Neutral Citation: [2023] UKUT 00013 (TCC)

Case Number: UT/2021/000197

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

VALUE ADDED TAX – s78 VATA 1994 interest for official error- whether error in legislation (unlawful property condition in bad debt relief regime) "error on part of Commissioners"- yes – whether interest under s78(1)(d) ran from date earlier than date of actual bad debt relief claim on basis that but for legislative error appellant would have put in claim earlier- yes- appeal allowed

Heard on: 25/26 October 2022
Judgment date: 13 January 2023

Before

MRS JUSTICE BACON
JUDGE SWAMI RAGHAVAN

Between

HBOS PLC
&
LLOYDS BANKING GROUP PLC

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Amanda Brown KC, KPMG LLP

For the Respondents: Eleni Mitrophanous KC, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against the FTT's decision in *HBOS and Lloyds Banking Group v HMRC* [2021] UKFTT 0307 (TC). The issues raised concern HMRC's liability to the appellants for interest under s. 78 Value Added Tax Act 1994 ("**VATA 1994**") ("**s. 78"**) (Interest in certain cases of official error), and in particular HMRC's liability for interest under s. 78(1)(d). Unless otherwise stated, paragraph references in this judgment are to the decision of the FTT.

2. Under s. 78, HMRC is liable to pay a person interest where "due to an error on the part of the Commissioners … a person has suffered delay in receiving payment of an amount due to him from them in connection with VAT …" The key issues of interpretation raised by the appeal are: (1) whether an error which arises from a UK statute's incompatibility with EU law counts as an error "on the part of the Commissioners", and (2) the period over which interest arises.

3. The interest at issue in this appeal relates to claims that the appellants ("**HBOS**" and "**Lloyds**") made for VAT bad debt relief. The basis for that relief is that suppliers account for VAT on the sale price charged to the customer; when customers do not then pay up, the supplier will have accounted for more VAT than they should have done. Successive EU VAT Directives have accordingly enabled Member States to provide for a scheme whereby the excess VAT may be refunded.

4. The UK scheme for bad debt relief introduced pursuant to those Directives made a claim for relief subject to a number of conditions, including a condition that on a supply of goods, property in the goods must have passed. That was of particular relevance to the appellants' car hire purchase supplies which were treated as supplies of goods, but with title retained where a customer defaulted on the hire charge. Thus in precisely the situation where it might be expected that bad debt relief could be claimed, it could not, because property had not passed.

5. The appellants' claims were made in 2007 (HBOS) and 2009 (Lloyds) for the periods 1 April 1989 to 19 March 1997. HMRC refused the claims on the basis that the property condition was not fulfilled for the relevant hire purchase supplies. In 2016, however, the property condition was held by the Court of Appeal to be unlawful under EU law and was disapplied: *GMAC UK v HMRC* [2016] EWCA Civ 1015. HMRC eventually paid the appellants the bad debt relief which they had claimed, in the sum of £12,298,561, on 4 February 2019. HMRC also paid the appellants s. 78 interest from the dates of their claims until February 2019, it being not disputed that the appellants had suffered delay in receiving their refunds due to HMRC's wrongful rejection of their 2007/2009 claims.

6. The appellants argued, however, that they were in addition entitled to s. 78 interest from the dates on which all of the conditions for refunds, apart from the invalid property condition, had been satisfied. Those dates ("**the earlier dates**") were many years before their claims for bad debt relief had been made. On the appellants' case that would mean interest of around £10m, instead of the £872,147.04 which HMRC had paid.

7. The agreed issue put to the FTT was whether s. 78 interest arose from the 2007/2009 claim dates (HMRC's case) or the earlier dates (the appellants' case). The FTT considered that the enactment of the property condition, as an act of Parliament, was not an "error on the part of the Commissioners" for the purposes of s. 78(1), and that the reason the appellants did not claim bad debt relief earlier was their belief that the property condition was legally valid. The FTT rejected the appellants' arguments that the failure to pay interest in respect of the period

sought breached the EU principles of effectiveness, equivalence and fiscal neutrality. Accordingly, the FTT decided in favour of HMRC that the interest ran from the dates of the appellants' claims.

8. With the permission of the FTT the appellants appeal to this Tribunal on a number of grounds. In its response, HMRC pursues an argument which it raised before the FTT in the alternative (which the FTT did not address given its decision in favour of HMRC). That was that even if the appellants were correct that interest should in principle start to run before the claim dates, it should nevertheless not run from as early as the appellants submitted because of a dispute as to the attribution of hire purchase instalments as between the (taxable) supply of goods and the (exempt) supply of finance. On that basis HMRC says that interest should only run from the time when that dispute was resolved in 2002 or 2004. We refer to this as the "**attribution issue**".

STATUTORY BACKGROUND

Bad debt relief provisions

9. The EU legislative basis for the UK's bad debt relief provisions was set out in Article 11C(1) of Directive 77/388/EEC (now Article 90 of Directive 2006/112/EC) as follows:

> "In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.
>
> However, in the case of total or partial non-payment, Member States may derogate from this rule."

10. That provision was implemented in the UK for the relevant claim period in s.11 Finance Act 1990 and then s. 36 VATA 1994 (re-enacting the substance of the bad debt relief in the former). Section 36 VATA 1994 provided as follows:

> "**36 Bad Debts**
>
> (1) Subsection (2) below applies where—
>
> (a) a person has supplied goods or services for a consideration in money and has accounted for and paid VAT on the supply,
>
> (b) the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and
>
> (c) a period of 6 months (beginning with the date of the supply) has elapsed.
>
> (2) Subject to the following provisions of this section and to regulations under it the person shall be entitled, on making a claim to the Commissioners, to a refund of the amount of VAT chargeable by reference to the outstanding amount.
>
> (3) In subsection (2) above "the outstanding amount" means—
>
> (a) if at the time of the claim the person has received no payment by way of the consideration written off in his accounts as a bad debt, an amount equal to the amount of the consideration so written off;

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

(4) A person shall not be entitled to a refund under subsection (2) above unless

(a) the value of the supply is equal to or less than its open market value; and

(b) in the case of the supply of goods, the property in the goods has passed to the person to whom they were supplied or to a person deriving title from, through or under that person."

11. There were thus a number of conditions which a taxpayer had to satisfy to obtain bad debt relief: a writing off condition: s.36(1)((b); a statutory waiting period, which was progressively shortened during the period in issue in this case from two years under s. 11(1)(c) Finance Act 1990, to one year under s. 15 Finance Act 1991, and finally to six months under s. 36(1)(c), above; and a property condition: s. 36(1)(d). The property condition was removed for supplies after 19 March 1997. In respect of pre-1997 supplies it was found to be unlawful in *GMAC*.

Interest provisions

12. The interest provisions now covered by s. 78 VATA 1994 were first set out in s. 38A Value Added Tax Act 1983 (as inserted by s. 17 Finance Act 1991).

