SDRT paid after 8 September 1997 to the extent the claim was made more than 6 years after the date of the payment. For those payments made after 8 September 1997 but before 8 September 2003, section 320 did not cause any absolute retrospective curtailment of a right to repayment since a 6 year time limit was still provided for the making of a claim. On the basis of its pleaded case, the Claimant has not identified any payment where they were prevented from making a claim for overpaid SDRT by virtue of section 320. For payments made after 8 September 2003, it cannot be argued that section 320 was in reality retrospective (and so operated unlawfully) since sufficient notice was given of the change in the law by the announcement of the Paymaster General (accompanied by draft legislation). There was no curtailment of the Claimant's right to repayment of SDRT as none existed at 8 September 2003."

27. Returning now to the table of Payments in the Judgment at [23], it is important to note that Payments 1 to 9 inclusive were made before 8 September 2003; but since the earliest of those Payments was made in 2000, including in particular the substantial Payment 2 made on 7 January 2000, it cannot be said that the retrospective curtailment of the limitation period for mistake-based claims on 8 September 2003 self-evidently deprived Jazztel of its right to bring such a claim in respect of any of those Payments within a reasonable period after that date. Thus, for example, a mistake-based claim for restitution of Payment 2 could in principle have been brought, in accordance with the curtailed limitation period, at any time between 8 September 2003 and 6 January 2006, a period of approximately 2 years and 4 months. This was the basis, as we understand it, of HMRC's contention in their response to the requests for further information that, on the basis of its pleaded case, Jazztel had "not identified any payment where they were prevented from making a claim for overpaid SDRT by virtue of section 320".

28. Payments 10 to 23 in the table were all made after 8 September 2003, but (as we have already pointed out) only the last of them, Payment 23 made on 7 May 2008, was made less than six years before the issue of the claim form. Accordingly, Payments 10 to 22 inclusive, ranging in date from 17 December 2003 to 3 August 2007, were all prima facie time-barred by the curtailed limitation period. Whether the claim for their recovery was based on the *Woolwich* cause of action or on mistake, the six year period of limitation had already expired when the claim form was issued. Furthermore, all of the payments made after 8 September 2003, with the possible exception of the first, which is trivial in amount, were made less than six years, and in most cases much less

than 6 years, before the CJEU delivered its judgment in HSBC Holdings on 1 October 2009. Accordingly, on the assumption that the curtailed six year limitation period began to run when each such payment was made, there was still in most cases ample time for the claim to be brought after the CJEU had given its judgment establishing the unlawfulness of the charge to SDRT under section 96 of the Finance Act 1986.

29. There is one further aspect of the procedural background which it is convenient to mention at this stage. As one would expect, Jazztel was by no means the only taxpayer which wished to bring claims against HMRC in the High Court for restitution and/or for damages arising from payments of unlawfully levied SDRT under sections 93 or 96 of the Finance Act 1986. Accordingly, by a group litigation order ("GLO") made by Chief Master Winegarten in the Chancery Division of the High Court on 21 October 2010, the Stamp Taxes Group Litigation was established on the terms set out in the GLO, which has subsequently been amended on a number of occasions. Pursuant to CPR 19.11, a group register was established and GLO issues were identified, to be determined in test claims. Jazztel was added to the group litigation in December 2014 by an amending order made by Proudman J, which also identified two new GLO issues, numbered 9A and 9B. Those issues, which were described as "the pre 8 September 2003 limitation issue" and "the post 8 September 2003 limitation issue" respectively, raised the question whether HMRC could rely on section 320 of the 2004 Act in cases where the relevant SDRT at the rate of 1.5% was paid before, or after, that date.

30. In due course, Jazztel's case was designated as the test claim for determination of those two issues. Indeed, as the Judge noted at [11], the hearing before him "was concerned only with Jazztel's mistake claim". Jazztel's *Factortame* claim for damages had been stayed, as had the issue about the availability of compound interest pending the outcome of two appeals to the Supreme Court which eventually established that the claims for compound interest were misconceived: see FII (SC) 2 at [15], Littlewoods Ltd v Revenue and Customs Commissioners [2017] UKSC 70, [2018] AC 869 and Prudential Assurance Co Ltd v Revenue and Customs Commissioners [2018] UKSC 39, [2019] AC 929.

31. At the trial of Jazztel's claim in January 2017, Mr Sam Grodzinski QC and Mr Michael Jones (also now QC) appeared for Jazztel, as they have in this Court. HMRC were represented by Mr Rupert Baldry QC, leading Mr David Yates (also now QC); in this Court Mr Baldry has again appeared for HMRC, leading Ms Barbara Belgrano and Mr Frederick Wilmot-Smith. For the reasons set out in the Judgment, and reflected in paragraph 7 of his Order dated 25 April 2017, the Judge determined GLO Issue 9A in favour of the GLO claimants, but GLO Issue 9B in favour of HMRC. In other words, he held that HMRC could not rely on section 320 of the 2004 Act to deny Jazztel recovery of Payments 1 to 9, but that Jazztel was time-barred, by reason of section 320, from recovering Payments 10 to 22 (paragraphs 4 and 6 of the Order). In addition, as we have already noted, the Judge found that Jazztel made each of the Payments identified in the Judgment at [23] under a mistake (paragraph 2 of the Order).

32. In formal terms, the position now is that HMRC appeal to this Court against the parts of the Judge's Order relating to GLO Issue 9A and Payments 1 to 9, while Jazztel cross-appeals against the parts of the Order relating to GLO Issue 9B and Payments 10 to 22, in each case with permission granted by the Judge on 18 March 2019. The reason for the delay in granting permission to appeal is that by paragraph 10 of the Order the Judge had deferred consideration of any application for permission pending the outcome of

HMRC's application for permission to appeal to the Supreme Court in relation to their defence of change of position in the FII Group Litigation. HMRC had pleaded such a defence to Jazztel's claim, and the Judge had heard evidence and made detailed findings of fact in relation to that defence on the assumption that it was open to HMRC in law to rely upon it. In the event, however, this part of the case ceased to be a live issue when HMRC wrote to the Court on 6 November 2018 to confirm that they were abandoning their change of position defence in the FII Group Litigation, and were therefore also abandoning it in the present case.

33. Pursuant to the permission granted by the Judge, HMRC filed their appellant's notice and grounds of appeal on 12 April 2019. The substance of the grounds is contained in paragraphs 3 and 4:

> "3. The grounds of appeal are that the learned judge erred:
>
> (1) in holding that Jazztel needed to know that it had a cause of action in order for any transitional period to be effective;
>
> (2) by finding that disapplication of section 320 in respect of Payments 1-9 was the only remedy sufficient to protect EU rights that had already accrued prior to 8 September 2003;
>
> (3) in failing to hold that section 320 applied in respect of Payments 1-9 with the effect that Jazztel's claim for Payments 1-9 was time-barred.
>
> 4. HMRC's case is that the introduction of section 320 and its application to Jazztel complies with the principle of effectiveness. The inherent transitional period (well over 2 years) afforded to Jazztel following the introduction of section 320 was sufficient to comply with the principle. Accordingly, there was no need to consider whether, on Jazztel's facts, section 320 needed to be subjected to a conforming interpretation/disapplication. Further and alternatively, there was no proper basis for adopting a conforming construction or disapplying section 320 in the present case."

34. Jazztel's appellant's notice and grounds of appeal were also dated 12 April 2019. The sole ground was that the Judge's reasons for dismissing Jazztel's claim in relation to Payments 10 to 22 were not consistent with the principles of EU law established in Marks & Spencer, as subsequently applied by the House of Lords in Fleming v Revenue and Customs Commissioners [2008] UKHL 2, [2008] 1 WLR 195 ("Fleming").

35. The appeal was originally listed to be heard in early April 2020, but in March 2020 it was adjourned (on the application of HMRC, which Jazztel did not oppose) to await the pending judgment of the panel of seven Supreme Court Justices who had heard argument over three days in February 2020 on important issues of law concerning the scope and interpretation of section 32(1)(c) of the Limitation Act 1980, including the question whether the Court should depart from the previous decision of the House of

Lords in Deutsche Morgan Grenfell on the correct approach to "discovery" of a mistake of law. The Supreme Court delivered its judgment in FII (SC) 2 on 20 November 2020, holding by a majority (Lord Briggs and Lord Sales JJSC dissenting) that the ambit of section 32(1)(c) did extend to mistakes of law, as well as mistakes of fact, but that the test of "discovery" for the purposes of the section had been wrongly stated in Deutsche Morgan Grenfell as (in short) the date on which "the truth" as to whether the claimant had a well-founded cause of action was established by a court of final jurisdiction. Instead, the majority held (again in outline) that the correct test was that time began to run at a point when the claimant discovered, or could with reasonable diligence have discovered, his mistake in the sense of recognising that a worthwhile claim had arisen.

36. In the light of that ground-breaking decision, HMRC applied on 8 March 2021 for permission to amend their grounds of appeal by addition of the following paragraph:

> "5. The learned judge further erred in failing to hold that Jazztel is time-barred from recovering Payments 1 to 22 because Jazztel discovered or could with reasonable diligence have discovered its mistake in making those Payments more than six years before it issued its claim for the purposes of section 32 of the Limitation Act 1980."

That application was opposed by Jazztel, and it was listed to be heard with the appeal.

37. Accordingly, there are two main issues on which we have heard argument over the course of three days and which we need to determine. The first issue is the subject matter of HMRC's appeal on GLO Issue 9A and Payments 1 to 9. The second issue is whether HMRC should have permission to amend their grounds of appeal so as to include paragraph 5 set out above, and (if so) whether that ground is made out on the basis of material that we can properly take into account when considering it for the first time on appeal.

38. As to Jazztel's appeal on GLO Issue 9B and Payments 10 to 22, the position is that Jazztel accepts before us, as it did before the Judge, that the issue has been resolved in HMRC's favour at all levels below the Supreme Court by the decision of the Court of Appeal in Leeds City Council v Revenue and Customs Commissioners [2015] EWCA Civ 1293, [2016] STC 2256 ("Leeds City Council"). Jazztel's skeleton argument in support of its appeal is therefore confined to preserving its position on the issue pending any further appeal to the Supreme Court, together with a brief indication of the reasons why Jazztel wishes to submit that Leeds City Council was wrongly decided.

39. With this rather lengthy introduction, we will now consider in turn the two main issues which we have identified.

II **HMRC's appeal: Was the Judge right to disapply section 320 of the Finance Act 2004 in relation to the Payments made before 8 September 2003 (Payments 1 to 9)?**

40. Before we come to the Judge's reasoning on this issue, it is helpful to begin with a brief review of the established jurisprudence of the CJEU on limitation periods for the recovery of unlawful tax, and the circumstances in which such periods may be legitimately curtailed by a Member State. We will then examine the important decision of the House of Lords in Fleming. To avoid unnecessary repetition, we make it clear

that, when we refer to "unlawful tax", we mean tax levied contrary to directly effective provisions of EU law.

CJEU case law

41. For present purposes, there is no need to refer to any case earlier than the decision of the CJEU in Marks & Spencer on 11 July 2002. The case had a structural similarity to the present case, in that it concerned the retrospective curtailment of a limitation period in domestic UK tax legislation, with effect from the date when the proposal to reduce the limitation period was announced (with no prior notice) in Parliament. As the headnote at [2003] QB 866 records:

> "On 18 July 1996 it was announced in Parliament that it was intended in the 1997 Finance Bill to reduce the limitation period for claims to refunds of value added tax from six to three years, and to provide for that change in the law to have taken effect at the date of the announcement. Following a judgment of the [*CJEU*] in October 1996, from which it was apparent that the manner in which VAT had been levied in the United Kingdom in connection with certain voucher schemes used by traders was not in accordance with article 11 of Sixth VAT Directive 77/388/EEC, the claimant, which had operated such a scheme, made a claim, by letter of 31 October 1996, for a refund of VAT overpaid as from May 1991. The Customs and Excise Commissioners stated that they were only prepared to pay such part of the claim as fell within the new three-year limitation period. Section 47(1) of the Finance Act 1997, amending section 80(4) of the Value Added Tax Act 1994, enacted the new limitation period and section 47(2) provided that it was to be deemed to have come into force on 18 July 1996."

