[2018] UKUT 0373 (TCC)

Appeal number: UT/2014/0049

VAT - Interest - application for interest under section 84(8) VATA - rate of interest - deduction of repayment supplement

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

EMBLAZE MOBILITY SOLUTIONS LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: The Honourable Mr Justice Marcus Smith

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 23 October 2018

Leigh-Ann Mulcahy, QC, instructed by The Khan Partnership LLP, for the Appellant

Philip Moser, QC and Nicholas Macklam, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

A. INTRODUCTION

(1) The factual background

1. On 13 April 2006, Global Telecoms Distribution Ltd ("Global") submitted a VAT return for the VAT Accounting Period 03/06 (that is, for the quarter ending 31 March 2006) in which it claimed an input tax repayment of £8,444,651. The basis on which that claim was made, and the reasons for the Respondents' ("HMRC's") refusal of that claim, are immaterial for the purposes of this appeal.

2. On 20 December 2006, Global filed a notice of appeal against HMRC's decision refusing the repayment claim (the "Appeal").

3. On 30 May 2007, Global was placed into administrative receivership. On 16 January 2008, Global (acting by its receivers) assigned all its rights, interest and title in the appeal to the Appellant ("Emblaze"), which was a 51% shareholder in Global and an unsecured creditor of Global. On 29 February 2008, Emblaze was substituted for Global in the Appeal.

4. The Appeal was allowed, with costs. For reasons that are again immaterial for present purposes, HMRC did not make the repayment to Emblaze. This resulted in proceedings before the High Court, which were concluded in part by a consent order dated 18 July 2011, under which HMRC agreed to pay Emblaze a total of £7,333,716.84 comprising:

(1) £6,911,433.66 in respect of the repayment claim; and

(2) £422,282.51 by way of "repayment supplement" under section 79 of the Value Added Tax Act 1994 ("VATA").

5. It is helpful to set out here the relevant parts of section 79 VATA, which provides as follows:

"**Repayment supplement in respect of certain delayed payments or refunds**

(1) In any case where –

(a) a person is entitled to a VAT credit, or

…

and the conditions mentioned in subsection (2) below are satisfied, the amount which, apart from this section, would be due by way of that payment…shall be increased by the addition of a supplement equal to 5 per cent of that amount or £50, whichever is the greater.

(2) The said conditions are –

(a) that the requisite return or claim is received by the Commissioners no later than the last day on which it is required to be furnished or made; and

(b) that a written instruction directing the making of the payment…is not issued by the Commissioners within the relevant period, and

(c) that the amount shown on the return or claim as due by way of payment or refund does not exceed the payment…which was in fact due by more than 5 per cent of that payment…or £250, whichever is the greater.

(2A) The relevant period in relation to a return…is the period of 30 days beginning with the later of –

(a) the day after the last day of the prescribed accounting period to which the return…relates, and

(b) the date of the receipt by the Commissioners of the return…"

6. Following a hearing in the High Court in March 2012, HMRC were ordered to pay the balance of the input tax repayment claim (£1,534,216.78) to Emblaze. HMRC did so on 9 May 2012.

7. HMRC refused to pay interest on the amounts (re)paid to Emblaze and, by a notice of application dated 25 July 2012, Emblaze applied to the First-tier Tribunal (Tax Chamber) (the "FTT") for an award of interest under section 84(8) VATA.[1] The FTT's decision (the "Decision") is dated 14 July 2018. The FTT held that:

(1) Interest should be paid at a rate of Bank of England base rate plus 1.75%.

(2) Interest was to be calculated on a simple basis.

(3) Interest should be paid on the repayment of £6,911,434 from 28 April 2006 until 9 April 2012. Interest should be paid on the repayment of £1,533,217 from 28 April 2006 until 9 May 2012.

(4) On this basis, the total interest payable in monetary terms amounted to £2,052,268.58. From this amount, the repayment supplement of £422,282.51 was to be deducted, giving an award of £1,629,986.06.