13. Section 78 makes HMRC liable to pay interest to a person in the following circumstances set out in subsections (a) to (d) as follows (subsection (d) is the relevant head of interest for the appeal before us, but we set out the surrounding subsections as they are relevant to the FTT's reasoning, the parties' submissions and the interpretation of the section as a whole):

"**78 Interest in certain cases of official error**

"(1) Where, due to an error on the part of the Commissioners, a person has—

(a) accounted to them for an amount by way of output tax which was not output tax due from him and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him, or

(b) failed to claim credit under section 25 for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him, or

(c) (otherwise than in a case falling within paragraph (a) or (b) above) paid to them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, or

(d) suffered delay in receiving payment of an amount due to him from them in connection with VAT,

then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions of this section."

14. Subsections (4) to (9) define the "applicable period" for the various heads (a) to (d) as follows (in the version which applied during the relevant period of claim):

"(4) The 'applicable period' in a case falling within subsection (1)(a) or (b) above is the period—

(a) beginning with the appropriate commencement date, and

(b) ending with the date on which the Commissioners authorise payment of the amount on which the interest is payable.

(5) In subsection (4) above, the 'appropriate commencement date'—

(a) in a case where an amount would have been due from the person by way of VAT in connection with the relevant return, had his input tax and output tax been as stated in that return, means the date on which the Commissioners received payment of that amount; and

(b) in a case where no such payment would have been due from him in connection with that return, means the date on which the Commissioners would, apart from the error, have authorised payment of the amount on which the interest is payable; and in this subsection 'the relevant return' means the return in which the person accounted for, or (as the case may be) ought to have claimed credit for, the amount on which the interest is payable.

(6) The 'applicable period' in a case falling within subsection (1)(c) above is the period—

(a) beginning with the date on which the payment is received by the Commissioners, and

(b) ending with the date on which they authorise payment of the amount on which the interest is payable.

(7) The 'applicable period' in a case falling within subsection (1)(d) above is the period—

(a) beginning with the date on which, apart from the error, the Commissioners might reasonably have been expected to authorise payment of the amount on which the interest is payable, and

(b) ending with the date on which they in fact authorise payment of that amount.

(8) In determining in accordance with subsection (4), (6) or (7) above the applicable period for the purposes of subsection (1) above, there shall be left out of account any period referable to the raising and answering of any reasonable inquiry relating to any matter giving rise to, or otherwise connected with, the person's entitlement to interest under this section.

(9) In determining for the purposes of subsection (8) above whether any period is referable to the raising and answering of such an inquiry as is there mentioned, there shall be taken to be so referable any period which—

(a) begins with the date on which the Commissioners first consider it necessary to make such an inquiry, and

(b) ends with the date on which the Commissioners—

(i) satisfy themselves that they have received a complete answer to the inquiry, or

(ii) determine not to make the inquiry or, if they have made it, not to pursue it further,

but excluding so much of that period as may be prescribed; and it is immaterial whether any inquiry is in fact made or whether it is or might have been made of the person referred to in subsection (1) above or of an authorised person or of some other person."

15. Although not directly relevant to the claim period in issue (which ended on 19 March 1997), it is to be noted that so far as determining whether any period *after* 19 March 1997 is left out of account, the following subsections of s. 78 were substituted by s. 44 Finance Act 1997:

"(8) In determining in accordance with subsection (4), (6) or (7) above the applicable period for the purposes of subsection (1) above, there shall be left out of account any period by which the Commissioners' authorisation of the payment of interest is delayed by the conduct of the person who claims the interest.

(8A) The reference in subsection (8) above to a period by which the Commissioners' authorisation of the payment of interest is delayed by the conduct of the person who claims it includes, in particular, any period which is referable to—

(a) any unreasonable delay in the making of the claim for interest or in the making of any claim for the payment or repayment of the amount on which interest is claimed;

(b) any failure by that person or a person acting on his behalf or under his influence to provide the Commissioners—

(i) at or before the time of making of a claim, or

(ii) subsequently in response to a request for information by the Commissioners, with all the information required by them to enable the existence and amount of the claimant's entitlement to a payment or repayment, and to interest on that payment or repayment, to be determined; and

(c) the making, as part of or in association with either—

(i) the claim for interest, or

(ii) any claim for the payment or repayment of the amount on which interest is claimed,

of a claim to anything to which the claimant was not entitled.

(9) In determining for the purposes of subsection (8A) above whether any period of delay is referable to a failure by any person to provide information in response to a request by the Commissioners, there shall be taken to be so referable, except so far as may be prescribed, any period which—

> (a) begins with the date on which the Commissioners require that person to provide information which they reasonably consider relevant to the matter to be determined; and
>
> (b) ends with the earliest date on which it would be reasonable for the Commissioners to conclude—
>
> (i) that they have received a complete answer to their request for information;
>
> (ii) that they have received all that they need in answer to that request; or
>
> (iii) that it is unnecessary for them to be provided with any information in answer to that request."

16. These substituted provisions are of some relevance to the interpretation of s. 78(1)(d), which we address under Ground 3 below.

KEY BACKGROUND FACTS AND FTT DECISION

17. The appellants claimed bad debt refunds for supplies made in periods 1 April 1989 to 19 March 1997. HBOS made its claim on 14 February 2007, and Lloyds on 31 March 2009.

18. As the FTT explained at §17, the bad debts had arisen because some customers defaulted on their agreements to make payments under their hire purchase contracts, which gave the appellants (or the relevant members of their groups) the right to terminate the relevant agreements, repossess the vehicles and sell them. The appellants suffered bad debts when the net sale proceeds were less than the sums due under the agreement.

19. It might be asked why the FTT was concerned with such a tightly-defined and historic period of claim. The answer to the "book-ends" of 1 April 1989 and 19 March 1997 lies in various legislative changes made to the applicable bad debt relief scheme. First of all, §9(2) of Schedule 13 VATA 1994 barred the making of bad debt relief claims in respect of supplies made before 1 April 1989. Section 39(1) Finance Act 1997 then removed the property condition in respect of supplies made after 19 March 1997. It was not therefore necessary to make a historic claim for those supplies.

20. As noted above, the appellants' claims for bad debt refunds were initially refused by HMRC. Following the judgment in *GMAC*, however, HMRC agreed to pay the refunds sought; as set out above, with refunds totalling almost £12.3m being paid in February 2019. HMRC also paid interest from the appellants' respective dates of claim. It refused, however, to pay interest for any period before those dates of claim.

21. It was common ground that the appellants' claims for interest did not fall within ss. 78(1)(a) or (b) VATA 1994. The FTT also rejected the appellants' arguments that s. 78(1)(c) was engaged, on the basis that absent claims filed for bad debt refunds the VAT "due" pursuant to the returns they made was as shown on those returns. By the time of the hearing before us the appellants no longer pursued their fourth ground of appeal regarding the FTT's rejection of their argument on s. 78(1)(c). The sole issue is therefore the application of s. 78(1)(d).

22. The FTT had before it written and oral evidence from Andrew Plant, a senior VAT manager in Lloyds' VAT team with extensive VAT advisory and industry experience, and a witness statement from an indirect tax specialist at KPMG, Mark Treacher, who had been involved in preparing Lloyds' bad debt refund claim.