The question referred to the CJEU by the Court of Appeal for a preliminary ruling, as reformulated by the CJEU in paragraph 33 of its judgment, asked:

> "whether national legislation retroactively curtailing the period within which repayment may be sought of sums paid by way of VAT collected in breach of provisions of the Sixth Directive with direct effect … is compatible with the principles of effectiveness and of the protection of legitimate expectations."

42. We note, in passing, that the actual decision of the Court of Appeal, and the question referred to the CJEU in its original formulation, had drawn a distinction between the period before, and after, the date in August 1992 when the relevant article of the Sixth Directive had been correctly implemented into English law, on the footing that it was no longer possible for individuals to rely on the direct effect of the directive after that date. The CJEU held that this distinction was misconceived in principle, with the consequence that (as the Court stated in paragraph 27):

> "the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member states remain bound actually to ensure full application of the

> directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the state, on the provisions of a directive which appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured …"

43. The CJEU discussed the principle of effectiveness at paragraphs 34 to 42. The Court began by repeating what was already its standard learning, and has been repeated many times since, to the effect that in the absence of EU rules on the repayment of unlawfully levied national charges "it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law", provided always that those rules comply with the EU law principles of equivalence and effectiveness.

44. With regard to the principle of effectiveness, the Court then said (at paragraph 35) that "in the interests of legal certainty, which protect both the taxpayer and the administration, it is compatible with Community law to lay down reasonable time limits for bringing proceedings", and that such time limits do not infringe the principle of effectiveness. The Court added:

> "In that context, a national limitation period of three years which runs from the date of the contested payment appears to be reasonable: see, in particular, *Aprile*, paragraph 19, and *Dilexport*, paragraph 26."

45. The Court then continued:

> "36. Moreover, it is clear from *Aprile* [2000] 1 WLR 126, 149, para 28, and *Dilexport* [1999] ECR I-579, 616, paras 41 and 42, that national legislation curtailing the period within which recovery may be sought of sums charged in breach of Community law is, subject to certain conditions, compatible with Community law. First, it must not be intended specifically to limit the consequences of a judgment of the court to the effect that national legislation concerning a specific tax is incompatible with Community law. Secondly, the time set for its application must be sufficient to ensure that the right to repayment is effective. In that connection, the court has held that legislation which is not in fact retrospective in scope complies with that condition.
>
> 37. It is plain, however, that that condition is not satisfied by national legislation such as that at issue in the main proceedings which reduces from six to three years the period within which repayment may be sought of VAT wrongly paid …
>
> 38. Whilst national legislation reducing the period within which repayment of sums collected in breach of Community law may be sought is not incompatible with the principle of

> effectiveness, it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously enforced would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right."

46. The Court went on to note, at paragraph 39, that Member States are required as a matter of principle to repay taxes collected in breach of EU law. Although, by way of exception to that principle, a reasonable limitation period for making repayment claims may be fixed in the interests of legal certainty, "in order to serve their purpose of ensuring legal certainty limitation periods must be fixed in advance: *ACF Chemiesarma NV v Commission of the European Communities* (Case 41/69) [1970] ECR 661, 683, para 19."

47. The Court then stated its conclusion, at paragraph 40:

> "Accordingly, legislation such as that at issue in the main proceedings, the retroactive effect of which deprives individuals of any possibility of exercising a right which they previously enjoyed with regard to repayment of VAT collected in breach of provisions of the Sixth Directive with direct effect must be held to be incompatible with the principle of effectiveness."

48. The Court then applied similar reasoning to conclude that the UK legislation also infringed the principle of the protection of legitimate expectations, noting (in paragraph 44) that the principle "forms part of the Community legal order and must be observed by the member states when they exercise the powers conferred on them by Community directives", citing copious authority to that effect.

49. The next important case in the CJEU is Case C-255/00 Grundig Italiana SpA v Ministero delle Finanze [2002] ECR I-8003, [2003] All ER (EC) 176 ("Grundig Italiana"). That case concerned Italian legislation which originally provided a ten, and then five, year limitation period for the recovery of unlawfully levied tax, but subsequently reduced that period to three years, subject to a 90 day transitional period which ran from the date of entry into force of the legislation. The question referred to the CJEU by the Italian court concerned the validity of the 90 day transitional period (or "period of grace" as it was sometimes termed) in relation to claims to recover sums paid before the entry into force of the amending legislation which reduced the relevant limitation period from five years to three. The Court held, in short, that the curtailed time limit of three years was, in itself, compatible with the principle of effectiveness, but that the transitional period of 90 days was "clearly insufficient", although a period of six months would have sufficed.

50. In its discussion of the question at paragraphs 33 to 42 of the judgment, the Court followed and repeated much of its reasoning in Marks & Spencer. For present purposes,

the significance of the case lies mainly in what the Court said about the transitional arrangements which had to satisfy the condition (see paragraph 37) of "allowing an adequate period after the enactment of the legislation for lodging claims for repayment which persons were entitled to submit under the original legislation". After referring to Marks & Spencer in paragraph 38, the Court continued:

> "38. Thus, the transitional period must be sufficient to allow taxpayers who initially thought that the old period for bringing proceedings was available to them a reasonable period of time to assert their right of recovery in the event that, under the new rules, they would already be out of time. In any event, they must not be compelled to prepare their action with the haste imposed by an obligation to act in circumstances of urgency unrelated to the time limit from which they could initially count.
>
> 39. A transitional period of 90-days prior to the retroactive application of a period of three years for initiating proceedings in place of a ten-or-five-year period is clearly insufficient. If an initial period of five years is taken as reference, 90-days leaves taxpayers whose rights accrued approximately three years earlier in a position of having to act within three months when they had thought that almost another two years were still available.
>
> 40. Where a period of ten or five years for initiating proceedings is reduced to three years, the minimum transitional period required to ensure that rights conferred by Community law can be effectively exercised and that normally diligent taxpayers can familiarise themselves with the new regime and prepare and commence proceedings in circumstances which do not compromise their chances of success can be reasonably assessed at six months.
>
> 41. However, the fact that the national court has found that a transitional period fixed by its national legislature such as that in issue in this main proceedings is insufficient does not necessarily mean that the new period for initiating proceedings cannot be applied retroactively at all. The principle of effectiveness merely requires that such retroactive application should not go beyond what is necessary in order to ensure observance of that principle. It must, therefore, be permissible to apply the new period for initiating proceedings to actions brought after expiry of an adequate transitional period, assessed at six months in a case such as the present, even where those actions concern the recovery of sums paid before the entry into force of the legislation laying down the new period."

51. Unlike Marks & Spencer, Grundig Italiana was not a case where there was a complete absence of any transitional provision when an existing limitation period was curtailed. The problem was, instead, that the transitional period provided by the legislature was too short. In that context, it seems to us that the Court was willing to adopt a relatively pragmatic approach. It recognised that an acceptable transitional period would be one

which enabled normally diligent taxpayers to familiarise themselves with the new regime, and that six months should be enough for this purpose when a five year period is reduced to three. The Court also went out of its way to emphasise, in paragraph 41, that where a fixed transitional period is too short, this "does not necessarily mean that the new period for initiating proceedings cannot be applied retroactively at all". Nevertheless, it appears to us from the remainder of paragraph 41 that the type of case which the CJEU here had in mind was one where an action is brought after the expiry of what would have been an adequate transitional period in order to recover sums paid before the entry into force of the curtailing legislation. That reasoning therefore has no direct application to a case such as the present, where there was *never* a fixed transitional period of any duration.

52. In FII (CJEU) 3, the CJEU had to consider the very statutory provision with which we are now concerned, namely section 320 of the 2004 Act. As we have explained, the reference for a preliminary ruling was made by the Supreme Court in view of the differences of opinion between the members of the court in FII (SC) 2. The test claimants for the purposes of the reference were companies in the Aegis group, which had made their claims on 8 September 2003, the date from which section 320 had retrospective effect. To the extent that their claims went back for more than six years, the effect of the section (if valid) was therefore to deprive them of any remedy in respect of all payments of unlawful tax made by them before 8 September 1997, dating back in many instances to 1973. As Lewison LJ put it in Leeds City Council at [25]:

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

That was the stark factual background to the decision of the CJEU, which (as we have already noted) held that section 320 was incompatible with the EU principles of effectiveness, legal certainty and the protection of legitimate expectations.

53. In its discussion of the principle of effectiveness, the Court repeated the basic principles established in Marks & Spencer and in paragraphs 35 and 36 of Grundig Italiana. With regard to transitional arrangements, the Court said in paragraph 37:

> "Such transitional arrangements are necessary where the immediate application to those claims [*i.e. the claims which persons were entitled to submit under the previous legislation*] of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right."

54. The Court then said:

> "38. It follows that national legislation curtailing, retroactively and without any transitional arrangements, the period within which repayment could be sought of sums collected in breach of EU law is incompatible with the principle of effectiveness: see the *Marks & Spencer* case [2003] QB 866, para 47."

55. The natural implication of paragraphs 37 and 38, in our view, is that express transitional arrangements must be provided if immediate application of the new limitation period would deprive at least some taxpayers of their right to repayment, or would allow them too little time within which to assert that right. We do not find any support in this passage for the notion that, in the absence of any express transitional arrangements, it is only those individuals who have in fact been deprived of their right to repayment, or who have been left too short a period for asserting it, who are entitled to claim that the legislation breaches the principle of effectiveness. In other words, the passage suggests that the fact that there are *some* claimants who would be so affected is enough to render the legislation structurally defective because it fails to satisfy the condition of including adequate transitional arrangements.

56. This view is reinforced, as it appears to us, by what the Court went on to say about the principles of legal certainty and the protection of legitimate expectations: see paragraphs 44 to 49. In particular, the Court stated in paragraph 44 that:

> "… according to settled case law, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them … As has been observed in para 33 of this judgment above, limitation periods must be fixed in advance if they are to serve their purpose of ensuring legal certainty."

It seems to us that, if transitional arrangements are to be "clear and precise" and if their application is to be "predictable for those subject to them", they must either be spelt out in the terms of the legislation itself, or at least be promulgated in express terms by the tax authorities of the Member State. Moreover, because the transitional arrangements form an integral part of the curtailed limitation period, they "must be fixed in advance".

<u>*Fleming*</u>

57. The decision of the House of Lords in <u>Fleming</u> is of central importance to the present case, because it involved a detailed analysis of the consequences in domestic English law of the retrospective curtailment of a limitation period for the recovery of unlawfully levied VAT without any transitional arrangements. The House had before it appeals in two different cases. The taxpayer in one case was a sole trader in the motor industry, Mr Fleming, trading as Bodycraft. He claimed repayment of input VAT paid on the purchase of three cars in 1989 and 1990. The taxpayer in the other case was Condé Nast Publications Ltd ("Condé Nast"), which made a claim in June 2003 for repayment of input VAT in respect of expenditure on staff entertainment expenses between April 1973 and April 1997. The most recent of those claims were similar to Jazztel's claims in respect of Payments 1 to 9 in that they accrued, but had not yet been made, in the period before the curtailed limitation period came into effect.