(2) The appeal

8. The Decision considered and reached determinations in relation to a number of matters. Most of them are not before this tribunal. This appeal is only

[1] Section 84(8) VATA was repealed on 1 April 2009 by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, SI 2009/56. The FTT determined that this provision was applicable to Emblaze's claim for interest, and HMRC has not appealed this determination.

concerned with two grounds of appeal. Both are advanced by Emblaze.[2] HMRC does not seek to appeal the FTT's Decision in any respect but does (if the matter arises) seek to uphold the award of interest on other grounds. The two grounds of appeal that are before me are:

(1) Whether the FTT erred in concluding that the rate of interest under section 84(8) VATA should be Bank of England rate plus 1.75% rather than the rate contended for by Emblaze which was 2.55% above the Bank of England base rate ("Ground 1").

(2) Whether the FTT erred in deducting the repayment supplement from the amount of interest awarded as described in paragraph 7(4) above ("Ground 2").

9. There was a third ground of appeal, namely that the FTT erred in concluding that interest should be calculated on a simple rather than a compound basis, having regard to Emblaze's right under EU law to an "adequate indemnity". The appeal from the Decision was stayed by consent to await the outcome in *Littlewoods Ltd v. Revenue and Customs Commissioners* [2017] UKSC 70, which considered this question.

10. In *Littlewoods*, the Supreme Court decided that the right to an "adequate indemnity" did not require the award of compound interest. In consequence, this third ground of appeal was not pursued before me.

11. This decision accordingly considers the two remaining grounds of appeal.

B. GROUND 1: THE APPROPRIATE RATE OF INTEREST

(1) The relevant statutory provision

12. Section 84(8) VATA provides:

> "**Further provisions relating to appeals**
>
> (8) Where on an appeal it is found –
>
> …
>
> (b) that the whole or part of any VAT credit due to the appellant has not been paid,
>
> so much of that amount as is found not to be due to or not to have been paid shall be repaid (or, as the case may be, paid) with interest at such rate as the tribunal may determine."

[2] The FTT refused Emblaze permission to appeal. Permission to appeal was granted by the Upper Tribunal on 10 November 2014.

(2) A broad discretion

13. It is readily apparent that section 84(8) confers a broad discretion on the FTT. HMRC emphasised that this tribunal ought to be slow to interfere with the FTT's exercise of discretion. HMRC cited two cases in support:

(1) In *G v. G* [1985] 1 WLR 647 at 651-652, Lord Bridge cited with approval the following statement of Asquith LJ in *Bellenden (formerly Satterthwaite) v. Satterthwaite* [1948] 1 All ER 343 at 345:

> "We are here concerned with a judicial discretion, and it is of the essence of such discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

(2) In *AEI Rediffusion Music Ltd v. Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1523, Lord Woolf MR cited with approval the following statement of Stuart-Smith LJ in *Roache v. News Group Newspapers Ltd* [1998] EMLR 161 at 172:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale…"

14. Emblaze accepted that it needed to show that the FTT's decision on the rate of interest was wrong in the sense described in these cases.

15. As these authorities make clear, the decision of a lower tribunal can, on appeal, be criticised by identifying material factors left out of account by that tribunal. However, the exercise of discretion can only be criticised by reference to factors not considered by the tribunal when those factors were properly before the tribunal, for its consideration, when it made its decision. A party cannot properly criticise a tribunal for failing to take into account a matter that was not before it.

16. There is no statement in Emblaze's grounds of appeal identifying factors that the FTT should have, but did not, consider. During the course of submissions, leading counsel for Emblaze (who did not appear below) suggested that certain factors had been left out of account by the FTT, notably the fact that certain borrowing by Global was secured borrowing. This, it was suggested before me, might have caused the rate at which Global could borrow commercially to be lower than it otherwise would have been, which in turn went to the appropriate rate of interest the FTT should have selected. Leading counsel for HMRC – who did appear before the FTT – confirmed that this point had never been argued before the FTT, and leading counsel for Emblaze quite properly ceased to rely on the point.

17. I am not going to entertain criticisms of the Decision based upon matters that the FTT might have considered, but did not in fact consider, when reaching its conclusions. That is because I can have no assurance that such points were in fact articulated before the FTT.

(3) Findings of fact

18. A judicial discretion is often exercised on the basis of findings of fact made by the tribunal. Appeals to this Tribunal are, of course, only on points of law. HMRC emphasised in its submissions that factual findings by the FTT could not be challenged on appeal unless they were shown to amount to errors of law.