23. The FTT identified two errors on the part of HMRC, namely: (1) that the relevant iterations of its guidance (HMRC Notice 700/18 *Relief from VAT on Bad Debts*) included the unlawful property condition within the list of conditions for refund; and (2) that HMRC had rejected and declined to pay the appellants' bad debt refund claims until 2019. The FTT considered that both of these errors were caused by HMRC's (incorrect) belief that the property transfer condition was valid. By contrast, the FTT held that the enactment of the property condition and its continued presence on the statute book was an error of Parliament rather than of HMRC (§89).

24. On the basis of these conclusions, the FTT considered whether the error in HMRC's guidance had caused the appellants to suffer delay in receiving payment, within the meaning of s. 78(1)(d) (§91).

25. In that regard, the FTT found that the reason the appellants had not claimed bad debt refunds on the earlier dates was that (§28):

> "… they considered the property transfer condition to be legally valid in respect of supplies in the relevant years, as it was set out in the UK statute. They thought it would be 'non-compliant' to make bad debt refund claims on supplies in the relevant years when they did not satisfy the property transfer condition. They did not consider that EU law principles rendered the condition legally invalid, as they assumed the UK enacted the relevant EU directives correctly. The appellants changed their mind on these matters shortly before the dates of claim in part due to learning of the claims being made by GMAC and, following GMAC's claim, other taxpayers in similar positions to the appellants."

26. The FTT thus rejected a suggestion in Mr Plant's evidence that it was HMRC's guidance which led to the appellants' omission to claim at earlier dates (§§30–1, which we say more about in our discussion of Ground 5).

27. It therefore rejected the appellants' argument that the HMRC guidance caused them not to claim refunds prior to their dates of claim: the cause was rather (the FTT found) the appellants' belief that the property transfer condition was legally valid. It was therefore the property transfer condition, rather than the HMRC guidance, that was relied upon when the appellants failed to make claims on the earlier dates (§98).

28. Accordingly, s. 78(1)(d) was not engaged, since the delays in receiving bad debt refunds were not "due to" HMRC's first error (§100). That disposed of the case in HMRC's favour.

29. The FTT then went on to consider how it would have dealt with the parties' arguments on the application of 78(1)(d) if (contrary to its primary conclusion) it had concluded that failure to claim was "due to" an error on the part of HMRC which fell within the scope of s. 78. On that point the FTT said that HMRC became liable to pay bad debt relief from the point of entitlement to make a claim (§103(1)):

> "the statutory scheme of s78, based on the construction of s78(1)(b), is that where a taxpayer has failed (due to HMRC's error) to claim a credit it is entitled to claim, HMRC are as a consequence (of such entitlement to claim) 'liable' to pay that amount to the taxpayer; in other words, entitlement to claim on the taxpayer's part is sufficient to create liability on HMRC's part. Applying this construct to s78(1)(d), this means that the bad debt refunds became 'due' (because HMRC became liable) at the point at which the

> appellants (or members of their groups) satisfied the (valid) conditions for entitlement to claim."

30. On that basis the FTT said that it would have concluded that bad debt refunds were due to the appellants from the earlier dates, such that they had suffered delay in receiving the amounts due to them (§103(3)).

31. Finally, the FTT rejected the appellants' arguments that a denial of interest from the earlier dates would contravene the EU law principles of effectiveness, equivalence and fiscal neutrality, in particular by failing to give the appellants adequate indemnity and/or reasonable redress. In essence its reasoning was the appellants could have made their claims earlier; there was no real constraint on them doing so; it was therefore not reasonable to expect payment of the refund prior to their claims (§§105–110).

32. In summary, the FTT determined the agreed issue between the parties in HMRC's favour. That meant that it did not need to deal with the attribution issue raised by HMRC in the alternative.

GROUNDS OF APPEAL

33. The appellants now only pursue four of their original five grounds of appeal, having dropped their fourth ground which related to s. 78(1)(c). We retain the original numbering of the grounds, which are as follows:

> (1) **Ground 1** is that the FTT erred by holding that the enactment of the property transfer condition, and its continued presence on the statute book up to 19 March 1997, was an error on the part of Parliament, not HMRC and that it was therefore not "an error on the part of the Commissioners" for the purposes of s. 78(1).
>
> (2) **Ground 2** is that the FTT erred in concluding that its interpretation of s. 78 was in keeping with the relevant EU law principles.
>
> (3) **Ground 3** is that the FTT erred in finding that the appellants did not have a right to repayment of interest from the earlier dates under s. 78(1)(d).
>
> (4) **Ground 5** is the FTT wrongly discounted the evidence of Lloyds' senior VAT manager, Mr Plant, that the real cause of the delay was the HMRC guidance.

34. We address these grounds in turn.

Ground 1: FTT was wrong to conclude that the enactment and continued presence of the property condition was not an error on HMRC's part because it was an act of Parliament

Ground 2: FTT erred in concluding that its decision was consistent with EU principles

The parties' arguments

35. Under these two related grounds the appellants argue, first, that as a matter of domestic construction, the FTT was wrong to construe the reference in s. 78(1) to "an error on the part of the Commissioners" as excluding an error in the enactment of the property condition and its continued presence on the statute book.

36. Secondly, the appellants say that the provision should be given a conforming interpretation in view of the EU law principles governing the payment of interest (i.e. that

adequate indemnity or reasonable redress must be provided where sums are held or collected in consequence of a breach of EU law). Those principles, the appellants submit, require s. 78 to be interpreted so as to encompass statutory errors.

37. It is worth noting that HMRC's case before the FTT did not rely on any limitation flowing from the words "on the part of the Commissioners" in s. 78. Rather, it was put on the basis that for the purposes of s. 78(7)(a), which set out the start date for payment of interest, HMRC could not have authorised payment of a bad debt relief claim prior to such a claim being made – i.e. effectively the argument made by HMRC in response to Ground 3 in this appeal. The question of whether an error on the part of HMRC included a statutory error appears to have been identified by the FTT itself in the course of the opening submissions of Ms Brown KC, for the appellants (who had assumed that such errors would be included).

38. HMRC's position before us on Grounds 1 and 2 is that it does not need to defend the FTT's position that statutory errors can never qualify as "errors on the part of the Commissioners", since if its arguments in response to Ground 3 are correct then the appeal will fail in any event. Ms Mitrophanous KC therefore advanced no submissions on Grounds 1–2 other than saying that the FTT's interpretation was right on the ordinary meaning of the words used in s. 78(1), reserving HMRC's position to say more should the matter go further.

Discussion

39. Following the UK's withdrawal from the EU, s. 78 is a provision of VATA 1994 which is "EU-derived domestic legislation" as defined in s. 1B(7) European Union (Withdrawal) Act 2018 as amended ("**EUWA**"). It therefore continues under s. 2 EUWA to have effect in domestic law after exit day (31 December 2020). VATA 1994 is accordingly also "retained EU law" as defined in s. 6(7) EUWA. Section 6(7) defines general principles of EU law and EU case-law principles in effect immediately before 31 December 2020 as (respectively) "retained general principles of EU law" and "retained EU case law". The tribunal must under s. 6(3) EUWA interpret VATA 1994 in accordance with those retained principles and case-law.

40. The appellants' case under Grounds 1 and 2 is based on the EU law context for the interest provisions. That context featured heavily in the Supreme Court's decision in *Littlewoods v HMRC* [2017] UKSC 70.