58. The legislative background was helpfully summarised by Lord Hope at [2] to [3]:

> "2. As Lord Walker has explained, claims for overpayment of output tax and previously unclaimed deduction of input tax are provided for by section 80 of the Value Added Tax Act 1994

and regulation 29 of the Value Added Tax Regulations 1995. As originally enacted, section 80 provided that no amount paid by way of VAT which was not due to the commissioners could be claimed after the expiry of six years from the date on which it was paid unless an amount had been paid by reason of a mistake, in which event a claim could be made at any time within six years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it: subsections (4) and (5). In the ordinary course input tax should be claimed as a deduction on the return for the accounting period to which it relates. As originally drafted, regulation 29 which permits claims for a deduction to be made later did not subject those claims to any time limit.

3. An amendment to section 80(4) of the 1994 Act was enacted by section 47 of the Finance Act 1997 with effect from 18 July 1996. It reduced the six-year time limit for the recovery of overpaid tax to three years and removed the exception in relation to cases of mistake. No provision was made for a transitional period during which a claim could be made in cases where a right to recovery of overpaid tax already existed. A new regulation 29(1A) was inserted into regulation 29 by the Value Added Tax (Amendment) Regulations 1997 with effect from 1 May 1997. It provided that the commissioners were not to allow a claim for deduction of input tax made more than three years after the date of the return for the relevant period. In the case of this amendment too there was no transitional period."

59. Lord Hope went on to explain, in [4], that following the decisions of the CJEU in Marks & Spencer and Grundig Italiana steps were taken by the Revenue, by means of announcements contained in business briefs, to introduce a transitional period for the making of claims for the recovery of overpaid output tax under section 80. However, no similar transitional provisions were ever introduced or announced with regard to claims for repayment of input tax. Such claims had never been subject to any time limit under regulation 29 of the 1995 Regulations, and that remained the position until the new regulation 29(1A) was inserted, without any transitional period, with effect from 1 May 1997. Accordingly, since Condé Nast did not make its claim until June 2003, all of the input tax which it sought to recover was prima facie time-barred.

60. It was common ground in Fleming, as Lord Hope noted at [5], that the unmodified time limit in regulation 29(1A) was incompatible with EU law because it was retrospective and made no provision for any transitional arrangements: see Marks & Spencer at paragraph 38, and Grundig Italiana at paragraph 37. Lord Hope then identified the question which the House had to resolve as being "how to apply the guidance that was given in [Marks & Spencer and Grundig Italiana] in order to make good the lack of a transitional period for the application of regulation 29 to accrued claims resulting from a failure to deduct input tax": see [6]. Legislation that is incompatible with EU law had to be disapplied, but could the court "go further and make good the defect which has led to its disapplication?" Acknowledging that the problem was "far from easy",

and referring to a number of possible choices identified by leading counsel for the Revenue, Lord Hope continued (ibid):

> "Underlying these possible choices is a more fundamental point, which I would express in this way. Where national legislation is defective because it lacks the transitional arrangements that are necessary under EU law, is it for the national court to make good the deficiency by devising such transitional arrangements as it may regard as appropriate? Or must this be left to the legislature or, following the example of what was done in regard to section 80 by means of announcements in business briefs, to the commissioners?"

61. Lord Hope then referred to the two different situations (although he saw no difference in principle between them) where (a) transitional arrangements have been included, but they are found to be too short, and (b) cases where no transitional arrangements have been included at all. He then said, at [7]:

> "In both cases the retrospective time limit is unenforceable as there is no adequate transitional period. But there is a difference in degree between them which affects the ability of the court to make good the defect."

62. After referring to Grundig Italiana as an example of the first situation, and commenting that it is open to the court, as the CJEU did in that case, to make its own assessment of what in accordance with EU law is an adequate transitional period during which the new time limit is not to be applied retrospectively, Lord Hope turned to the second type of case:

> "9. The other situation is that which applies in the case of these two appeals. Here too the guiding principle is that of effectiveness. Account must also be taken of the principle of protection of legitimate expectations … [*which*] is infringed by the retrospective introduction of a time limit for the making of claims retrospectively. But this will not be in breach of EU law so long as transitional arrangements are included which allow an adequate period for the lodging of claims which persons were entitled to submit under the original legislation … Sufficient notice of these transitional arrangements must be given to ensure that the exercise of those accrued rights is not rendered virtually impossible or excessively difficult. Unless this is done there will be a breach of the principle of effectiveness.
>
> 10. I would not rule out the possibility, in a suitable case, of the court reaching its own decision as to what would be a reasonable time for the making of claims and rejecting claims that were made after a period which it held to be reasonable. But I do not think that the situation disclosed by these appeals lends itself to that treatment. In my opinion this is a step too far for the court to take. The issue is not one of statutory interpretation, for which the court must accept responsibility. There is a gap in

> the legislation which is unfilled … The primary responsibility for giving a clear indication to taxpayers as to where they stood with regard to the making of claims despite the retrospective introduction of the time limit lay with the legislature and the executive.
>
> 11. To be compatible with EU law, taxpayers were entitled to be told in advance of any transitional arrangements that would enable them to submit late accrued claims for the deduction of input tax despite the introduction of the time limit. They were entitled to be given sufficient notice to familiarise themselves with the new regime, including the period of grace that was to be allowed for the submission of accrued claims during a transitional period: *Grundig* [2002] ECR I-8003, para 40. This was necessary to give effect to the principle of effectiveness. Not all taxpayers affected by a system whose reach is as wide as VAT can be assumed to have been aware of the development of the relevant case law, or even if they were aware of the case law, to have understood the effect of it. Some may have appreciated that they could claim a period of disapplication, but some might not. Such indications as were available to them through the business briefs suggested that, in most cases, any such claims would be rejected by the commissioners. I do not think that the gap in the legislation can be made good on a case by case basis. The nature of the defect is such that a single solution is required that can reasonably be applied to all taxpayers.
>
> 12. For these reasons, and for those explained more fully by Lord Neuberger, I would hold that the period has not yet begun and that it is for Parliament or the commissioners, if they choose to do so by means of an announcement disseminated to all taxpayers, to introduce prospectively an adequate transitional period. Until that is done the three year time limit must be disapplied in the case of all claims for the deduction of input tax that had accrued before the introduction of the time limit. I would apply that reasoning to Mr Fleming's case as well as that of Condé Nast."

63. Lord Hope's reasoning was expressly agreed with by both Lord Carswell and Lord Neuberger: see [77] and [109]. It follows, in our view, that the following propositions had the support of a majority of their Lordships:

(1) the omission of any transitional arrangements left an unfilled gap in the legislation;

(2) to be compatible with EU law, taxpayers were entitled to be told in advance of any transitional arrangements that would enable them to submit late accrued claims for the deduction of input tax, despite the introduction of the three year limitation period;

(3) the gap in the legislation cannot be made good on a case by case basis, and a single solution is needed that can reasonably be applied to all taxpayers; and

(4) unless and until Parliament or the Revenue introduce prospectively an adequate transitional period, the three year time limit "*must* be disapplied in the case of *all* claims for the deduction of input tax that had accrued before the introduction of the time limit" (our emphasis).

64. To similar effect, Lord Carswell said at [77]:

> "I agree with [*Lord Hope and Lord Neuberger*] that it is for Parliament or for the commissioners – who must disseminate the information sufficiently to all value added taxpayers – to introduce prospectively an adequate transitional period which will apply to all claims for the deduction of input tax that had accrued before the introduction of the time limit. That was not done before 27 June 2003 and indeed has not yet been effected. When such a step is taken, the time limit applied by regulation 29(1A) of the 1995 Regulations must be disapplied."

Again, we emphasise the reference to *all* claims for the deduction of input tax that had accrued before the introduction of the time limit.

65. Lord Neuberger's opinion contains a helpful summary, at [79], of the propositions of EU law which can be derived from Marks & Spencer and Grundig Italiana, and then covers, in valuable detail, much of the same ground that Lord Hope summarised in his shorter opinion. In the interests of brevity, we will confine ourselves to what Lord Neuberger said about the last sentence of paragraph 41 of the CJEU's judgment in Grundig Italiana, which reinforces some of the points we have already made in our review of the European case law. After recalling that a valid limitation period must be "fixed in advance" in order to satisfy EU law, Lord Neuberger said at [88]:

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

66. Returning to the same theme, Lord Neuberger said in [90]:

> "In my opinion, in the last sentence of para 41 of its judgment in [Grundig Italiana], the ECJ was saying that legislation containing a retrospective limitation period without a transitional provision could be retrospectively effective, provided that what

> amounted to an effective transitional period (such as a period of disapplication) was accorded by the member state, but that it was for that member state to determine how and when it accorded such a period, and what the period was, provided Community law principles, especially those of effectiveness, legitimate expectation and certainty … were satisfied."

The reasoning of the Judge

67. The Judge began his analysis at [87] by setting out the key dates in reverse chronological order, beginning with the issue of the claim form on 19 December 2013 and going back to the announcement in Parliament on 8 September 2003. He then referred to a definition of "retrospective legislation" in the 4th (2015) edition of Jowitt's Dictionary of English Law, which we were told had not been cited to him, and proceeded to draw a distinction between two types of retrospectivity which he labelled "express" and "hidden" retrospectivity. In his view, section 320 was retrospective in both senses. It was expressly retrospective, in the sense that it was enacted on 22 July 2004 but had effect in relation to actions brought on or after 8 September 2003. It was also an example of hidden retrospectivity, in the sense that an accrued right might be rendered unenforceable by the operation of the section, in circumstances where the claimant had no prior knowledge of the accrued right and could not with reasonable diligence have discovered it within the meaning of section 32(1)(c) of the Limitation Act 1980.

68. The Judge developed this train of thought at [88] and [89], noting that this "hidden" detrimental effect occurred without the fault of Jazztel and in circumstances where it could not have been remedied by the provision of a reasonable express transitional period "during which taxpayers are aware that the regime is going to change and have the opportunity to bring such claims vindicating accrued rights as they wish". The Judge said at [89(ii)]:

> "Such transitional provisions are only effective where the affected party is *aware* of the effect the legislation will have on him or her, and is able to take protective steps."

69. The Judge correctly recognised, at [90], that neither Marks & Spencer nor Grundig Italiana had drawn the distinction between express and hidden retrospectivity which he had identified. He nevertheless considered that the reasoning in those cases was intended to extend to both types of retrospectivity, and that it sought to control and regulate the effect of changes in the time limit on the taxpayer, irrespective of how the hidden retrospectivity had arisen: see [91] to [93]. Applying the principles which he had identified to the facts, he concluded at [96] that section 320 infringed EU law "both in its express retrospectivity and in its hidden retrospectivity". He exemplified the hidden retrospectivity, in [96(ii)], by positing two taxpayers with an accrued mistake claim in respect of a payment made in 1985, one of whom discovered the mistake on 7 September 2003 and could take advantage of section 32(1)(c), and the other of whom discovered his mistake on 9 September 2003, and could not. (Incidentally, the Judge appears at times to have been under the misapprehension that section 320 applied only to actions brought after 8 September 2003, with the result that section 32(1)(c) was still available for an action started on 8 September 2003. That is not correct, as the final

words of section 320(1) make clear. The subsection "has effect in relation to actions brought on or after 8 September 2003.")

70. Having reached this conclusion, the Judge held that, in order to avoid an infringement of EU law, no remedy short of the partial disapplication of section 320 would suffice with regard to Payments 1 to 9. Following Leeds City Council, which was binding on him as it is on us, he rightly recognised that no disapplication was required in relation to Payments 10 to 22.

71. In relation to Payments 1 to 9, the Judge's reasoning on disapplication was heavily influenced by his concept of hidden retrospectivity. For example, he said at [100(vi)]:

> "The real mischief, which I consider must be addressed in order to render section 320 compliant with Community law, is the loss of accrued rights of which there owner is ignorant – that is, the hidden retrospectivity of section 320."