19. In *Georgiou v. Customers and Excise Commissioners* [1996] STC 463, Evans LJ, giving the judgment of the Court of Appeal, said this at 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law…It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts…the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of the evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

20. In *Henderson v. Foxworth Investments Ltd* [2014] UKSC 41 at [67], Lord Reed JSC put the point in the following way:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

21. I accept these statements as a correct articulation of the distinction between a "mere" error of fact and an error of law.

(4) The *Littlewoods* decision

22. The FTT held that Emblaze had a right under EU law to interest on repayments of tax wrongly withheld by HMRC.[3] This is a conclusion that is not appealed.

23. Early on in the *Littlewoods* litigation, Vos J made a reference to the Court of Justice of the European Union ("CJEU"). In determining that reference, the CJEU stated (Case C-591/10 at [29]) that "[the principle of effectiveness] requires that the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of VAT."[4]

24. The CJEU went on to answer the question that had been referred to it in the following way:[5]

> "European Union law must be interpreted as requiring that a taxable person who has overpaid value added tax which was collected by the member state contrary to the requirements of European Union legislation on value added tax has a right to reimbursement of the tax collected in breach of European Union legislation on value added tax has a right to reimbursement of the tax collected in breach of European Union law and to the payment of interest on the amount of the latter. It is for national law to determine, in compliance with the principles of effectiveness and equivalence, whether the principal sum must bear 'simple interest',, 'compound interest' or another type of interest."

25. The decision of the Supreme Court in *Littlewoods* concerned the question whether an award of compound interest in relation to claims for the repayment of tax was necessary under EU law to provide an "adequate indemnity" to the taxpayer. Contrary to the conclusion reached by both Henderson J and the Court of Appeal in the *Littlewoods* litigation, the Supreme Court concluded that an award of compound interest was not so needed (which is why Emblaze's third ground of appeal fell away).

26. Even though the issue of compound interest is not before me, the Supreme Court's decision nevertheless casts light on the true meaning of the term "adequate indemnity". In a decision given by Lord Reed and Lord Hodge JJSC, the Supreme Court held that an "adequate indemnity" meant that the CJEU "has given member state courts a discretion to provide reasonable redress in the form of interest in addition to mandatory repayment of any wrongly levied tax, interest and penalties".[6] There was no general principle of EU law "that there must be full reimbursement of the use value of money".

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[3] Decision at [45]-[46].

[4] Emphasis added.

[5] At the conclusion of the judgment, below [35].

[6] At [51].

27. This is in contrast to the conclusion of Henderson J, who held that an "adequate indemnity" "requires payment of an amount of interest which is broadly commensurate with the loss suffered by the taxpayer of the use value of the tax which he has overpaid, running from the date of payment until the date of repayment".

28. The Supreme Court interpreted the CJEU as "*(i)* requiring the repayment of tax with interest, without specifying the form of that interest, *(ii)* stating that the principle of effectiveness requires that the calculation of that interest, together with the repayment of the principal sum, should amount to reasonable redress for the taxpayer's loss, and *(iii)* suggesting that the referring court might consider that interest which is over 125% of the amount of the principal sum might be such reasonable redress".[7]

29. The reference to the amount of simple interest exceeding the amount of the principal highlights one of the, possibly extraordinary, aspects of the *Littlewoods* case: because – for reasons that are immaterial – Littlewoods was able to claim monies paid away by it over a 40-year period, even simple interest was capable of exceeding the principal due to be repaid. Because of limitation, that will rarely be the case in litigation before English courts and in this case, the interest ordered by the FTT was 28.6% of the principal sum.[8]

30. Whilst this metric of simple interest as a percentage of principal might have been helpful in the *Littlewoods* case as a means of emphasising the very large amounts of simple interest being recovered by Littlewoods, in the more ordinary case – such as this – I do not find the metric a helpful one at all. The amount of simple interest payable is a function of rate and time: the longer a party has been kept out of money it is entitled to, the greater the interest will be.

31. The *Littlewoods* decisions – that is, of the CJEU and the Supreme Court – make clear the primacy of national law in determining questions of interest. Provided the requirements of effectiveness and equivalence are observed, the former being characterised by the need for "reasonable redress", which is a flexible standard, it is national law and not EU law that governs.

32. Accordingly, it is necessary to have regard to the law relating to section 84(8) VATA. The leading decision in this regard is the decision of Lawrence Collins LJ in *Revenue and Customs Commissioners v. Royal Society for the Prevention of Cruelty to Animals* [2007] EWHC 422 (Ch) ("*RSPCA*").