41. In that case, following an approach to the VAT treatment of agents' commissions which turned out to be mistaken under both EU and domestic law, Littlewoods submitted claims under s. 80 VATA 1994 for overpaid VAT. It was accepted that HMRC was liable to pay simple interest on the overpaid VAT under s. 78. Littlewoods, however, sought compound interest by way of a restitution claim, arguing that the proviso to s. 78(1) "if and to the extent that they would not be liable to [pay interest] apart from this section" meant that s. 78 yielded to any other liability to pay interest, including a restitutionary claim for compound interest.

42. The Supreme Court rejected the taxpayer's case, on the basis that s. 78 did not permit a parallel claim to restitution, confirming the exclusivity of s. 78 as the means by which interest could be claimed for an overpayment of VAT due to an error of EU law (§31). It nevertheless emphasised, following an analysis of the CJEU jurisprudence, that there is a general entitlement to interest on tax levied in breach of EU law (§52).

43. Taking these elements together, the appellants submit that there would be a startling lacuna if the FTT's interpretation were correct and s. 78 did not cover errors where UK legislation had been held not to comply with EU law. Breaches of EU law in relation to overpaid VAT leading to claims under s. 80 clearly give rise to a right to interest, as HMRC

accepted in *Littlewoods*. The Supreme Court has also confirmed that the only right to interest is under s. 78. Accordingly, if a taxpayer were to be denied recovery of VAT because of a non-compliant UK VAT statutory provision, then the FTT's interpretation of s. 78 would deny any right to interest. Interest would not be payable under s. 78, the error being a legislative error; nor could it be obtained via a restitution claim because the Supreme Court has determined that s. 78 is the exclusive remedy for interest in such circumstances.

44. We agree that this is an outcome that Parliament cannot have intended. It is one which points strongly against an interpretation that an error in a statute is excluded from a claim under s. 78.

45. Moreover, it is also an interpretation that could give rise to absurd and incongruous outcomes. HMRC will often give guidance on how the legislation operates, which (as one might expect) will seek to explain the operation of the legislation in terms that assists taxpayers to comply with their obligations under the legislation. In a situation where, on the evidence, one taxpayer has relied on the guidance rather than directly seeking to refer to and follow the legislative provision, but another has relied on the text of the legislation rather than the guidance, there is no obvious policy reason why s. 78 interest in relation to tax wrongfully levied should be allowed in the former case but denied in the latter.

46. In our view the above points do not mean that the words "on the part of the Commissioners" deem HMRC to have enacted the non-compliant legislation. Rather we consider that Parliament must have recognised when using those words that in so far as a statute concerns matters such as VAT which are within the collection and management powers of HMRC, HMRC is the relevant responsible State body. HMRC's behaviour, whether in acting or omitting to act, will therefore inevitably reflect the requirements and stipulations of the relevant UK legislative provisions. Behaviour on the part of HMRC (whether that is regarded as an act e.g. taking a payment, or an omission e.g. failing to repay it) whose source is a provision of a non-compliant statutory provision will clearly be something capable of fitting with the words "error on the part of the Commissioners". That being the case, in our view, whether one articulates the error in terms of the statutory error or the corresponding action or inaction on the part of HMRC should not, and does not, make a difference.

47. Although this point of interpretation has not specifically arisen previously in the higher courts we can draw some reassurance, as Ms Brown pointed out, from the assumptions made in previous litigation before the court, and HMRC's practice to the same effect.

48. Ms Brown referred us in particular to *FJ Chalke v HMRC* [2010] EWCA Civ 313, which concerned payments of VAT by motor vehicle dealers in respect of demonstrator cars, as set out in various statutory instruments. An ECJ decision established that certain aspects of the UK legislation were unlawful, which meant that VAT had been overpaid. The taxpayer submitted a claim, which HMRC had paid together with simple interest under s. 78; the question before the court (similar to that in *Littlewoods*) was whether compound interest should have been paid. For present purposes, the relevance of the case is that there appears to have been no dispute that s. 78 interest was due in relation to the overpayment of VAT, in circumstances where the overpayment arose from a statutory error in the form of UK legislation which was found to be in breach of EU law.

49. Although not of course conclusive, there are also acknowledgments by HMRC in its own guidance supporting the proposition that legislative error may constitute an error for s. 78 purposes.

50. HMRC's now-withdrawn guidance issued on 17 September 2010 in the light of *Fleming (t/a Bodycraft) v HMRC* [2008] UKHL 2, stated:

> "**30. Statutory interest**
>
> …
>
> **30.2 Entitlement**
>
> Was there or would there have been an entitlement to Statutory Interest (SI) on the original claim? Was SI paid on the amount of the claim that was repaid?
>
> …
>
> If not then there may now be an entitlement to SI due to the M&S ECJ capping judgment against the Department, which confirmed that the enactment of the three-year cap with retrospective effect constituted official error.
>
> **30.3 Start and end dates for payment of SI**
>
> …
>
> B. Where there was no official error other than that of the 18 July 1996 (output tax) or 1 May 1997 (input tax), entitlement to SI arises solely from the delay in receiving the previously capped sum caused by the capping error."

51. Ms Brown also took us to a policy paper issued by HMRC: *Revenue and Customs Brief 10 (2016): VAT-unjust enrichment: non-profit making sports clubs*, in which it was assumed that HMRC would pay interest in relation to over-declared output tax where s. 80 claims were made. That was issued in response to litigation in the CJEU and domestic courts which established that the UK's VAT legislation which applied VAT to golf club green fees paid by visitors of non-profit-making golf clubs was in breach of EU law, and that golf clubs were thereby entitled to repayment of the net tax overpaid. The policy paper again suggests that HMRC accepted that interest was due in circumstances where the overpayment had arisen from the fact that the UK's legislation breached EU law.

52. On the other hand, we were shown two decisions of the VAT and Duties Tribunal (the predecessor to the FTT) which expressed the view that statutory error was not covered by s. 78. Neither of these first-instance decisions, which are not binding on us in any event, dissuade us from our view that s. 78 should be construed in the way suggested by the appellants so as to cover the error arising from the unlawful property condition.

53. In *North East Media Development Trust Ltd v CCE* (1995) MAN/94/448, the Tribunal agreed with the Commissioners that the relevant domestic legislation was not in breach of EU law. It went on to consider whether, in case it was wrong on that issue, the taxpayer had been disadvantaged for the purposes of s. 38A VATA 1983 (which became s. 78) "due to an error on the part of the Commissioners". On that point the Tribunal took the view that the expression "the Commissioners" should not mean the legislature or any other organ of the state. Given its conclusion on the question of breach of EU law, however, this part of the decision was *obiter*.

54. That *obiter* view was then cited and endorsed by the Tribunal in *Wydale Hall* (1996) 5686 MAN/94/687. The Tribunal nevertheless found in favour of the taxpayer, finding that the errors in question were due to control visits by customs. The point of interpretation was not therefore ultimately necessary for its decision allowing the taxpayer to claim interest.