And again, in the following sub-paragraph:

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

He therefore disapplied section 320 in relation to claims accruing on or before 8 September 2003, which would be time-barred according to the ordinary six year limitation period, and which could only be vindicated by the taxpayer relying upon section 32(1)(c).

The "Class 8" case

72. The Judge's reasoning on this part of the case, and in particular his reliance on the concept of hidden retrospectivity, was considered, but not followed, by Sir Geoffrey Vos C (as he then was) in Claimants in Class 8 of the CFC and Dividend Group Litigation v Revenue and Customs Commissioners [2019] EWHC 338 (Ch), [2019] 1 WLR 5097 ("Class 8"). The background to the case is helpfully summarised in the headnote to the Weekly Law Reports report:

> "The claimants were United Kingdom resident companies which had paid corporation tax on dividend income received from non-United Kingdom resident companies. Between 2012 and 2014 they brought common law claims in mistake, unjust enrichment and damages, seeking repayment of and interest on overpaid corporation tax on the basis that the statutory provisions concerning overseas dividend income were incompatible with European Union law. The revenue contended that the claims were ousted by paragraph 51(6) of Schedule 18 to the Finance Act 1998, which provided that the revenue was not liable to give relief in respect of overpaid corporation tax except as provided

> by specified tax legislation. In particular the revenue contended that paragraph 51(6) was not incompatible with the European Union law principle of effectiveness because the claimants could have sought double taxation relief under section 790 of the Income and Corporation Taxes Act 1998 ["*ICTA 1998*"]. The claimants contended that section 790 was not an effective remedy because they had not actually known that they had such a remedy before it had become time-barred … Further, the revenue contended that the claims were time-barred as a result of section 320 of the Finance Act 2004 … A number of preliminary issues were ordered to be tried, including (i) whether the claimants' claims were ousted by paragraph 51(6) of Schedule 18 to the 1998 Act and (ii) whether section 320 of the 2004 Act had effect in relation to claims for restitution of tax paid before its introduction."

73. On the first preliminary issue, Sir Geoffrey Vos C held that the claims were indeed ousted by paragraph 51(6) of Schedule 18 to the 1998 Act, which had come into force on 1 April 2010. As the Chancellor explained at [10], the paragraph 51(6) issue "took most of the available time in argument … because the bulk of the Class 8 claims were issued in 2012 and 2014". This meant that the Class 8 claims were at first sight ousted by the express terms of paragraph 51(6), unless it was held to be incompatible with (primarily) the EU law principle of effectiveness (ibid). The Chancellor's ultimate conclusion, at [119], was that "paragraph 51(6) does indeed operate to oust the claimants' common law claims", and that this outcome did not contravene the principle of effectiveness.

74. In the course of coming to this conclusion, one of the sub-issues which the Chancellor had to consider was whether the double taxation relief allowed by section 790 of ICTA 1988 was "prevented from being an effective remedy because in some cases the claimants can show that they did not *actually know* that they had such a remedy before the abbreviated limitation periods meant that their remedy had become statute-barred": see [75(iv)]. The Chancellor discussed this sub-issue at [85] to [97], holding at [97] that "section 790 can provide an effective remedy in such circumstances". In so holding, he rejected the submission of leading counsel for the taxpayers (Mr Graham Aaronson QC) that he should follow the decision of the Judge in the present case "so as to decide that a claimant who does not know that a remedy is available to him cannot have an effective remedy for the purposes of EU law": see [85].

75. The Chancellor said he was unable to agree with the reasoning of the Judge on the question of "hidden retrospectivity", saying at [88]:

> "In my judgment, this is a misunderstanding of the EU law cases and of the EU law principle of effectiveness itself. The principle was best expressed in *FII CJEU 3* [2014] AC 1161, para 32 as follows:
>
> 'The detailed procedural rules governing actions for safeguarding a taxpayer's rights under EU law … must not be framed in such a way as to render impossible in practice or

> excessively difficult the exercise of rights conferred by EU law: …'
>
> It is the procedural rules that must not be framed in such a way as makes it impossible to claim. The knowledge of the claimant as to the existence of a claim is nothing to the point."

76. After referring to Lord Neuberger's summary of the relevant principles in Fleming at [79], the Chancellor continued:

> "90. What these authorities [*i.e. Marks & Spencer and Grundig Italiana*] did not say is that the limitation period can only be attenuated when the claimant is shown to have known that he or she had the accrued right in question. That would be contrary to principle, and would … mean that taxpayers could have claims that had accrued in respect of many years past that would be impossible to remove until it could be shown that the taxpayers knew about them."

So too at [92], the Chancellor said:

> "In the absence of express statutory provision making the claimant's knowledge relevant to limitation (such as section 32(1)(c) and section 14A of the Limitation Act 1980), it is not relevant."

77. In the light of the Chancellor's decision on the ouster issue, it may not have been strictly necessary for him to express a view on the section 320 issue, but he dealt with it relatively briefly at [122] to [124]. That was entirely understandable, because in group litigation it is usually desirable for the judge at first instance to deal with all the common issues which have been identified. The agreed formulation of the section 320 issue asked whether section 320 had effect in relation to claims for restitution of tax "paid before and/or after its introduction", and (if so) whether the relevant date of introduction was the date from which it took effect (8 September 2003) or the date of Royal Assent (22 July 2004): see [9(iii)].

78. We need to set out the Chancellor's reasoning on this part of the case in full:

> "122. I have already dealt, in substance, with this issue, which asks whether section 320 has effect in relation to claims for restitution of tax paid before and/or after its introduction, and if so, whether its effective date was its date of taking effect on 8 September 2003 or the date of Royal Assent on 22 July 2004.
>
> 123. I have already said that I am unable to agree with Marcus Smith J in *Jazztel* …, when he held that the legislature's ability to deprive taxpayers of an existing claim to recover overpaid tax depended on whether those taxpayers *knew* that they had such a claim when the right was removed. In these circumstances, in my judgment, section 320 was effective to remove common law claims to restitution in respect of tax paid

> before section 320 took effect. Mr Aaronson accepted that this court was bound by *Leeds City Council* … as regard claims relating to tax paid on or after 8 September 2003, but reserved his position in the event of any appeal.
>
> 124. Accordingly, the answer to the third issue is that section 320 has effect from 22 July 2004, whether the claim relates to tax paid before or after 8 September 2003. After a draft of this judgment was provided to the parties, the claimants sought to re-argue this issue by referring to the decision in *FII SC* [2012] 2 AC 337 and *FII CJEU 3* [2014] AC 1161 as reasons why the issue should be answered differently whether or not *Jazztel* was correctly decided. As Mr Ewart [*leading counsel for HMRC*] submitted, however, the claims that were in issue in *FII CJEU 3* were claims in relation to tax paid more than six years before 8 September 2003. It was those claims which had been removed by section 320 with immediate effect and without a transitional period. In this case, the argument is about whether section 320 was effective to remove claims that had accrued before the legislation took effect, but in respect of which a part of the limitation period (at least six months) had still to run when the legislation took effect. The claimants argued that *Jazztel* meant that section 320 was not compliant with EU law, because of its hidden retrospectivity i.e. that the taxpayer might not have known that it had such claims before they were removed. It was that argument that I have held to be wrong. As it seems to me, without it, the decisions in *FII* do not affect the facts of this case, because, as I say, in these cases there remained an unexpired part of the limitation period after section 320 was introduced, which was not the case on the facts in *FII*."

79. To similar effect, the Chancellor said in the summary of his conclusions at [147]:

> "In relation to the section 320 issue, that section has effect from 22 July 2004, whether the claim relates to tax paid before or after 8 September 2003."

80. We observe that the Chancellor appears to have proceeded on the footing that his rejection of the concept of hidden retrospectivity entailed the further conclusion that section 320 was effective to remove common law claims to restitution in respect of tax paid before the section took effect. The critical point, in his view, appears to have been that there was no breach of the principle of effectiveness in relation to accrued claims provided that there remained an unexpired part of the limitation period of at least six months after the introduction of section 320. That reasoning is supported in the present case by HMRC, but challenged by Jazztel. As will appear, our own conclusion is that Sir Geoffrey Vos C was entirely right to reject the espousal by the Judge of the concept of hidden retrospectivity, but (with great respect) he was wrong to conclude that section 320 could apply to accrued claims in the absence of any express transitional arrangements, even if there remained an unexpired part of the limitation period of at least six months when the section took effect.

81. For completeness, we should also mention that there is a pending appeal to this court in Class 8, but it has been stayed.

Submissions

82. Relying on the CJEU case law on the principle of effectiveness, HMRC submit that the UK was in principle entitled to introduce and apply a shortened time limit to claims to recover unlawful tax which had not yet been commenced at the time the new period came into force. That is the case even if the claim relates to payments of tax which were made while the previous limitation period (under section 32(1)(c)) was still applicable: see, in particular, Grundig Italiana at paragraph 35. The only requirements which need to be satisfied are that the new limitation period is reasonable, and it must allow an "adequate period" for taxpayers to bring their claims after the enactment of the legislation: FII (CJEU) 3 at paragraph 37.

83. HMRC go on to submit that those requirements are satisfied in the present case. The six year time limit introduced by section 320 is, in itself, reasonable. In relation to the earliest substantial payment in dispute, namely Payment 2 made on 7 January 2000, Jazztel therefore had until 6 January 2006 to bring its claim. Or in other words, on 8 September 2003 Jazztel still had well over two years to bring a mistake-based *Kleinwort Benson* claim, as well as a *Woolwich* claim, to recover the full amount of SDRT paid. It cannot be said that this was too short a period, such that it was either practically impossible or excessively difficult for Jazztel to bring its claim. Furthermore, contrary to the Judge's reasoning, the fact that Jazztel may not have known of its right to make a claim when section 320 came into force is irrelevant, for the reasons given by the Chancellor in Class 8.

84. In those circumstances, submit HMRC, the question whether section 320 must be disapplied for a transitional period does not arise. On the facts of Jazztel's case, where no EU rights would be infringed, section 320 is to be construed and applied in the ordinary way. It does not matter that, in different factual situations, section 320 may need to be disapplied, or subjected to a conforming interpretation, in order to secure compliance with EU law: see R (Hurst) v London Northern District Coroner [2007] UKHL 13, [2007] 2 AC 189, at [52] and Imperial Chemical Industries plc v Colmer (No 2) [1999] 1 WLR 2035 (HL). Furthermore, say HMRC, this reasoning is consistent with the actual conclusion reached by the Chancellor on the section 320 issue in Class 8: see [123] and [124].

85. For its part, Jazztel submits that we are bound by Fleming to hold that, in the absence of express and adequate transitional arrangements, section 320 must be disapplied in relation to claims based on rights accrued before 8 September 2003. That remains the position until the expiry of an adequate, prospective transitional period, which even today has still not been provided: compare Fleming at [104].

86. Jazztel submits that the force of these points was correctly recognised by the Judge in [101] and [102] of the Judgment, and the correctness of his ultimate conclusion is not vitiated by his emphasis on "hidden retrospectivity". In so far as the Judge thought that section 320 created a further injustice for taxpayers in the position of Jazztel, by depriving them of accrued rights before they even knew that they existed, he went further than was necessary to satisfy the principle of effectiveness; but that does not detract from the basic point that the facts of the present case fall squarely within the

reasoning and result in Fleming. Furthermore, the facts of the Condé Nast claim show that the House of Lords must have had well in mind claims which had accrued at all stages up to the change in the limitation period: see, in particular, the opinion of Lord Scott at [15] and [22], where he referred expressly to recently accrued claims brought in the period of three years before regulation 29(1A) came into force on 1 May 1997.