[7] At [59].

[8] Decision at [30]. This percentage ignores the deduction of the repayment supplement.

(5) The *RSPCA* decision

(i) Compound interest

33. In the *RSPCA* decision, Lawrence Collins LJ made clear that – notwithstanding its broad wording – section 84(8) did not permit a tribunal to award compound interest:

> "76 Section 84(8) does not include any reference either to 'compound interest' or to 'simple interest'. The correct construction is that it refers to simple interest only. Section 84(8) must be read in the context of VATA as a whole. The construction of section 84(8) as providing for simple interest only is consistent with other sections of VATA concerning payment of interest, namely sections 74 and 78. Those other provisions provide that 'interest' is payable, without stating in terms whether that interest is 'simple or compound'. It is clear that only simple interest is payable under those provisions. Construing section 84(8) as permitting the award of compound interest would put it out of step with section 78, introducing a major distinction for no obvious reason.
>
> 77 If compound interest were available under section 84(8) on appeal to the tribunal, that would create a strong incentive for taxpayers to appeal to the tribunal rather than resolve disputes by other means, since the sums recoverable would be likely to be significantly greater. That would overburden the tribunal and disrupt the scheme of the legislation, which cannot have been the intention of Parliament.
>
> 78 A statutory entitlement to compound interest is the exception rather than the rule. Thus, in the field of indirect taxation, and by way of contrast to sections 74 and 78, there are express references to 'compound' interest in provisions requiring the payment of compound interest, juxtaposed with provisions requiring simple interest that do not expressly state that the obligation that they create is to pay 'simple' interest. A statutory power on a court or tribunal to award compound interest is exceptional. Under section 35A of the Supreme Court Act 1981, and section 69 of the County Court Act 1984, there is a power to award simple interest only. The exception to the general rule is the Arbitration Act 1996, section 49. The statutory position is in keeping with the approach both at common law and in equity."

(ii) General discretion

34. In terms of the general discretion under section 84(8), Lawrence Collins LJ said this:

> "111 The starting point is that section 84(8) gives the tribunal a discretion and contains no guidance as to how it is to be exercised or what factors are relevant in the exercise of the jurisdiction.
>
> …
>
> 113 In my judgment, it would be wrong for me to attempt to fetter the discretion by attempting to lay down guidelines as a gloss on the legislation. But I will

> say that it would not be easy to criticise a tribunal if it applied principles commonly applied in cases involving commercial entities, even if the relationship between the trader and the commissioners is not a commercial one. In civil cases, the overriding principle is that interest should be awarded to the claimant not as compensation for the damage done but for being kept out of money which ought to have been paid to him…
>
> 114 Conventional practice in commercial cases (under section 35A of the Supreme Court Act 1981) is to award simple interest at base rate plus 1% (described by the Law Commission, *Pre-Judgment Interest on Debts and Damages* (Law Com No 287 (2004), para 3.41, as 'relatively low').
>
> 115 I do not consider that there is any overriding reason of principle why a higher rate should not be adopted by the tribunal in the circumstances of a particular case, either because that rate is reasonably considered too low, or because on the facts the taxpayer has to borrow at a higher rate. The former case would no doubt be rare. In the latter case, there must be some evidence on which the tribunal can act.
>
> 116 In commercial cases, although a rate higher than the conventional rate may be justified, any such claim is normally dependent on evidence that a claimant has in fact borrowed funds at a higher rate…"

35. I agree that the conventional practice in section 35A cases represents a good guide and structure to the manner in which the section 84(8) discretion should be exercised. In *BritNed Development Ltd v. ABB AB* [2018] EWHC 2913 (Ch) at [17], I summarised the discretion under section 35A in the following propositions:

> (1) An award of interest is not punitive and the use to which the party paying interest would have put the funds (and the returns that such party may or may not have made) is irrelevant.[9]
>
> (2) There is a convention that at least the starting point for the award of simple interest (at least where the award is in £ sterling) is Bank of England base rate plus 1%.[10]
>
> (3) This conventional rate will, usually, be less than what a claimant would have to pay as a borrower, but more than a claimant could earn as a lender. The appropriate benchmark, however, is not to regard the claimant as the lender of monies (inferentially, to the defendant), but rather as having had to borrow money in order to fund the loss that has been vindicated by the award of damages in the judgment.[11] It is this that informs the court's

[9] *Fiona Trust & Holding Corporation v. Privalov* [2011] EWHC 664 (Comm) at [13]; *Sycamore Bidco Ltd v. Breslin* [2013] EWHC 174 (Ch) at [6].