55. Neither case ultimately adds to the straightforward argument that HMRC have already made (which is also, essentially the basis for the FTT's analysis), namely that an error of Parliament does not fall within the words of the legislation. As discussed above, that does not take account of the clear EU law context in which the provision must serve duty; that if the FTT's analysis correct it would result in a significant lacuna in the framework of redress which the Supreme Court made clear was exclusive; and the reality that HMRC is the responsible State body in the relevant field.

56. We thus agree, as a matter of domestic statutory construction, that the phrase "error on the part of the Commissioners" in s. 78(1), construed in its wider context, is capable of covering the error arising from the enactment of the property condition. We do not therefore need to address the appellants' further arguments on the need to adopt a conforming interpretation pursuant to the relevant EU law principles.

Ground 3: FTT erred in concluding that s. 78(1)(d) did not apply

57. Under Ground 3 the appellants argue that, as a result of the error under Grounds 1 and 2 above, the FTT erred in law in concluding at §98 that s.78(1)(d) did not apply so as to entitle the appellants to interest from the earlier dates. The appellants support the FTT's reasoning and conclusion at §103 that, if it was wrong in its primary conclusion as to the scope of s. 78(1), then bad debt refunds would have become due under s. 78(1)(d) once the appellants satisfied the (valid) conditions for entitlement to claim – i.e. the writing off condition and the statutory waiting period.

58. HMRC argues that the FTT's interpretation of s. 78(1)(d) was incorrect, and that until the appellants' repayment claims were made there was no "amount due" to them under that provision. Its case is that the requirement for the taxpayer to put in a claim is just as much a condition of entitlement for bad debt relief as the writing off condition or statutory waiting period. Accordingly, in respect of the period between the earlier dates and the date the actual claim was put in, there was no "amount due" because the appellants had not, as required made any claim. Likewise, for the purposes of s. 78(7)(a), HMRC could not reasonably have been expected to authorise payment where no claim had been made.

59. Ms Mitrophanous contended, in that regard, that there is no difficulty in expecting a taxpayer to have made a claim even though there was an unlawful condition which meant HMRC would, in accordance with the UK law, have refused that claim. In both *BT v HMRC* [2014] EWCA Civ 422, which concerned an unlawful insolvency condition, and in *GMAC*, which of course concerned the unlawful property condition itself, the Court of Appeal considered that it would have been open to the taxpayer to make bad debt relief claims by asserting their rights under EU law, even though such claims would have been at odds with the UK legislation (*BT* §§121–3 and *GMAC* §§133–4).

60. The appellants' response to this is put in effectively two ways. The first is to say – essentially following the reasoning of the FTT – that a requirement for an "amount due" is satisfied once the relevant (valid) statutory conditions for bad debt relief are fulfilled. The requirement to make a claim is, the appellants say, a procedural requirement rather than a substantive pre-condition to entitlement to relief, by contrast with the statutory waiting period and writing off conditions. Once those other conditions were fulfilled in their case, therefore, the appellants contend that an entitlement to repayment arose; there was therefore an amount "due" to them, in respect of which there was a delay in receiving payment because of the unlawful property condition. Had the property condition not existed, the appellants say that the evidence shows that they could and would have made their claims once the other conditions were satisfied.

61. Before us the appellants, also, it appeared to us, advanced a rather more straightforward reason for saying that was an "amount due" in respect of which delay had been suffered, above and beyond the delay occasioned by HMRC's initial refusal to repay following the appellants' claims. The chain of reasoning is as follows:

(i) The appellants made claims in 2007 and 2009 for bad debt relief which HMRC paid on 17 February 2019. HMRC must have considered those amounts "due" to the appellants otherwise they would not have paid them.

(ii) Those refunds were delayed. There was a delay following submission of the repayment claims, which HMRC accepted was an error on their part. But there was also a delay in making the claims (i.e. by making the required entry in the VAT return) because of the existence of the property condition, which we have found under Grounds 1 and 2 to be an error falling within the scope of s. 78(1).

(iii) The question is therefore whether the delay flowed from the error. It is common ground that s. 78 requires consideration of what would have happened "but for" the error. That follows both from the wording of s. 78(1)(d) "due to an error … a person has suffered delay" and s. 78(7)(a) "the date on which, apart from the error, the Commissioners might reasonably have been expected to authorise payment". On that basis the appellants say that, but for the existence of the property condition, they could and would have made their claims at the earlier dates. The delay in making those claims and accordingly in receiving the bad debt relief due to them therefore flowed from the error for the purposes of s. 78(1)(d).

62. We agree with the approach set out in the foregoing paragraph, subject to one modification. The appellants' primary position is that an investigation of when, but for the error, the appellants *would have* made their claims is inappropriate; rather they contend that the question is when they *could have* made claims, and it is to be assumed that they could have done so as soon as the writing off condition and statutory waiting period were satisfied. Ms Brown relied in that regard on the approach taken by the House of Lords in *Fleming*.

63. In our view, however, the comments of the House of Lords need to be read in the particular context of that case, which was that the legislation had failed to accord an effective transitional period, and the question of what was an appropriate transitional period and who should determine it was then at large. In that particular situation, Lord Neuberger rejected HMRC's suggestion that the disapplication of the limitation period might differentiate between taxpayers, such that it should only extend to those who "would have" put in a claim during the transitional period, whatever that was determined to be:

> "96. … The 'would have' point is in my view simply wrong. A period, whether of transition or disapplication, is intended to be for the benefit of anyone who could take advantage of it. If the legislation fails to accord an effective transitional period, then the Member State, through the legislature the executive or the courts, must do so. Quite apart from this, arguments and evidence as to the hypothetical question of whether a particular claim would have been made during a notional transitional period would very often be expensive and time-consuming and likely to lead to uncertainty. While not decisive, such a consideration is not irrelevant.
>
> 97. … Accordingly, again in agreement with Lord Walker … I would reject the Commissioners' contention that a person with an accrued right can only take advantage of a period of disapplication if he or she would have made a claim during the transitional period (if there had been one)."

64. Lord Walker's rejection of the "would have" test had explained that:

> "64. … The essence of a limitation period is that it operates impartially (arbitrarily, even) in the interests of finality and certainty. (The fact that some national legal systems make special provision for cases of disability or mistake does not alter the general principle.) It would be contrary to legal certainty, and administratively unworkable, for the extent of disapplication to depend not only on the duration of the transitional period but also on an hypothetical question to be answered by reference to the circumstances and states of mind of particular taxpayers. It would be unworkable regardless of whether the burden of proof lay on the Commissioners or on the taxpayer."

65. The concern articulated there, regarding the uncertainty over whether a taxpayer would claim in the context of a transitional period which was itself uncertain, does not arise here. The counterfactual case in the present case is mandated by the legislation, and its scope is a matter of statutory interpretation and application. The applicable period for which interest will be payable under s. 78 is tethered to various factual circumstances surrounding the error: what delay did it cause; and (for periods *before* 1997) what periods should be excluded because of reasonable enquiries related to the claim: ss. 78(7) and (8); and (for periods *after* 1997) whether any periods should be excluded because of the taxpayer's unreasonable conduct: s. 78(8A).