87. So far as concerns Class 8, Jazztel submits that the Chancellor was wrong to draw no distinction between claims brought before and after 8 September 2003, although he was right to hold that knowledge was not an essential requirement for the principle of effectiveness to be satisfied.

Discussion

88. For the reasons which follow, we consider that the Judge came to the right ultimate conclusion in relation to Payments 1 to 9, although his analysis of the issue was unfortunately vitiated by his reliance on the concept of "hidden retrospectivity", which in our view has no part to play in the resolution of cases of the present type.

89. The European authorities clearly establish that, in the interests of legal certainty, it is open to a Member State to lay down reasonable time limits for the recovery of unlawfully levied tax, and that a period of three years would normally be enough to satisfy that requirement. As Sir Geoffrey Vos C correctly held in Class 8, it is not a requirement of EU law that the claimant taxpayer should have actual or constructive knowledge of its right to make a claim before the limitation period has expired. That does not mean, of course, that it is not open to a Member State to provide for a knowledge-based extension to a primary limitation period, such as section 32(1)(c) of the Limitation Act 1980. But the EU law principle of legal certainty does not, in itself, impose any such requirement.

90. The Judge was understandably sympathetic with taxpayers who may find themselves deprived, by a fixed limitation period of reasonable length, of an otherwise valid claim to recover unlawful tax before they know, or even can know, of the claim's existence. He erred, however, in our respectful opinion, by importing the concept of hidden retrospectivity into his analysis of the relevant EU law principles. It was confirmed to us in oral argument that neither side had sought to rely on this concept in its submissions to the Judge. It was, in truth, a concept of his own devising which had not been tested in argument.

91. The real question in the present case is about the extent to which the EU law principles of effectiveness, protection of legitimate expectations and legal certainty require section 320 to be disapplied, given the now admitted failure of the section to comply fully with EU law in retrospectively curtailing the time limit for mistake-based restitution claims without the provision of any transitional provisions. HMRC concede that the section has to be disapplied in relation to mistake-based claims for repayment of SDRT paid before 8 September 1997, which depend on section 32(1)(c) for their vindication and are brought more than six years after the date of payment: see [25] above. That is the category of claims which vanished in a puff of smoke on 8 September 2003 as a result of the retrospective effect of section 320 and the absence of any express transitional provisions. It is also common ground, at least in this Court, that section 320 did not breach EU law in relation to Payments 10 to 22, because those claims had not accrued before 8 September 2003 and Jazztel was left with more than enough time

to make them before the new six year limitation period (without any mistake-based extension) had expired. That is the category of claims covered by Leeds City Council.

92. The claims with which we are directly concerned occupy an intermediate position, in that they accrued (in the sense that the payments of unlawful SDRT were made) before 8 September 2003, but Jazztel was in practice left with a residue of at least two years and four months of the new unextended six year limitation period within which to bring them. If a transitional period of such duration had been expressly provided for, it seems to us that Jazztel could have had no complaint. HMRC fasten on this point in order to argue that there has been no breach of the principle of effectiveness in relation to Payments 1 to 9, because it was always possible for Jazztel to bring claims to recover them within an objectively reasonable period.

93. In our judgment, however, that argument ignores the force of the principles established by the decision of the House of Lords in Fleming. As we see it, the four propositions which we have identified at [63] above bind us as part of the *ratio decidendi* of Fleming. The propositions formed part of the process of reasoning which led the House to decide that legislation introducing a new limitation period without notice and without express transitional provisions formulated in advance had to be disapplied until compliant transitional provisions were promulgated, and that the gap in the legislation could not be filled by a process of judicial implication of a reasonable transitional period.

94. In our view, those propositions are decisive of this part of the case. The basic fallacy in the submissions attractively advanced to us by Mr Baldry for the Revenue is that they treat the continuing ability of Jazztel to make the relevant claims after 8 September 2003 as conclusive, when the real problem is a structural fault in the legislation which cannot be cured unless and until adequate transitional arrangements are put in place. Until that is done, section 320 must in our judgment be disapplied in relation to all mistake-based claims to recover unlawful SDRT which accrued, in the sense that the relevant payments were made, before 8 September 2003.

95. Finally, it follows from our conclusions on this point that Sir Geoffrey Vos C was, in our respectful opinion, wrong in Class 8 to conclude that section 320 could apply to accrued claims relating to tax paid before 8 September 2003. That conclusion does not follow from his rejection of the Judge's reasoning in the present case on the relevance of knowledge, and it cannot stand with the principles which we have sought to extract from Fleming. We also observe that the Chancellor's decision on this point was briefly expressed, in response to arguments raised only when he circulated the draft of his judgment, and that it was in any event not strictly necessary for him to decide it following his conclusion on the ouster issue.

96. We would therefore dismiss HMRC's appeal against paragraph 3 of the Judge's Order, although our reasons for doing so differ significantly from those of the Judge.

III. HMRC's appeal: Should HMRC have permission to amend their grounds of appeal to introduce the contention that Jazztel discovered or could with reasonable

diligence have discovered its mistake in making Payments 1 to 22 more than six years before it issued its claim form and (if so) is that contention made out?

Introductory

97. So far as relevant, section 32(1) of the Limitation Act 1980 provides:

> "Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

As already explained, therefore, time does not begin to run as regards a claim to recover money paid under mistake until the claimant "has discovered the … mistake … or could with reasonable diligence have discovered it".

98. In Deutsche Morgan Grenfell, the claimant sought restitution on the basis that it had made payments by way of advanced corporation tax ("ACT") under a mistake of law. At least one of the relevant payments had been made more than six years before the proceedings were issued, but the claimant contended, and the House of Lords accepted by a majority, that it could not have discovered its mistake until the European Court of Justice had given judgment in Joined Cases C-397 & 410/98 Metallgesellschaft Ltd and Hoechst AG v Inland Revenue Commissioners EU:C:2001:134, [2001] Ch 620 ("Hoechst"). It was held in Hoechst that the UK's ACT regime infringed the Treaty establishing the European Community ("the TEC"). In Deutsche Morgan Grenfell, Lord Hoffmann concluded at [31] that, until then, the claimant "could not have discovered the truth because the truth did not yet exist" and, "therefore, the mistake was not reasonably discoverable until after the judgment had been delivered". "Until the determination was made", Lord Hope said at [71], "the mistake could not have been 'discovered' in the sense referred to in section 32(1) of the 1980 Act". "[T]he judgment of the European Court of Justice on 8 March 2001 was the decisive moment", Lord Walker said at [144].

99. Lord Brown dissented on the issue. As he stated at [165], he took the view that:

> "as soon as a paying party recognises that a worthwhile claim arises that he should not after all have made the payment and accordingly is entitled to recover it (or, as here, to compensation for the loss of its use), he has 'discovered' the mistake within the meaning of section 32; and, by the same token, I would hold that if he makes any further payments thereafter, they are not to be regarded as payments made under a mistake of law".

Lord Brown continued in [166]:

> "Where, I would respectfully ask, is there any injustice in this? No one is suggesting, let me repeat, that the moneys are not recoverable or that the payee should remain unjustly enriched. All that is required is that the payer does not sit upon what ex hypothesi he recognises to be a worthwhile legal argument for more than six years. Provided he acts within that (surely ample) time, he can pursue his claim (whether in respect of past payments or, indeed, payments he may choose to continue making) under whatever may be the appropriate cause of action: restitution for mistake of law in respect of past payments made when he had no reason to question his liability to make them, total failure of consideration, or a claim based on the *Woolwich* principle."

100. In FII (SC) 2, the Supreme Court concluded by a majority that Deutsche Morgan Grenfell had been wrongly decided, that it should depart from it and that the views on section 32(1) of the 1980 Act which Lord Brown had expressed in his dissenting judgment were to be preferred. Lord Reed PSC and Lord Hodge DPSC, with whom Lords Lloyd-Jones and Hamblen JJSC agreed, pointed out at [173] that the approach adopted in Deutsche Morgan Grenfell resulted in the paradox that "a claimant can be unable to discover the existence of his cause of action even after he has brought his claim: he cannot discover it until his claim succeeds". Deutsche Morgan Grenfell further gives rise, Lords Reed and Hodge noted at [174], to the "equally paradoxical result" that "a limitation period applicable to the commencement of proceedings cannot begin to run until the proceedings have been completed". "[T]he concept of discoverability", Lords Reed and Hodge said, "is designed to protect claimants who could not reasonably be expected to know of the existence of the circumstances giving rise to their cause of action until sometime after it accrued", but "there is … a lack of realism in treating the date of a judicial decision authoritatively establishing the true state of the law as the earliest date when the claimant discovers, or could with reasonable diligence discover, the mistake in question": see [176] and [178]. Lords Reed and Hodge concluded at [193], in a passage echoed at [209(1)] and [213(13)]:

> "The purpose of the postponement effected by section 32(1) is to ensure that a claimant is not disadvantaged, so far as limitation is concerned, by reason of being unaware of the circumstances giving rise to his cause of action as a result of fraud, concealment or mistake. That purpose is achieved, where the ingredients of the cause of action include his having made a mistake of law, if time runs from the point in time when he knows, or could with reasonable diligence know, that he made such a mistake 'with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence'; or, as Lord Brown put it in *Deutsche Morgan Grenfell* [2007] 1 AC 558, he discovers or could with reasonable diligence discover his mistake in the sense of recognising that a worthwhile claim arises. We do not believe that there is any difference of substance between these formulations, each of which is helpful and casts light on the other."

101. The phrase "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and

collecting evidence" was taken from the judgment of Lord Nicholls in Haward v Fawcetts [2006] UKHL 9, [2006] 1 WLR 682. That case concerned section 14A of the Limitation Act 1980. Section 14A provides for an extended limitation period running from the earliest date on which the claimant "first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action". With regard to the degree of certainty required before such knowledge can be said to exist, Lord Nicholls said at [9]:

> "Lord Donaldson of Lymington MR gave valuable guidance in *Halford v Brookes* [1991] 1 WLR 428, 443. He noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: 'Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice.' In other words, the claimant must know enough for it to be reasonable to begin to investigate further."

102. In FII (SC) 2, Lords Reed and Hodge said this about the implications of the approach they favoured:

> "210. In practice, the application of that approach will depend on the circumstances of the case. For example, in cases where the claimant has made a payment on the basis of a mistaken understanding of the law which has resulted from ignorance, the mistake will normally have been discoverable immediately, by seeking legal advice. Section 32(1) only has effect where a mistake could not have been discovered at the time of the payment with the exercise of reasonable diligence. On the other hand, where the payment was made in reliance on a precedent that was subsequently overruled, or an understanding of the law that was later altered by a judicial decision, the question will be whether the claim was brought within the prescribed period beginning on the date when it was discoverable by the exercise of reasonable diligence that the basis of the payment was legally questionable, so as to give rise to a worthwhile claim to restitution. Depending on the circumstances, it may be difficult to identify a specific date, but doubtful cases can be resolved by bearing in mind that the burden of proof lies on the claimant to prove that his claim was brought within the prescribed limitation period.
>
> 211. Clearly, where a payment was made in accordance with the law as it was then understood to be, the point in time at which the claimant could, with reasonable diligence, have discovered that the basis of the payment was legally questionable, so as to give rise to a worthwhile claim to restitution, will have to be established by evidence. The focus of that evidence is likely to be upon developments in legal understanding within the relevant category of claimants and their advisers …. Thus, in the circumstances of the present case, Lord Walker JSC referred in *FII (SC) 1* [2012] 2 AC 337 … to there being a reasonable prospect that the limitation period could be deferred until the time when 'a well advised multi-national group based in the UK would have had good grounds for supposing that it had a valid claim to recover ACT levied contrary to EU

> law'. This point is considered in greater detail in para 255 below. Evidence in relation to matters of this kind may well include expert evidence concerning the state of understanding of the law within the relevant categories of professional advisers during the relevant period."