[10] *Shearson Lehman Hutton Inc v. Maclaine Watson & Co Ltd* [1990] 3 All ER 723 at 733; *Fiona Trust* at [14], [15].

[11] *Fiona Trust* at [14]; *Reinhard v. ONDRA* [2015] EWHC 2943 (Ch) at [31].

departure from the conventional starting point: the overall aim is to determine a fair rate to compensate the claimant.[12]

(4) When considering the departure from the conventional starting point, a broad brush approach must be taken. In *Fiona Trust*, Andrew Smith J put the point as follows:[13]

> "A "broad brush" is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate…The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional."

(5) Specific evidence (eg as to the claimant's borrowing rates) may be adduced to support a particular departure from the conventional rate or as regards the particular circumstances of the claimant.[14]

(6) The discretion in this case

36. The FTT considered the question of the rate of simple interest that should be awarded in conjunction with the repayment supplement point. The reasoning in relation to these two (separate) issues is intertwined.[15] Given the two distinct grounds of appeal, I have done my best to separate the FTT's reasoning, so as to distinguish between the reasoning going to Ground 1 and the reasoning going to Ground 2. So far as the rate of simple interest (Ground 1) is concerned:

(1) The FTT began by noting what Lawrence Collins LJ said in *RSPCA*: Decision at [86]. I have set out the relevant passages in paragraph 34 above. At [88], the FTT noted that "[b]oth parties agreed that the conventional rate of base rate plus 1% was the starting point". That is clearly right.

(2) The FTT considered that "it would not be correct to use the rates of borrowing of persons other than Global in determining the interest rate to be applied": Decision at [91]. Neither party took issue with this approach before me, and I respectfully agree that the fact that Global's claim was assigned to Emblaze cannot result in a higher rate of interest being paid by HMRC. It is trite law that an assignment cannot prejudice the position of the debtor.

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[12] *Fiona Trust* at [25].

[13] At [16]. See also *Ahmed v Jaura* [2002] EWCA Civ 210 at [20] and [26]; *Sempra Metals v.IRC* [2006] QB 37 at [47] (in the Court of Appeal); *Reinhard* at [9].

[14] *Fiona Trust* at [25].

[15] See, for example, [86], [87] and [93].

(3) The FTT then summarised the expert evidence on interest that was before it (Decision at [94] to [99]). Having done so, the FTT then stated its conclusions. It is appropriate to set these out in full (with emphasis supplied):

> "100 When determining what would be an appropriate rate of interest, I only take account of the actual costs of borrowing incurred by Global before the assignment of the right to the repayment and the hypothetical costs that Global would have incurred after that time. I do not accept Mr Lasok's [counsel for Emblaze at the hearing before the FTT] submission that I should determine a rate of interest according to a class of borrowers and determine the conventional rate for that class. Even if I considered that I should determine a rate for a class of borrowers, I was not provided with any evidence to enable me to do so. I consider that I must determine an appropriate rate of interest for Global in the circumstances of this case. An appropriate rate of interest is one that provides an adequate remedy for the financial losses incurred by Global based on its cost of borrowing.
>
> 101 It seems to me that the appropriate rate of interest in this case must lie between base plus 1% and LIBOR plus 2.55%. I consider that base rate plus 1% is too low to be an appropriate rate of interest for Global in the circumstances of this case. It is much lower than the lowest rate at which Global was able to borrow commercially, namely base rate plus 1.75%, and does not reflect the fact that the interest charged to Global would be calculated on a compound basis. Having decided that I am only concerned with Global's costs of borrowing, I do not consider that there is any reason to award interest at a rate higher than LIBOR plus 2.55%. That was the highest rate at which Global borrowed money during the period before it went into administration. In my opinion, a rate of LIBOR plus 2.55% would be excessive for the following reasons. First, it is much higher than the commercial rate of interest charged by HSBC in relation to Global's borrowing by way of overdraft. Secondly, the amount borrowed by Global at LIBOR plus 2.55% was much less than the repayment withheld so applying that rate to the whole repayment would result in Emblaze receiving an amount far greater than the financial losses were and would have been incurred by Global. However, the fact that Global borrowed less than the repayment withheld does not mean that Global is not entitled to any compensation for being kept out of that money by HMRC.
>
> 102 In the circumstances of this case, I consider that interest at the Bank of England base rate plus 1.75%, calculated on a simple basis, for the periods from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217 is an appropriate rate of interest. I consider that it is a realistic rate of interest in that it is a commercial rate set by a third party that was actually applied