66. Resolving such factual issues will depend on the evidence in a particular case. In those circumstances it is difficult to see why an enquiry into the factual circumstances regarding the claim should stop short so as to make an assumption in the taxpayer's favour that a claim would have been made irrespective of whatever evidence there is on that point. In our view, therefore, it is a relevant part of the counterfactual analysis under s. 78(7)(a) to consider whether the appellants not only *could* but also *would* have made their claims earlier than they did.

67. There is, as Ms Brown pointed out, no difficulty with satisfying that test on the evidence in this case. There was sufficient evidence before the FTT to which Ms Brown took us (for instance regarding how bad debt relief claims were made in relation to supplies which did not involve retention of title clauses) to show that the appellants would, but for the unlawful property condition, have made their claims on the earlier dates.

68. Ms Mitrophanous disputed the foregoing analysis on the grounds that, in her submission, s. 78(1)(d) is different in scope from subsections (a)–(c). She accepted that subsections (a)–(c) envisage situations where interest is, for good reason, capable of being paid from a date earlier than the claim, as provided for in s. 78(4)–(6). So for instance subsection (a) covers situations where HMRC holds money in breach of EU law; subsection (b) covers cases where there has been a failure to claim an input tax deduction due; and subsection (c) covers other cases where an overpayment of VAT has been made to HMRC. By contrast, she said, s. 78(1)(d) does not cover the situation where the error has led to a delay in making a claim; rather, it only covers the situation where there is a delay *after* the claim has been made.

69. There is, however, nothing in s. 78(1)(d) that imposes such a limitation. It does not follow from the natural wording of the clause, nor from the scheme of the legislation. Nor is there any reason of policy or principle why a delayed claim to bad debt relief should be excluded, whereas (for example) a failure to claim input tax is covered by s. 78(1)(b).

70. It is important to recognise that under our interpretation the requirement for a claim is not ignored. The taxpayer will need to have made an actual claim for the relevant amount in the first place, to obtain the amount "due" in respect of which interest is sought. The issue of when a claim would have been made will also – for the reasons given above – need to be addressed

in the counterfactual enquiry required under s. 78. Whether and when such a claim would have been made will be a matter of evidence. If the evidence suggests that the claim would have been made on an earlier date, but for the error in question, there does not appear to be any policy reason why interest should not then run from that date. In that scenario, it will have been established that a valid claim would have been made, for the amount accepted as being due to the taxpayer. A taxpayer who had not received payment of that amount due within a reasonable period after the hypothetical claim date would, therefore, have been kept out of their money.

71. That interpretation is supported by the fact that, as Ms Brown pointed out, in the version of s. 78 applicable to periods beginning on or after 19 March 1997, ss. 78(8) and (8A) are predicated on the explicit assumption that there *can* be an interest claim based on a delay in claiming a repayment. Those subsections are drafted to apply to 78(1)(d), since they refer back to s. 78(7). If Ms Mitrophanous' construction of s. 78(1)(d) were correct, then the part of (8) and (8A) which refers to a delay in claiming repayment could not, however, apply to s. 78(7) because there could on HMRC's case never be such a delay under that provision.

72. We acknowledge that this version of s. 78 only applied for a period falling outside the relevant claim period in the present case. We do not, however, understand it to be HMRC's case that the interpretation of the scope of s. 78(1)(d) changed as a consequence of the insertion of the new ss. 78(8) and (8A).

73. As a final point on the types of claims covered by s. 78(1)(d), Ms Mitrophanous submitted that it is significant that pre-claim interest is specifically addressed in s.78(1)(b), albeit limited to the context of a failure to claim credit under s. 25. We do not, however, consider that this requires s. 78(1)(d) to exclude an entitlement to pre-claim interest, and we have – for the reasons explained above – not identified any reason to restrict s.78(1)(d) in this way.

74. In light of the interpretation of s. 78(1)(d) that we prefer, as set out above, we do not need to consider the question of whether the bad debt refunds became "due" once the (valid) statutory conditions were met and irrespective of whether a claim was made, which was the basis of §103 of the FTT decision and which occupied much of the written argument before us.

75. The domestic construction we have suggested is sufficient to resolve the matter in the appellants' favour. Again, therefore, there is no need to resort to the appellants' argument that s. 78 must be given a conforming interpretation so as to respect the EU law requirement that adequate indemnity and reasonable redress is provided for in all circumstances in which the taxpayer has suffered financial detriment in consequence of *ultra vires* legislation.

76. We were, in any event, not convinced that any of the EU case-law to which we were referred added anything material to the analysis. Neither party, in our view, ultimately showed us a case which was authority for the proposition that interest in the disputed pre-claim period had to be provided, or conversely that it did not have to be provided. We do not, however, need to consider this any further given the conclusions we have reached above.

77. In conclusion, we reject HMRC's interpretation of s. 78(1)(d), and consequently its case that even if the appellants succeed on Grounds 1 and 2 their appeal nevertheless fails. We agree with the FTT's conclusion that interest ran from the earlier dates, albeit for different reasons than those given by the FTT.

Ground 5: FTT wrongly discounted evidence of Mr Plant that HMRC guidance was the real cause of delay

78. At §§30–1 of its decision the FTT set out Mr Plant's evidence, given during examination-in-chief, to the effect that Lloyds did not make claims earlier because of HMRC's guidance that they were precluded from making of a claim where there was a retention of title clause. The FTT rejected that explanation, however, on the grounds that it went "against the grain" of Mr Plant's other evidence and made "little intuitive sense", given that the appellants went on to make their claims in 2007/2009 despite the guidance not having changed.

79. Ground 5 disputes that conclusion on *Edwards v Bairstow* grounds that the finding was one that no reasonable tribunal could have made. The appellants contend, in particular, that it was untenable to conclude that the appellants' delay was due to their belief that the statutory condition was valid, while excluding the possibility of their reliance on guidance framed in the same terms. The FTT's point that the appellants cannot have relied on the guidance since their eventual claims were made despite the guidance not having changed by the time of those claims also did not, the appellants submit, make sense, since the statutory provisions had similarly not been amended either, in respect of debts arising for supplies made before 19 March 1997.

80. Ground 5 is, however, only pursued by the appellants if their arguments under Grounds 1 and 2 are unsuccessful. As we have found in the appellants' favour on those grounds it is not necessary for us to deal with this ground.

81. If it had been necessary to consider this ground, we would note the following. While in principle, even if guidance is identical to the legislation, the issue of whether someone has relied on one or the other, or both, is one of fact and will depend on the particular evidence. For our part, we consider Mr Plant's evidence presents rather a more mixed picture than the FTT's findings reflect and is consistent with a finding that both the law and guidance were causes of the delay, in that Mr Plant viewed them as one and the same. It is therefore not clear to us that Mr Plant's evidence did go "against the grain" of the other evidence.

82. If it were necessary we would also have agreed with the appellants that the fact the guidance had not changed at the time the appellants made the claim was not a good reason, or at least not one which bore the significance ascribed by the FTT, for ruling out the appellants' reliance on such guidance before the claims were made. The reason why someone eventually makes a claim may or may not throw light on the reason why the person did not make the claim before. The fact that the guidance did not change, but that the appellants still made a claim, does not mean that the guidance could not have been a reason in the relevant period for not making a claim.