103. Addressing the application of their approach to the case before them, Lords Reed and Hodge said at [255]:

> "This court cannot, however, determine in the abstract the point in time when the test claimants could with reasonable diligence have discovered, to the standard of knowing that they had a worthwhile claim, that they had paid tax under a mistaken understanding that they were liable to do so. That depends on an examination of the evidence. As we have explained, EU law, in relation to tax regimes which discriminated between companies based in one member state and companies based in another, developed through a series of judgments of the Court of Justice, including *Verkooijen* [2000] ECR I-4071, *Lenz* [2004] ECR I-7063 and *Manninen* [2005] Ch 236 … , *Hoechst* [2001] Ch 620 and *FII (CJEU) 1* [2012] 2 AC 436. Each of those judgments was itself the result of a claim made some years earlier. In *Hoechst*, for example, the claim was filed in 1995, 11 years before the judgment of the Court of Justice. DMG was aware of the claim almost immediately, and it was for that reason that, in *Deutsche Morgan Grenfell*, Lord Brown considered that time began running for DMG in July 1995. But the date when the claimant became aware of another claim, and appreciated its potential implications for its own situation, is not conclusive, if a claimant acting with reasonable diligence could have discovered that it had a worthwhile claim at an earlier time. Equally, the answer to the question arising under section 32(1) does not depend upon the characteristics of the particular claimant: whether, for example, it was inclined to await further developments, and to allow other taxpayers to make the running. The standard is 'could', as Millett LJ emphasised in *Paragon Finance* [1999] 1 All ER 400 …. And the test is objective, as Millett LJ explained in the same passage of his judgment, and as Lord Walker JSC made clear in *FII (SC) 1* [2012] 2 AC 337, when he referred … to the time when 'a well advised multi-national group based in the UK would have had good grounds for supposing that it had a valid claim to recover ACT levied contrary to EU law'."

104. As explained above, following the decision of the Supreme Court in FII (SC) 2 HMRC applied for permission to amend their grounds of appeal in the present case to include an argument to the effect that Jazztel's claim is time-barred "because Jazztel discovered or could with reasonable diligence have discovered its mistake in making [Payments 1 to 22] more than six years before it issued its claim for the purposes of section 32 of the Limitation Act 1980". This was not a contention which HMRC advanced before the Judge.

Should HMRC be given permission to amend their grounds of appeal?

105. There is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal: see Notting Hill Finance Ltd v Sheikh [2019] EWCA

Civ 1337, [2019] 4 WLR 146, at [26]. As, however, was explained by Haddon-Cave LJ, with whom McCombe and Moylan LJJ agreed, in Singh v Dass [2019] EWCA Civ 360 at [15]-[17], an appellate court "will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court" and "will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial".

106. In FII (SC) 2, the Supreme Court allowed HMRC to advance new arguments in that Court even though their success would "require the parties to amend their pleadings and conduct a further trial on the quantification of the test claimants' claim" (see FII (SC) 2 at [91] and also [255]-[256]). In that connection, Lords Reed and Hodge said at [99]:

> "The nature of the claims, depending as they do on a developing area of law, means that it is important that this court address the legal questions which the revenue wish to raise. The size of the claims and their impact on the public purse are also relevant considerations, as it would be wrong to uphold such claims if they are based on an incorrect understanding of the law. As we have said, even if the revenue's challenge to the application of section 32(1)(c) succeeds, the claimants will have claims of substantial value. The legal question is also of great importance to other claimants outside the FII Group Litigation, including claimants in the litigations to which we have referred in paras 5–6 above, who also have claims of high value."

Lords Reed and Hodge further considered it relevant that the litigation before the Court had "involved novel and developing legal claims raising legal issues of unparalleled complexity, causing the claimants and the revenue to amend their pleadings in the light of developments of both EU law and domestic law": see [78] and [99].

107. In the present case, HMRC stress that, until the Supreme Court overruled Deutsche Morgan Grenfell in FII (SC) 2, lower Courts were bound by that decision and so the case which HMRC now wish to advance could not have succeeded. On the other hand, the key questions of law relating to section 32 of the 1980 Act have been determined in FII (SC) 2. Further, while the sums which Jazztel might hope to recover from success in its claim are significant (up to, perhaps, a couple of million pounds, we gather), they are not comparable to those which Lords Reed and Hodge had in mind when they spoke of the "size of the claims and their impact on the public purse" as relevant considerations. Moreover, although these proceedings have been designated as a test claim in the Stamp Taxes Group Litigation, HMRC will be able to invoke section 32 of the 1980 Act, as interpreted in FII (SC) 2, against other claimants in the Stamp Taxes Group Litigation regardless of whether we accede to their application to amend their grounds of appeal in this case. On top of that, Jazztel, unlike the claimants in the *FII* litigation, will not have "claims of substantial value" if HMRC win on their new ground of appeal.

108. In the circumstances, it would not, in our view, be appropriate to grant HMRC permission to amend their grounds of appeal if the question raised by the new ground cannot be resolved in their favour without a further hearing. Supposing, say, that Jazztel might be assisted in defeating the section 32 defence by "expert evidence concerning

the state of understanding of the law within the relevant categories of professional advisers during the relevant period" (such as Lords Reed and Hodge had in mind in FII (SC) 2 at [211]), it would not, as it seems to us, be just to accede to the application to amend. On the other hand, should it be the case that, as HMRC suggest, it can already be seen, from the existing findings and documentary evidence, that Jazztel discovered, or could with reasonable diligence have discovered, their mistake more than six years before the claim form was issued, there would, as we see it, be no injustice in allowing HMRC to introduce the additional ground of appeal. In fact, Mr Grodzinski realistically did not dispute that HMRC should be allowed to amend if (which he very much disputed) HMRC could definitively establish now, without a remittal, that the postponement of the limitation period for which section 32 of the 1980 Act provides could not avail Jazztel.

Correspondence relating to the SDRT payments

109. HMRC's case on their new ground of appeal is founded on correspondence between, on the one hand, Linklaters, and, on the other hand, Jazztel and HMRC. Given their importance to the parties' contentions, it is appropriate to set out some of the communications at length.

110. As already mentioned, the earliest Payment of any significance was one of £1,819,060 on 7 January 2000. Linklaters, who were acting for Jazztel, had emailed Jazztel about that payment in these terms on 22 December 1999:

> "As you know, the company is liable to pay SDRT at a rate of 1.5% on the 11,500,000 new shares issued for listing on EASDAQ/NASDAQ.
>
> Bearing in mind the exchange rate on the date of issue of the shares we calculate that the company's liability is £1,819,060.
>
> This amount should be paid to the tax authorities by 7 January 2000 to avoid any penalties being incurred.
>
> … In view of the rather complex arrangements for SDRT, I attach a note setting out the definitive position for the different charges. As I mentioned to you a while ago, there is some criticism of the application of SDRT to transactions with a European dimension. This is a very complex issue, but I thought it important to write to you to clarify the arguments before you make the payment. The attached note therefore also goes into some detail on this, all of which I think you need to have the full picture. I would, however, briefly summarise the position as follows:
>
> There are good arguments that the operation of SDRT **in some circumstances** is against European law, particularly that relating to the freedom of movement of goods. In the context of Project Saxo, we think the arguments are weak in relation to the SDRT payable on transfers by existing shareholders and on the issue of ADR's, and stronger in relation to the issue of new shares into Euroclear. In relation to the latter the position is not free from doubt, but any attack on the duty would be very strongly resisted by the UK Inland Revenue as this would have wide

> implications for stamp duty generally, which brings in significant revenue for the government. In view of the fact that the duty is likely to be payable on the shares issued in ADR form in any event, we are looking at an amount of about £700k at stake. There must be doubts about whether this is worth pursuing in the case of Project Saxo, but this is one for the company to decide. The note does raise the possibility of paying the duty but trying to preserve a subsequent claim. Let me know if you would like me to discuss the feasibility of this with a litigating colleague ….”

111. The memorandum attached to the email identified the SDRT and stamp duty charges that stood to arise on, among other things, the issue of new shares by Jazztel. It continued as follows:

> “As you are aware, the liabilities to SDRT and stamp duty referred to above arise because Jazztel plc is a UK incorporated company and would not arise if it were incorporated in a different country. This may appear illogical and unfair, but is, unfortunately, the state of UK legislation. For completeness, however, we thought that we should mention that it appears to us that there may be grounds for questioning the validity of some or all of these charges on the basis of EU law. We summarise the grounds for the possible invalidity of these charges below. lt may be, however, that, as a practical matter, and having regard to the sums of money involved for which Jazztel is liable and the length and complexity of any potential litigation that would be required to successfully challenge the charges, you may well conclude that it would not be worthwhile taking the matter any further and that the prudent action is simply to pay the 1.5% SDRT charge arising to Jazztel on the issue of its new shares.
>
> The grounds for considering that the SDRT charge levied on the issue of new shares to a clearance system may not be valid under EU law are, broadly, that the charges are contrary to:
>
> (a) Article 58 of the Treaty of Rome, relating to the freedom of movement of capital throughout the EU;
>
> (b) Article 49 of the Treaty of Rome, relating to the prohibition of restrictions on the freedom to provide services within the EU; and
>
> (c) the provisions of Article 11 of Council Directive 69/335, prohibiting member states from subjecting to any form of taxation whatsoever the creation, issue, admission to quotation on the stock exchange, making available on the market or dealing in shares or other securities.
>
> In the context of a UK incorporated company acquiring the shares in a target company incorporated in another EU member state in circumstances where the shares in the target company are held within an EU clearance service and the acquisition is effected by means of a share

for share exchange under which the shares in the UK incorporated company are put into such clearance service, we consider that there are very strong grounds for questioning the validity of a specific exemption from the 1.5% charge which exempts such acquisition by one UK incorporated of another UK incorporated company but not the acquisition by a UK incorporated company of a company incorporated in another EU member state.

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

(a) the uncertainty of whether Euroclear should be considered to be an EU clearance service (since it is ostensibly operated from Belgium) or a clearance system operated by the non-EU incorporated company of Morgan Guaranty Trust Company of New York, and whether the latter interpretation would undermine arguments about the invalidity of the charge based on EU law;

(b) whether the validity of a charge related to the **issue of ADRs by a non-EU resident entity** (ie. Morgan Guaranty Trust Company of New York) could be questioned under EU law;

(c) whether, even if an argument about the invalidity of the charge arising on the **issue of shares** by a UK company into a clearance service could be sustained, the provisions of Article 12 of Directive 69/335, which permit the levying of tax on the **transfer of shares**, would prevent any successful attack on the charge relating to the transfer by existing shareholders of their shares into Euroclear or the charges arising on the movement of shares from NASDAQ to EASDAQ; and

(d) the unlikelihood of being able to challenge the 1.5% charge arising on the **transfer of shares from EASDAQ to NASDAQ** where the issue of the ADRs is not an EU incorporated entity.

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

there are two options available to ,Jazztel in relation to the 1.5% charge arising on the issue of their new shares:

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

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

As far as (a) is concerned, you may well consider that the amount of money that is likely to be open to challenge, being the proportion of €2.5-3m (based on the share issue price of €17 each) that equates to the proportion of the issue to be listed on EASDAQ compared to that to be listed on NASDAQ and EASDAQ in total, means that the potential time and expense involved in challenging the charge and the fact that the Inland Revenue is likely to fight extremely strenuously against any such challenge, may lead you to consider that the prudent approach would simply be to pay the SDRT.

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

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

> how the charge relating to the issue of new shares to Euroclear would be analysed under EU law.
>
> We would, of course, be happy to pursue this matter for you if you consider that it is worth taking further at this point and in relation to the present issue of shares ….”