> to Global. It also, conveniently, falls between the inadequate compensation produced by applying base rate plus 1% and the over-generous award by using LIBOR plus 2.55%. **The fact that it exceeds the conventional rate might be seen to reflect some element of compounding as [Lawrence] Collins LJ recognised in *RSPCA*.**
>
> *Decision on calculation and rate of interest*
>
> 103 In summary, I have concluded that interest is payable from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217. **Although I consider that the FTT can and must direct that interest under section 84(8) should be calculated on a compound basis where that is required in order to provide an adequate indemnity**, I concluded that simple interest at an appropriate rate would provide an adequate indemnity in this case. In my opinion, interest at the Bank of England base rate plus 1.75%, calculated on a simple basis, is broadly commensurate with the loss suffered by Global, which was assigned to Emblaze, and provides an adequate indemnity under EU law."

37. I regard this reasoning as unimpeachable, and certainly well within the discretion conferred on the FTT by section 84(8). The FTT properly directed itself on the law – the *RSPCA* decision was and remains the leading case, in this regard – and properly considered whether the conventional rate of Bank of England base rate plus 1% should be departed from. The FTT considered that it should – to Emblaze's advantage – but preferred (for the reasons it gave) the commercial rate that Global borrowed from HSBC of Bank of England base plus 1.75% to the inter-company rate of LIBOR plus 2.55%. I can quite understand why the FTT did so. Furthermore, the FTT considered that – given the repayment on which interest was being awarded was greater than Global's actual borrowing, there was a particular risk of over-compensation in awarding a rate higher than the commercial rate.

38. Emblaze was entirely unable to identify any error amounting to a sufficient error entitling me to call the FTT's decision an error of law and so set it aside. The points made by Emblaze amounted to no more than an attempt to re-argue what the FTT had decided before this Tribunal. That, self-evidently, does not amount to an error of law capable of being reviewed by this Tribunal.

39. I consider that the FTT's decision was well within the range of permissible decisions it could make, given the discretion it had.

40. I am conscious that the FTT's Decision was made prior to the Supreme Court's decision in *Littlewoods*. At the time of the Decision, only Henderson J's decision in *Littlewoods* had been made. I have considered whether this fact entitles or obliges me to re-visit the Decision, because, in *Littlewoods*, the Supreme Court overturned the Court of Appeal's decision affirming that of Henderson J. I do not consider that it does. In point of fact, the FTT presciently

directed itself in accordance with the Supreme Court's future decision in *Littlewoods*[16] and correctly followed the guidance of Lawrence Collins LJ in *RSPCA*.

41. The only point I might make is that, had the Decision followed the Supreme Court's decision in time, rather than preceding it, the comments I have emphasised in **bold** in paragraph 36(3) above would probably not have been made. If anything, this (now clearly incorrect) reference to compounding would have inclined the FTT to make too high an award of interest, rather than too low an award. However, having considered the Decision as a whole, I do not consider, even in this regard, that the FTT fell into error. It seems to me that the FTT arrived at the rate of Bank of England base plus 1.75% by reference to Global's HSBC borrowing, and that it did so applying the correct test.

42. In these circumstances, the appeal in relation to Ground 1 must be dismissed.

C. GROUND 2: DEDUCTION OF THE REPAYMENT SUPPLEMENT FROM THE INTEREST AWARDED

(1) Introduction

43. As I have described, the FTT considered it appropriate to deduct 100% of the repayment supplement from the monetary amount of interest it had calculated.[17] It is necessary to consider, first, the relevant law; and then, secondly, how the FTT applied the law in the facts of this case.