83. The appellants' submissions under this ground neatly exposes the incongruity of so much turning on whether the taxpayer relies upon incorrect law, or guidance which faithfully reflects that incorrect law. That is a point which we have taken into account in our conclusions on Grounds 1 and 2 (see §45 above).

The attribution issue

84. In the event that the appellants succeed on their argument that the dates from which interest runs are not the claim dates but the earlier dates, HMRC says that the interest period should nevertheless be restricted to take account of the fact that a further dispute arose between automotive hire purchase finance providers and HMRC, *after* the removal of the property condition from 19 March 1997. The dispute concerned the way in which instalment payments received up to the point of repossession should be attributed as between the supply of the car

and the supply of finance. That dispute meant (so HMRC say, relying on the evidence given on behalf of the appellants) that despite the removal of the property condition, finance providers did not start to make bad debt relief claims until some years later.

85. In essence HMRC's argument is that because of this uncertainty, or ongoing wrangling, as it was described in oral submissions, even if it were assumed that the property condition was not present as at 1 April 1989, there would nevertheless have been a delay in the appellants lodging claims while the attribution issues were being sorted out. Interest should therefore only start to run from a later date.

86. The FTT found that Lloyds started to make claims for bad debt refunds (for supplies after the relevant years) in around 2004, and that prior to that, because of uncertainty about the calculation, it made such claims otherwise than on its VAT returns (§37). Mr Plant's evidence by reference to his previous experience at BMW was that claims were not made until 2002.

87. HMRC therefore contends that the earliest dates on which interest would have been claimed, assuming the disappearance of the property condition on 1 April 1989, was either 7 years later in 1996 (on the basis of the FTT's finding at §37), or alternatively 5 years later in 1994 (on the basis of Mr Plant's evidence regarding BMW).

88. As noted above, the FTT did not need to deal with this argument given its other conclusions. On the basis of our conclusions above the argument would in principle be relevant. The appellants make the preliminary point, however, that HMRC should not be permitted to rely on this argument, since it was only raised in closing submissions before the FTT after the evidence was heard, and was not pleaded in HMRC's statement of case or raised in HMRC's skeleton argument before the FTT. HMRC seeks to justify this on the basis that the point only emerged for the first time following the appellants' oral submissions and Mr Plant's evidence.

89. To address these contentions, it is necessary to set out the evolution of the issue in the proceedings before the FTT.

90. HMRC's statement of case did not specifically address the point. All it said was that:

> "in any event, even on basis of the Appellants' view that the start date for interest being due is when claims would have been made absent the Property Condition, no admissions are made as to when such claims would have been made by the Appellants."

91. Mr Plant's evidence, for the appellants, described the attribution issue and then explained what happened after the change in law in 1997 in the following terms:

> "19. If the business had wanted to include the BDR adjustment to box 4 of the VAT return in respect of HP debts during this period, it was theoretically possible to request the relevant bad debt information from the finance team and perform the necessary calculation but the practicalities of making a claim would have been difficult and involved considerable time and effort. The systems in place at the time were not as efficient as modern systems, relied on paper records and because of the less advanced nature of the programming made obtaining extra information that was not directly relevant complicated. Put simply why would a business incur the time and costs of extracting data in order to compile VAT return entries which were precluded by law.
>
> 20. Post the change in law, businesses took a while to make the necessary changes in accounting systems in order to calculate entitlement to BDR for

> HP contracts. The business system changes necessary following the law change in 1997 took several years to fully implement. From my recollection, there was also a period where the industry negotiated with HMRC on what basis the quantum of BDR was to be determined given the need to identify and attribute payments received between the taxable and exempt supplies arising under the HP contract. Ultimately, the parties agreed on a straight line basis for making a claim (rather than reflecting the economic, contractual and consumer credit basis on which each payment under the contract is attributed to the asset and the cost of finance. This illustrates the fact that quantifying such a claim was neither a simple nor an uncontroversial matter."

92. At the FTT hearing, in the course of the appellants' opening submissions, Ms Brown emphasised that the claims had not been made earlier because the law precluded them. In response to the Tribunal's query why that was not just as much the case when the appellants actually made the claims in 2007/2009 (when claims for the 1989–1997 period were still subject to the property condition), Ms Brown trailed Mr Plant's evidence above regarding the negotiations with HMRC on the attribution issue.

93. In supplementary oral examination-in-chief Mr Plant recounted the change in HMRC's treatment in relation to attribution. When asked about the claims that BMW had made, he said that the first evidence he had found of VAT claims being made on returns was in around 2004, but suggested that separate claims would have been made (other than adjustments on the VAT returns) "from about 2002 to 2007".

94. When cross-examined on §20 of his witness statement and the above evidence, Mr Plant again said that bad debt relief claims were not made by BMW on VAT returns until 2004, but that he "suspected" that claims had been made in some other way because of the amounts involved. It was put to him that there would still have been a lag of several years even if the property condition had been removed in 1989. His response was to point out that the property condition was there before 1989.

95. Following Mr Plant's evidence, Ms Brown made further submissions regarding the chronology of HMRC's stance on attribution, saying that it "severely limited BDR post 1997". She included the attribution issue amongst various issues which explained why it would have been difficult to make a claim earlier than the appellants did, in particular noting the calculation difficulties if a refund claim was made outside a VAT return.

96. In HMRC's ensuing submissions, after having addressed the main issues including those concerning the construction of s. 78(1)(d), Ms Mitrophanous went on to make submissions on the attribution issue to the effect summarised above, namely that it was likely that even if the property condition had been removed from 1989 there would not have been any bad debt relief claims for another 5 to 7 years because of the attribution dispute. She described this as being a point made on the basis of Mr Plant's evidence and Ms Brown's subsequent submissions on the reasons for the delay in making claims.

97. By this stage, the parties had agreed to provide the FTT with an agreed list of issues. This had not been finalised by the end of the hearing, but the parties agreed to finalise this and send it on to the FTT as soon as possible thereafter.

98. Ms Brown then made her closing submissions in reply, which also briefly covered her submissions on the attribution issue. While these did not take any pleading point on that issue, the Statement of Agreed Facts and Issues sent to the FTT after the hearing did raise a pleading point in the following terms:

> "HMRC FURTHER ISSUE
>
> 10. HMRC's position is that a further question arose following Mr Plant's evidence which the Tribunal is invited by HMRC to resolve.
>
> 11. The Appellant's position is that para. 9 above [setting out the issue of whether interest was due from the earlier dates, or only from the dates of the appellants' claims] represents the only issue to be determined by the Tribunal as agreed by the parties before the hearing – see in this regard HMRC's Reply dated 24 May 2021 at para. 12 and Transcript Day 1 p.11 lines 11–20. Further, there was nothing material in the evidence (and not addressed in Mr Plant's witness statement) to justify a departure from the sole agreed issue.
>
> 12. However, HMRC's further question is: whether the fact that an issue arose with HMRC after the removal of the Property Condition from 1997 about the attribution of consideration received as between the supply of the car and the supply of finance should restrict the period from which interest should run even if the Appellants succeed.
>
> 13. Mr Plant's evidence as to this issue is at Transcript Day 2 p.124 lines 1–12, p.125 lines 1–7 and p.138 line 10 to p.140 line 5).
>
> 14. HMRC's submissions on this question is at Transcript Day 4 p.31 line 4 to p.32 line 12. The Appellant's submissions in reply to HMRC's submission is at Transcript Day 4 p.76 line 15 to p.77 line 9."