112. On 7 January 2000, Linklaters sent HMRC on Jazztel's behalf a cheque for the £1,819,060 in respect of the SDRT which would be payable on the company's issue of 11,500 shares "but for the European Law points noted below" (to quote the covering letter). In that connection, the letter explained that it had occurred to Linklaters that the UK's SDRT provisions were "very probably inapplicable under European law" and that the purpose of the payment was "merely to avoid any interest or penalties if, notwithstanding our view on the European law issues, these SDRT charges were ultimately found to be applicable". Linklaters added that they were writing to Mr David Halsey, a Deputy Director, Policy, Technical and Legislation, in the Stamp Office, about these issues.

113. The letter to Mr Halsey was sent on 11 January 2000. Linklaters explained that they considered that there were "very good grounds for the view that the provisions of Sections 96, 93, 70 and 67 FA 1986 (under which the SDRT and stamp duty liabilities arise) are inapplicable under European law" by reason of the Capital Duties Directive and articles 56 and 49 of the TEC. Linklaters set out a summary of their reasoning, commenting as regards article 11 of the Capital Duties Directive:

> "Under Article 11 of the Directive, Member States shall not subject to any form of taxation whatsoever the creation, issue, admission to quotation on the stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of certificates representing such securities, by whomsoever issued.
>
> The charge to SDRT arising pursuant to Section 96 FA 1986 clearly imposes taxation on the issue of shares by a UK incorporated company. In cases, such as the Issue [*i.e. Jazztel's issue of new shares*], where an issue of shares is to be listed on a stock exchange such as EASDAQ (as is the case with the Issue) and it is a requirement of the listing that the shares should be settled through a clearance service such as, in the case of listing on EASDAQ, Euroclear and Cedelbank, the charge under Section 96 FA 1986 would also be a form of taxation on the admission to quotation on a stock exchange and the making available on the market of shares in a UK incorporated company. Further the charge under Section 93 FA 1986 constitutes a charge on depositary receipts and, therefore, a charge on certificates representing shares of UK incorporated companies. We consider, therefore, that the charge to SDRT under Section 96 and Section 93 FA 1986 should be considered to be invalid since they impose a form of taxation on both the issue of shares by UK incorporated companies or certificates representing such shares and, where such shares or certificates are to be listed on a stock exchange that requires settlement through a clearance service, on the admission of those shares or certificates to quotation on a stock

> exchange and on the making available on the market of or of dealing in such shares or certificates.
>
> Since Article 11 has direct effect, its provisions can be relied on by residents of the EU and can be enforced by domestic courts. Further, the provisions of Sections 96 and 93 FA 1986 have been introduced after the date on which the Directive came into force, being 1 January 1972."

The letter concluded:

> "Accordingly, we would request that you would instruct the Stamp Offices in Worthing and London to return to us the money paid to them relating to the Issue and the Transfers if you agree with our analysis set out above, so that we may remit such sums to our client.
>
> In the event that you are not able to agree with our arguments set out above, we would request that you would write to us setting out the basis for your conclusions, so that we may discuss your position further with our client. In addition, we would of course be happy to meet with you to discuss these issues further in the light of your considered view on the matter if you feel that this would be helpful."

114. Mr Halsey replied to Linklaters on 6 March 2000. He explained that HMRC did not accept that the SDRT and stamp duty liabilities arising on the issue and transfer of Jazztel shares were contrary to EU law. With regard to the Capital Duties Directive, he said:

> "We consider that the preservation of the entitlement of Member States to charge duties on the transfer of securities in Article 12(l)(a) applies to both types of transaction. We agree that s.67 and s.70 (as well as, we believe, s.93 and s.96) are taxes on the anticipation of future transfers in the securities where - by virtue of s.90(5) and s.99(6) - those future transfers are themselves exempted from tax. However, we consider that Article 12(1)(a) should be interpreted purposive1y so as to include such transaction in accordance with normal Community law practice. All these charges to tax are in substance composition payments in lieu of charges on future transfers. This is highlighted by the fact that operators of clearance services may elect to pay the normal 0.5% Stamp Duty or SDRT on each share transfer in which case the 1.5% charge does not apply (s.97A FA 1986). We believe that UK courts and, if necessary, the European Court of Justice would accept that these charges are compounded transfer duty and that this falls within Article 12(l)(a)."

115. By this stage, therefore, Linklaters had put forward the argument which the CJEU was later to accept in HSBC Holdings, namely, that article 11 of the Capital Duties Directive prohibited the levying of a duty such as SDRT on the issue of shares into a clearance service. Echoing Mr Halsey, the UK had relied before the CJEU on article 12 of the Capital Duties Directive, but the Court said this about that article in its judgment at [34]:

> "To interpret the term 'transfer' referred to in Article 12(1)(a) of the directive in a way such as that proposed by the United Kingdom Government and by the Commission of the European Communities, namely that SDRT at the rate of 1.5% is a charge on share transfers in the form of a 'season ticket', would effectively deprive Article 11(a) of the directive of its practical effect and call in question the clear distinction established by Articles 11(a) and 12(1)(a) of the directive between the concepts of 'issue' and 'transfer'. In fact, such an interpretation would have the consequence that issues could nevertheless be subject to a tax or duty, although they, while necessarily involving an acquisition of newly issued securities, must not, under that provision, be subject to any taxes or duties other than capital duty."

116. Linklaters responded to Mr Halsey on 16 March 2000 that they were "not convinced" by his arguments but, when HMRC asked for an update in May, Linklaters said that Jazztel was "not, at present, proceeding with this matter any further". Jazztel did not ask HMRC to make a formal determination in respect of its claim for repayment against which it could have appealed pursuant to regulation 8 of the SDRT Regulations.

117. In the next half dozen years, Jazztel made some 14 more payments, totalling more than £1.2 million, in respect of SDRT without voicing any further challenge to the validity of the UK's SDRT regime. However, in an email to Jazztel of 27 February 2006 Linklaters said:

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

When, accordingly, Linklaters sent HMRC on Jazztel's behalf £162,963 in respect of SDRT on 6 March 2006, they explained in their letter:

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

The same formula was included in the letters under cover of which subsequent payments were made.

118. In September 2014, HMRC repaid to Jazztel the £1,819,060 which the company had paid on 7 January 2000. By the time the money was returned, HSBC Holdings and, subsequently, the First-tier Tribunal's decision in HSBC Holdings plc and The Bank of New York Mellon Corporation v HMRC, had made it clear that the UK's SDRT regime had not been compatible with the Capital Duties Directive and, hence, that Jazztel had not been liable for the £1,819,060. HMRC therefore considered regulation 14 of the SDRT Regulations (quoted in [9] above) to apply. Linklaters having requested the return of the £1,819,060 on Jazztel's behalf within days of its payment in January 2000, HMRC accepted that the company had made a claim that it had paid too much tax within the period specified in regulation 14(2).

119. HMRC also refunded pursuant to the SDRT Regulations the payments which Jazztel had made from 17 December 2003 onwards. In contrast, the sums paid between 7 January 2000 and 17 December 2003 have not been returned.

Findings by the Judge

120. The Judge did not have to consider whether the correspondence described in [110] to [117] above shows that Jazztel discovered its mistakes, or could with reasonable diligence have done so, more than six years before it issued proceedings: at the stage the matter was before the Judge, HMRC were not alleging that that was the case. The Judge did, however, address the correspondence when determining whether the relevant payments had been made under a mistake. As he explained at [30(ii)], the Judge approached that issue on the footing that a claimant's "conscious appreciation that the facts or law may not be as he or she believes them to be" is "not inconsistent with mistake, provided the doubt does not overwhelm the mistake". In the light of, among other things, the decision of Flaux J in Marine Trade SA v. Pioneer Freight Futures Co Ltd BVI [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep 631, the Judge took it that, "provided the level of subjective doubt remains below the 50% threshold, a mistake can still exist". The Judge concluded that all the payments in respect of which Jazztel was claiming had been made under a mistake.

121. The Judge observed at [51] that "[i]t is to be inferred that there was some communication between Linklaters and Jazztel regarding Linklaters' 22 December 1999 SDRT Advice" and that Jazztel had authorised the "reservation of rights approach" adopted in Linklaters' letter to HMRC of 7 January 2000. He none the less found at [67] that "Jazztel's predominant state of mind after the 22 December 1999 SDRT Advice remained that the liability to pay SDRT was a lawful one and that, although Jazztel was not the person in law liable to pay SDRT, this was an obligation Jazztel (as the issuer of the shares) had to assume". The Judge accepted at [68] that the advice which Linklaters gave on 22 December 1999 "must have injected an element of doubt into what was Jazztel's state of mind prior to this communication", but, although "the monolithic state of Jazztel's belief came to be qualified", it "did not otherwise change or crumble". "Had Jazztel harboured serious doubts about the liability to pay SDRT" in the period following Linklaters' 22 December 1999 advice, the Judge commented at [68(v)], "it would … have taken further advice". The Judge said at [68(iv)]:

> "Whilst I consider that Jazztel must have had some doubt as to whether the tax was lawfully due because of the 22 December 1999 SDRT Advice, my conclusion is that this doubt was a marginal one and that

> Jazztel's state of mind was predominantly as it had been prior to the 22 December 1999 SDRT Advice – namely that the tax was due."

122. It is perhaps worth adding that the Judge reached these conclusions exclusively from the documentary evidence. The witnesses who gave evidence before the Judge were not in a position to add anything useful to that material. As Mr Antonio Garcia, the only witness of fact called by Jazztel, explained in his witness statement, the company was unable to locate any employee or officer who had been involved in the relevant decisions when they were made.

The parties' cases in outline

123. Mr Baldry submitted that the correspondence between Linklaters, Jazztel and HMRC in December 1999 and January 2000 establishes that Jazztel "discovered" its mistake within the meaning of section 32(1) of the 1980 Act or, failing that, that it could have done so with reasonable diligence. Emphasising Lords Reed and Hodge's reference to having "sufficient confidence to embark on the preliminaries to the issue of a writ", Mr Baldry argued that Jazztel reached that point when it was advised by Linklaters that there were grounds for considering that the SDRT regime was not valid under European law. True it may be that Linklaters said that any attack on the charge "would be very strongly resisted by the UK Inland Revenue" and that "[t]here must be doubts about whether this is worth pursuing in the case of Project Saxo", but such matters do not bear on whether Jazztel was in a position to "embark on the preliminaries" or even whether a "worthwhile claim" had arisen. Time begins to run under section 32, Mr Baldry said, as soon as you have a belief which justifies you investigating whether you have made a mistake or would with reasonable diligence have reached that stage. Here, by 11 January 2000, Jazztel had not just been advised that the SDRT regime was vulnerable to challenge under European law but actually submitted a claim for repayment. While mere suspicion that SDRT might not be payable would not of itself suffice to start time running, if you have been advised of a potential argument and made a claim on that basis, you have inevitably reached the relatively low threshold for "discovery".

124. In contrast, Mr Grodzinski argued that time does not begin to run under section 32 of the 1980 Act until a claimant recognises, or could with reasonable diligence have recognised, that he has a "worthwhile" claim. Rightly in our view, Mr Grodzinski did not suggest that matters such as the prospect of "strenuous opposition" or "lengthy and expensive litigation" could affect whether a claim is "worthwhile" in this context, but he submitted that it is not enough for a claimant simply to know that an argument exists that a mistake of law has been made nor, always, for a claimant to have reached the stage of taking advice. For a mistake of law to have been "discovered", Mr Grodzinski said, the claimant must believe in the truth of an assertion that a mistake has been made. In the present case, far from Jazztel so believing, the Judge has made unchallenged findings to the effect that, until the Advocate General's opinion was delivered in HSBC Holdings in 2009, Jazztel had no more than a "marginal" doubt as to whether SDRT was due, not "serious" doubts, and, that being so, Linklaters' letter to Mr Halsey of 11 January 2000 cannot matter. Further, it is impossible for this Court to arrive at a conclusion as to whether Jazztel could with reasonable diligence have discovered its mistake. The question not having been raised, there was no need for Jazztel to consider adducing evidence on it for the hearing before the Judge, and he made no findings as to it.