(2) The law

44. The applicable principles are, again, set out in *RSPCA*. These were set out (in part, at least) by the FTT at [87] of the Decision. In *RSPCA*, Lawrence Collins said this:

> "136 Repayment supplement is a statutory penalty levied against the Commissioners for failing to deal with VAT Returns expeditiously, and as was pointed out in *Olympia Technology Ltd* , para 10, it does not produce an interest formula of the sort required for the application of section 84(8). I do not consider that as a matter of principle the section 84(8) interest should be adjusted in order to take account of a section 79 repayment supplement. Again, it is section 84(8) which applies, and not section 79 .
>
> 137 But that does not mean that there may not be circumstances in which the Tribunal can take account of, or have regard to, the fact that repayment supplement has been made. It would not normally be a reason for departing

[16] Although the FTT did not use the term "reasonable redress", it did what in substance the Supreme Court's decision in *Littlewoods* required: it applied the relevant English law, namely the decision in *RSPCA*.

[17] See paragraph 7(4) above.

> from a conventional rate if the Tribunal considered that a conventional rate was appropriate. But if on the basis of evidence, the trader claimed that it was entitled to a rate higher than a conventional rate, it may be unrealistic and unjust not to have regard to the receipt of the repayment supplement. I therefore consider that the Tribunal may have regard to the fact that there has been a section 79 repayment supplement, especially where the trader claims on the basis of evidence that interest should be higher than a conventional rate."

45. By this, I do not consider Lawrence Collins LJ to have been saying that whenever there is an upwards movement away from the conventional rate of Bank of England base plus 1%, the repayment supplement must be reflected in a deduction in the amount of interest paid by HMRC. That would, to my mind, defeat the object of the repayment supplement, whose rationale is to act as a spur to HMRC's efficiency.[18] In *Olympia Technology Ltd v. Revenue and Customs Commissioners* (2005) VAT Decision 19145 at [10] a similar point was made. It was noted that the repayment supplement served a different function to the payment of interest. The repayment substitute is not a substitute for interest.[19]

(3) The FTT's decision

46. The Decision records, at [89], that Mr Moser, QC, leading counsel for HMRC before the FTT (and before me) "also submitted, relying on the comments of [Lawrence] Collins LJ at [137] of *RSPCA*, that it would be "unrealistic and unjust" not to have regard to the receipt of the repayment supplement in determining the rate of interest where a taxpayer was claiming a rate of interest that was higher than the conventional rate". Importantly, no reason for adjusting the conventional rate in this way was advanced by HMRC: or, at least, none is recorded in the Decision.

47. The FTT concluded at [93]:

> "I accept Mr Moser's submissions that, adopting the approach discussed by [Lawrence] Collins LJ in *RSPCA* at [137], I should take account of the fact that repayment supplement has been paid to Emblaze if I decide to award a rate of interest higher than the conventional rate. That may be done most simply by directing that the amount of the repayment supplement is deducted from the amount of interest that is determined to be payable by HMRC to Emblaze. That is what I propose to direct even though I acknowledge that a simple deduction does not take account of the fact that Emblaze has had the use of the repayment supplement since July 2011."

48. So far as the deduction of the repayment supplement from the interest awarded is concerned, I consider that the FTT materially misdirected itself on the

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[18] See *Customs and Excise Commissioners v. L Rowland & Co (Retail) Ltd* [1992] STC 647 at 655 (*per* Auld J).

[19] *R (on the application of Mobile Export 365 Ltd) v. Revenue and Customs Commissioners* [2006] STC 1069 at [24] (*per* Collins J).

law and – both for that reason and separately – exercised its discretion in calculating interest under section 84(8) in a manner falling outwith the permitted scope of its discretion. As to this:

(1) As I have noted, the *RSPCA* decision does not require an adjustment to the interest payable to reflect the repayment supplement in every case where the rate of interest ordered to be paid exceeded the conventional rate. Rather, *RSPCA* articulates a discretion, that must be exercised for a reason, which may (or may not) be triggered by the rate of interest ordered.

(2) Given that the departure from the conventional rate of base plus 1% will have been ordered on the basis of evidence and a careful assessment of what constituted an adequate indemnity or reasonable redress, I consider that such a rate, once calculated, should only be adjusted downwards where there is a good, identified reason. The mere fact that a higher rate of interest and a repayment supplement is payable by HMRC is not enough. Although the FTT deducted the repayment supplement from the monetary award of interest, it is, I consider, necessary to bear in mind the effect that this has on the rate of interest being recovered in light of the deduction.