99. As noted above, the appellants were granted permission to appeal to this Tribunal by the FTT. HMRC raised the attribution issue in its response to the appellants' notice of appeal. The appellants, in their Upper Tribunal reply, argued this issue should not be before the Tribunal without HMRC having applied to the FTT for permission. That led to an interlocutory hearing (before Judge Raghavan) where the Tribunal accepted that HMRC could not have applied to the FTT on this point, because it was the successful party in the decision. The Tribunal also rejected the appellants' argument that the FTT had implicitly determined the attribution issue: *HBOS & Lloyds v HMRC* [2022] UKUT 00139 (TCC). The result was that the attribution issue was not something that needed permission from the FTT but could be contained within HMRC's response.

100. The Tribunal did not, however, determine the question of whether, if it became relevant, HMRC should be allowed to rely on the attribution issue at the hearing of the appeal. That is the matter which we now need to decide. The mere fact that the Tribunal permitted HMRC to refer to the issue in its response does not amount to a decision that the argument may be run in the appeal. That is clear from the Tribunal's recent decision in *CF Booth v HMRC* [2022] UKUT 00217 (TCC), §73 which, referring to the Court of Appeal's decision in *Mullarkey v Broad* [2009] EWCA Civ 2, confirmed that the mere fact that permission had been granted on a ground of appeal did not preclude an argument at the substantive appeal as to whether the appellant should be permitted to run the point because it was a new point that was not argued below. Although that was in the context of a ground of appeal raised by an appellant, the same principle would, we consider, apply to a point that HMRC was permitted to include in its response.

101. *CF Booth Limited* (at §67) also referred to the established line of authority that an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before at first instance, "particularly where that would necessitate new evidence or would have resulted in the trial below being conducted differently". The Upper Tribunal in

Wyatt Paul v HMRC [2022] UKUT 1166 (TCC) confirmed that those principles apply equally to a respondent seeking to rely on a new point that was not raised below.

102. In the present case the attribution issue *was* raised below, albeit at a very late stage in the proceedings after the appellants' evidence had been heard. The relevant principles are therefore those which apply where a party is seeking to amend their pleadings to raise a further point. These principles were addressed in the Upper Tribunal's decision in *Denley v HMRC* [2017] UKUT 0340 (TCC), §31 applying the same principles as those considered in relation to the CPR in §38 of *Quah v Goldman Sachs* [2015] EWHC 759 (Comm).

103. As set out there, the decision on whether to allow an amendment is a matter for the discretion of the court, striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted. While a very late application to amend (i.e. one that would compromise a fixed court date if allowed) should generally not be allowed, lateness is a relative concept which depends on the nature of the proposed amendment, the quality of the explanation for its timing, and the consequences in terms of work wasted and consequential work required.

104. We consider that, in the circumstances of this case, the balancing of the respective injustice to the parties points towards refusing to allow HMRC to raise the attribution issue. Chief among those circumstances is that if the issue had surfaced earlier, it is likely that the scope of evidence which the appellants might have chosen to adduce, and its level of detail, would have been quite different. For instance, what exactly were the sticking points in the negotiations? Were those matters which emerged from practices or knowledge that would only have been apparent in the period after 1997, or would they equally have been sticking points if the "wrangling" was transposed back to a start date of 1989? It is also possible that the appellants would have sought to develop a case in response that any further delays to their claims were due to other errors of HMRC.

105. As the ultimate quantum of an interest claim based on the earlier dates is still to be determined between the parties, we do not have any accurate figure for the sum at stake, but the estimate for the total disputed period is around £9 million. On any view the subtraction of 5 to 7 years of accrued interest, even simple interest, running from the start of a total period of 16 to 18 years (i.e. from 1991, the earliest date given the 2-year statutory waiting period in force at the time after the first supply date in the period in 1989, until the dates of claim in 2007 and 2009) means that a significant sum would turn on the outcome of this issue.

106. HMRC will therefore suffer material prejudice in being denied the opportunity to advance the issue. Against that, however, the points above indicate that the issue can only be litigated fairly with the benefit of detailed findings of fact after full pleadings on both side, and the commensurate opportunity to adduce relevant evidence in the light of those pleadings. While the merits of the attribution issue are also a factor, it is difficult to say anything which points one way or the other on that at this stage, given the impossibility of knowing the direction the pleadings and evidence would or might have taken if the issue had been raised earlier.

107. While we can see how the attribution issue appears to have crystallised for HMRC during the hearing before the FTT, we agree with the appellants that the point was reasonably apparent from §20 of Mr Plant's witness statement. The issue was therefore a point which could and should have been raised at a much earlier stage before the hearing even began.

108. For those reasons we refuse HMRC permission to rely on the attribution issue.

REMAKING THE FTT DECISION

109. We have concluded that there was an error of law in the FTT decision following our consideration of Ground 1, and we reject HMRC's case under Ground 3 that s. 78(1)(d) in any event prevents interest from arising from the earlier dates. We consider that the error identified in Ground 1 was material and that the FTT decision should be set aside and remade so as to correct it. We accordingly remake the decision to hold that the error arising from the enactment of the unlawful property condition was an error falling within s. 78.

110. Ms Mitrophanous highlighted that even if that were the case, the FTT made a finding of fact that the cause of the delay was the appellants' *belief* in the validity of the property condition (§28). That finding was not challenged by the appellants in their appeal. As a result, she said, the delay was caused by the appellants' failure to challenge the position earlier and Ground 1 could go nowhere.

111. We reject this submission. Having found an error of law in the FTT decision, and having set aside that decision, it is open to the Upper Tribunal to remake the decision making such findings as it considers appropriate. The suggestion that the FTT's finding must stand, and so precludes any alternative finding as to the cause of delay, must be approached with caution given that the finding was made in a context where the FTT considered (wrongly as we have found) that the enactment of the property condition could not constitute a s. 78 error. It is therefore not surprising that the FTT did not turn its mind to whether that caused the delay.

112. Having reached the contrary conclusion on the property condition as a s. 78 error, there is no difficulty in our view in finding that it caused the delay, and we so find. That finding can in any event be straightforwardly reached via the FTT's finding as to the cause of delay, in that the only reason that the appellants believed the property condition to be valid was because the property condition had been enacted.

113. We therefore find that that property condition error caused the delay in payment over the disputed period running from the earlier dates. This is on the basis that, but for the property condition error, the appellants would have made their bad debt relief claims earlier than they did, and HMRC would have authorised them by the earlier dates.

114. We therefore remake the FTT decision so as to determine the agreed issue in the appellants' favour.

DISPOSITION

115. The appellants' appeal is therefore allowed. The parties made clear before the FTT that the issues of quantum remain to be determined by the parties by agreement, and failing that by the FTT.

MRS JUSTICE BACON
JUDGE SWAMI RAGHAVAN

Release date: 13 January 2023