AB v Ministry of Defence

125. The decision of the Supreme Court in AB v Ministry of Defence [2012] UKSC 9, [2013] 1 AC 78 ("AB") is relevant to the significance to be attached to Linklaters' letter to Mr Halsey of 11 January 2000. In AB, claims had been brought from 2004 by former servicemen or their personal representatives alleging breach of duty in exposing the servicemen to radiation when testing thermonuclear devices in the 1950s in consequence of which injury had been suffered. Under section 11 of the 1980 Act, the relevant limitation period was three years from the date on which the cause of action accrued or, if later, the "date of knowledge" and, by section 14, a person's "date of knowledge" was:

> "the date on which he first had knowledge of the following facts—
>
> (a) that the injury in question was significant; and
>
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
>
> (c) the identity of the defendant; and
>
> (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
>
> and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

Lord Phillips PSC, Baroness Hale JSC and Lord Kerr JSC took the view that the claimants had not acquired such knowledge by the time they issued proceedings and, hence, that the claims were not time-barred. However, the majority (Lords Walker, Brown, Mance and Wilson JJSC) held the claims to be out of time and, in the course of their judgments, rejected the idea that a claimant could lack the requisite knowledge once he had issued his claim.

126. In that connection:

i) Lord Wilson said at [3]:

> "In my view … , it is a legal impossibility for a claimant to lack knowledge of attributability for the purpose of section 14(1) at a time after the date of issue of his claim. By that date he must in law have had knowledge of it. Pursuant to CPR r 22.1(1)(a)(4), he must verify his claim form by a statement that he 'believes' that the facts stated in it are true. The word in the statement of truth is 'believes' rather than 'knows' only because—of course—the assumption that the cause of action exists does not apply to the claim form. That it exists is indeed only a claim. Although the statement of truth covers wider ground, it can in my view be regarded as an explicit recognition by the claimant that he then has knowledge of attributability for the purpose of section 14(1)";

ii) Lord Wilson said at [6]:

> "It is in my view heretical that a claimant can escape the conventional requirement to assert his cause of action for personal injuries within three years of its accrual by establishing that, even after his claim was brought, he remained in a state of ignorance entirely inconsistent with it. Indeed it is, as Smith LJ observed in the course of argument in the Court of Appeal, 'a bit Alice in Wonderland'";

iii) Lord Walker said at [67]:

> "I do not see how a claimant who has issued a claim form claiming damages for personal injury can be heard to suggest that he did not, when it was issued, have the requisite knowledge for the purposes of the 1980 Act";

iv) Lord Brown, after expressing agreement with Lords Walker, Mance and Wilson, observed at [70] that "[p]erhaps the most critical proposition to which each of the above three judgments commits is (in Lord Wilson JSC's words at para 3): 'it is a legal impossibility for a claimant to lack knowledge of attributability for the purpose of section 14(1) at a time after the date of issue of his claim'", going on to say at [71]:

> "In short, once a claimant issues his claim, it is no longer open to him to say that he still lacks the knowledge necessary (by reference to sections 11 and 14) to set time running";

v) Lord Mance said at [84]:

> "A claimant bringing proceedings necessarily asserts that he or she has a properly arguable claim. In the present cases, the claims were expressly to the effect that the claimants had suffered personal injuries by reason of the negligence of the defendant in exposing them to radiation, radioactivity or contaminated material in one way or another. In modern procedure, such an assertion is attested by a statement of belief, as Lord Wilson JSC notes in para 3, and so it was here. Once proceedings are begun, it is by reference to the facts asserted as giving rise to the claim that the question of knowledge must be tested. The claimant cannot avoid this. Indeed, it is difficult in normal circumstances to think of a claimant trying to do so."

Conclusion

127. As the submissions we heard demonstrate, there is scope for argument as to some of the implications of the approach to section 32(1) of the 1980 Act which the Supreme Court adopted in FII (SC) 2. How good, for example, must a claim's prospects of success seem before it is "worthwhile" or before they "justify embarking on the preliminaries to the issue of a writ"? What scope is there for mistake and discovery to co-exist: in other words, for a claimant at one and the same time to be mistaken and to have discovered his mistake?

128. But for Linklaters' letter to Mr Halsey of 11 January 2000, however, we would have accepted that Jazztel had not discovered its mistake at that stage. Although Linklaters had alerted Jazztel on 22 December 1999 to the fact that there might be grounds for questioning the SDRT charges on the basis of EU law, the Judge found that Jazztel's state of mind remained predominantly that the tax was due and that such doubt as it had was "marginal". Moreover, as Mr Grodzinski stressed, there is no challenge to that finding. In the circumstances, we do not think the advice which Linklaters gave on 22 December can of itself be said to have led Jazztel to know of its mistake "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ" or to "recognis[e] that a worthwhile claim arises".

129. On 11 January 2000, however, Linklaters sent HMRC on Jazztel's behalf a letter formally requesting the return of the £1,819,060 which it had paid. That letter constituted a "claim" for the purposes of the SDRT Regulations and so affected Jazztel's legal position. In time, it resulted in HMRC repaying the £1,819,060, the 11 January letter having meant that Jazztel had made a "claim" within the period prescribed by regulation 14(2). Further, the 11 January letter correctly identified the basis on which the SDRT regime could be impugned, as was later held in HSBC Holdings.

130. The present case is not, of course, on all fours with AB. In AB, the claimants had issued legal proceedings and, as Lords Wilson and Mance pointed out at [3] and [84] respectively, they will have needed to sign statements of truth confirming their belief in the facts stated in their claim forms. Jazztel, in contrast, neither issued a claim form nor took steps to appeal HMRC's failure to refund the £1,819,060.

131. Even so, it seems to us that Jazztel must be taken to have "discovered" its mistake for the purposes of section 32(1) of the 1980 Act by the time Linklaters sent the 11 January 2000 letter on its behalf. The letter shows that, by then, Jazztel was alive to the grounds on which SDRT would prove not to have been payable and was in a position to claim repayment. While the company did not follow up the letter with any legal proceedings, it did not have to: the SDRT Regulations allowed it to make a legally effective "claim" by letter. It appears to us that, just as a person who has issued a claim form cannot be heard to suggest that he lacked the requisite knowledge for the purposes of the 1980 Act, Jazztel cannot be heard to suggest that it had not discovered its mistake when it had already succeeded in making a "claim" for repayment under regulation 14 of the SDRT Regulations. To echo Smith LJ's remark in AB in the Court of Appeal, there would be something "a bit Alice in Wonderland" in a conclusion that time had not even started to run against Jazztel even though it had earlier shown itself able to make a claim and had in fact done so. In the same way that "it is no longer open to [a claimant who has issued a personal injury claim] to say that he still lacks the knowledge necessary ... to set time running" (to quote Lord Brown in AB), it is not open to someone who has made a claim under the SDRT Regulations to recover an overpayment to say that he has not yet discovered that he could make one.

132. In the circumstances, it is in our view possible to determine from the existing materials, without the need for any further hearing, that the present proceedings are statute-barred as regards Payments 1 to 22. Jazztel must be considered to have sufficiently "discovered" by 11 January 2000 that it had a claim to recover its SDRT payments. On that footing, regardless of whether there is scope for challenging Leeds City Council, the six-year limitation period will have expired in respect of all but the last of the

relevant payments (Payment 23) before the claim form was issued on 19 December 2013. Accordingly, we would both grant HMRC permission to amend their grounds of appeal and allow the appeal against paragraph 4 of the Judge's Order.

IV. **Overall conclusion**

133. In our view, HMRC's appeal against paragraph 3 of the Judge's Order should be dismissed, but their appeal against paragraph 4 of the Order should be allowed. It seems to us that Jazztel "discovered" its mistake for the purposes of section 32(1) of the Limitation Act 1980 more than six years before it issued its claim form and, accordingly, that the proceedings are statute-barred as regards Payments 1 to 22.

134. Finally, we would add that we have read and agree with the judgment of Singh LJ.

Lord Justice Singh:

135. I agree with the judgment of Newey LJ and Sir Launcelot Henderson and add a few words of my own only out of deference to an argument which was advanced before us by Mr Baldry QC on behalf of the Revenue. He submitted that the decision of the House of Lords in Fleming is not binding on this Court because the way in which he has argued the case before us is materially different from the way in which the case was argued on behalf of HMRC in Fleming. In particular, he submits that the argument for HMRC in Fleming was that the new retrospective time limit introduced by Parliament could be applied to *all* cases, including those where accrued rights had gone up in a puff of smoke on the day when the new limitation period came into force. He submits that the Revenue in Fleming made no distinction between different types of cases, as he now does. In contrast, Mr Baldry accepts in the present context that there will have been some taxpayers to whom the new limitation period introduced by section 320 of the 2004 Act could not lawfully be applied but, he submits, those are not the facts of this case, because Jazztel did have more than two years to make a claim even under the new limitation period that was introduced. In my view, there are two difficulties with this line of argument.

136. First, although the facts of the Fleming case itself may not have been similar to those in the present case, the facts of Condé Nast were materially similar. This is because there were some payments which had been made in a period (the three years before the new limitation period came into effect on 1 May 1997) when there would still have been time on the facts to bring a claim for restitution of wrongly paid tax even under the new limitation period. That did not prevent the House of Lords reaching the decision which it did, of disapplying the new time limit in respect of all of the claims before it. The *ratio* of a case is the legal principle which is necessary to explain the outcome of that case on its facts. I cannot see how Mr Baldry's argument can account for the actual outcome on the facts of Condé Nast.

137. Secondly, the fact that different arguments might have been deployed in an earlier case does not prevent the relevant legal principle from forming part of its *ratio*. In a slightly different context, because it concerned an earlier decision of this Court rather than an earlier decision of the House of Lords or Supreme Court, Sir John Donaldson MR said of the doctrine of *per incuriam*:

> "I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it *might* have reached a different conclusion."

See Duke v Reliance Systems Ltd [1988] QB 108, at 113 (emphasis in original).

138. The position appears to be different if a point of law was simply assumed to be correct in an earlier decision (even that of a superior court) without any argument on it: see e.g. FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd [2019] EWCA Civ 1361, [2020] Ch 365, at [136] (Leggatt LJ, giving the judgment of the Court). But Fleming was not such a case: there was argument on the material issue of law. What Mr Baldry's submission really amounts to is that there was a better argument available to HMRC, which it did not advance at that time and which it now does.

139. In my view, there is an important distinction in principle between a case in which an *argument* was not advanced on the earlier occasion and a case in which the *legal issue* was entirely different: see, by way of example, R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213. In that case, there had been an earlier decision of the Court of Appeal in which a challenge to the very same scheme now under challenge had been rejected: see R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] EWCA Civ 473, [2003] QB 1397. That did not prevent the Court of Appeal from reconsidering the matter (and indeed deciding it in favour of the claimant) because there was an entirely new legal issue and a different ground of challenge advanced in Elias, which had not been raised in the earlier case. In the earlier case, the grounds of challenge were the conventional public law grounds of irrationality and breach of legitimate expectations; whereas, in Elias, the grounds arose under the Race Relations Act 1976. This was not therefore simply a case where different arguments were advanced which had not been made in the earlier case; the legal issues were themselves different.

140. In the present case, in contrast, the legal issue is on proper analysis the same as that which arose in Fleming (on the facts of Condé Nast) and the decision in that case is binding on this Court.