(3) Accordingly, I find that the FTT erred in its approach by deducting the repayment supplement for no proper reason. It exercised its discretion unlawfully in deducting the repayment supplement from the interest that had been awarded simply because the rate of interest had been calculated at a higher than conventional rate.

(4) Moreover, even if (which I do not accept) the discretion to deduct was properly exercisable in this case, it was exercised irrationally. As Emblaze pointed out, the effect of deducting the repayment supplement resulted in an effective rate of interest of less than 1% above Bank of England base rate.[20] Given that the FTT concluded – for reasons that I have found to be unimpeachable – that a higher than conventional award of interest was appropriate in this case, that is an outcome that I consider to be indefensible.

49. Accordingly, Ground 2 succeeds. On the facts found by the FTT I can see no reason to make any deduction to reflect the payment by HMRC of the repayment supplement. Accordingly, Emblaze is entitled to interest in the amount of £2,052,268.58 without any deduction of the repayment supplement.

D. DISPOSITION

50. For the reasons set out above, Ground 1 of the appeal is dismissed, whilst Ground 2 succeeds. As a result, Emblaze is entitled to a further payment of

[20] See paragraph 39(d) of Emblaze's written submissions.

£422,282.51, to reflect the improper deduction of the repayment supplement from the interest Emblaze was found to be entitled to.

51. In a draft version of this Decision that was circulated to the parties for the correction of typographical and other errors, paragraph 51 read:

> "HMRC should pay this amount to Emblaze within 14 days of this decision."

52. HMRC suggested that I lacked jurisdiction to make such a decision and invited the deletion of this paragraph. Although HMRC's suggestion went well beyond identifying a typographical or other obvious error, I invited submissions on the point. This is my conclusion:

(1) It is trite that both the FTT and this Tribunal are creatures of statute and that neither tribunal has jurisdiction beyond that which is conferred by statute.

(2) It is accepted by HMRC that this Tribunal can, jurisdictionally speaking, on an appeal exercise a power that the FTT could have exercised. Plainly, that is right.

(3) In this case, section 84(8) VATA permits the FTT, on an appeal to it, to determine the rate of interest to be paid. The FTT is given an express power to determine the rate. Section 84(8) is silent as to whether the FTT can determine <u>when</u> any interest due under this section should be paid.

(4) HMRC's position, as expressed in a letter to the Tribunal dated 19 November 2018, is that there is no jurisdiction in the FTT (and so none in this Tribunal) to specify a date. HMRC's position is that the time for compliance with an order under section 84(8) is essentially a matter for HMRC, although "[f]or the avoidance of doubt, HMRC would always seek to ensure that the implications of decisions made by the [FTT] and Upper Tribunal are put into effect as soon as is practicable, taking into account all the circumstances (some of which may be beyond the control of HMRC".

(5) I reject this contention. The obligation to pay interest under section 84(8) is not essentially voluntary, as HMRC suggests, but a matter that HMRC must comply with. As a matter of necessary implication – and, indeed, in order to be fair to HMRC, the paying party – the time for compliance must be specified, otherwise there is the risk that HMRC will be in immediate breach of any order made. It is, as it seems to me, essential that decisions of the FTT and the Upper Tribunal are clear in what they require.

(6) I entirely accept that neither the FTT nor the Upper Tribunal has enforcement powers. Section 27 of the Tribunals, Courts and Enforcement Act 2007 provides that a sum payable in pursuance of a tribunal decision shall be recoverable "as if it were payable under an order" of the court. The ability to recover, however, requires the tribunal's decision to specify when that decision must be complied with. Otherwise, a critical parameter to the enforcement of the decision (i.e. the time for compliance) is missing. Section 27 thus supports the conclusion reached in paragraph 52(5) above.

53. Accordingly, paragraph 51 of the draft decision stands. The sum of £422,282.51 must be paid by HMRC to Emblaze within 14 days of this decision. There was some suggestion by HMRC that payment to Emblaze of this sum might result in a claim from someone else for further payment. There was, in short, a risk that HMRC might pay twice. This point – which was never addressed in argument before me – I frankly do not understand, although apparently undertakings of some sort were obtained following the FTT's decision. If there are such issues, which cannot be resolved by the parties, then I give HMRC liberty to apply on the papers to vary my decision as to time for payment. However, any such application must be made within 14 days of this decision.

The Honourable Mr Justice Marcus Smith

A Judge of the Upper Tribunal

Release Date: 23 November 2018