Neutral Citation: **[2023] UKUT 00122 (TCC)**

Case Number: UT/2021/62

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Rolls Building
London

VAT – claim for relief for bad debts – preliminary issue referred to Upper Tribunal and appealed to Court of Appeal – whether judgment of Court of Appeal finally resolved all issues – whether open to appellant to raise new issue in light of subsequent decision of Court of Appeal – res judicata – whether FTT erred in law in striking out – appeal dismissed

Heard on: 21 to 23 February 2023
Judgment date: 30 May 2023

Before

MR JUSTICE LEECH
JUDGE NICHOLAS ALEKSANDER

Between

BRITISH TELECOMMUNICATIONS PLC

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Roderick Cordara KC and Lyndsey Frawley, Counsel, instructed by DWF Law LLP

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

DECISION

INTRODUCTION

1. British Telecommunications plc ("BT") appeals against a decision released by the Tax Chamber of the First-tier Tribunal ("the FTT") on 29 June 2020 ([2020] UKFTT 0278 (TC)) that its appeal be struck-out on the grounds that it had no real prospect of success or was an abuse of process.

PROCEDURAL HISTORY

2. The histories of BT's appeal and of the availability of VAT relief for bad debts in the UK is long and complicated. Because those histories are essential to an understanding of the issues before us, we set them out below.

Bad debt relief

3. With effect from 1 January 1978, Article 11C(1) of the VAT Sixth Directive (which has direct effect) provided 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.

4. UK domestic legislation made no provision for bad debt relief until 1 October 1978.

5. Section 12, Finance Act ("FA") 1978 introduced the "Old Scheme" for bad debt relief. This was replaced (with modifications that are not material to this appeal) by s22 Value Added Tax Act 1983 ("VAT Act 1983") with effect from 26 October 1983. The Old Scheme was in effect in relation to supplies made between 2 October 1978 and 26 July 1990.

6. The Old Scheme entitled (but did not require) taxable persons to make claims for bad debt relief to HM Customs and Excise (a predecessor to HMRC - for convenience, references in this decision to "HMRC" are to be taken as including HM Customs and Excise where relevant).

7. It was a requirement for any claim under the Old Scheme that the conditions in s12(2) FA 1978 (and subsequently s22(2) VAT Act 1983) were met. These required, amongst other things, that the customer had become insolvent ("the Insolvency Condition").

8. The regulations governing the Old Scheme required claims for bad debt relief to be made on the VAT return for the period in which the supplier (in the case of this appeal – BT) received the relevant document evidencing the customer's insolvency (or proving its claim in the customer's insolvency). HMRC had discretion to allow claims to be made in returns for later periods. HMRC exercised this discretion by a public notice which permitted claims to be made under the Old Scheme in VAT returns for any later accounting period. But this discretionary treatment was withdrawn with effect from 1 April 1991. From that date it was no longer possible for an Old Scheme claim to be made in a VAT return for an accounting period subsequent to the period in which the supplier received the relevant insolvency document.

9. The Old Scheme was replaced by a new scheme by FA 1990. However, paragraph 9(1), Schedule 13, Value Added Tax Act 1994 ("VAT Act 1994") permitted claims under the Old Scheme to continue to be made. The Old Scheme was finally closed by s39(5) FA 1997, which prohibited Old Scheme claims from being made after 19 March 1997.

10. In practice, given the nature of BT's customers, the Insolvency Condition could not be satisfied for many of BT's bad debts, as the amounts involved for each customer were too small to enable an insolvency procedure to be triggered. In consequence BT was unable to claim relief under the Old Scheme in respect of a large number of its bad debts.

Recovery of overpaid VAT

11. Section 24, FA 1989 made provision for recovery of overpaid VAT where a person had paid an amount to HMRC by way of VAT but "which was not [VAT] due to them". Section 24(4) provided for a six-year time limit on claims (from the time the amount had been paid). But, if the payment had been made by mistake, the limitation period was extended to six years from "the date on which the claimant discovered the mistake, or could with reasonable diligence have discovered it" (s24(5)). Section 24(7) provided that HMRC were not liable to make repayments of amounts not due to them otherwise than under s24. With the enactment of the VAT Act 1994, s24 FA 1989 was repealed and replaced by s80 VAT Act 1994.

12. Section 80, VAT Act 1994 was amended by FA 1997 to impose a three-year limitation period on claims. The amendment had retrospective effect back to 4 December 1994, and no provision was made for a transitional period. In consequence of the well-known decisions of the Court of Justice of the European Union in *Marks and Spencer v CCE* (Case C-62/00) and the House of Lords in *Fleming* (*t/a/Bodycraft) v HMRC* [2008] UKHL 2, s121 FA 2008 was enacted to disapply the three-year limitation period to claims made before 1 April 2009. The effect was to create a window in which s80 claims could be brought for accounting periods prior to 4 December 1996. The "Fleming window" ran from 19 March 2008 (when s121 came into force) until 31 March 2009.

13. For the period of the Fleming window (19 March 2008 to 31 March 2009) the relevant provisions of s80 VAT Act 1994 were as follows:

> **80.— Credit for, or repayment of, overstated or overpaid VAT**
>
> (1) Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> […]
>
> (1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of—
>
> (a) an amount that was not output tax due being brought into account as output tax, or
>
> (b) an amount of input tax allowable under section 26 not being brought into account
>
> the Commissioners shall be liable to repay to that person the amount so paid.

14. In consequence of various statutory amendments, since 22 April 2011 s80 has included a four-year limitation period, with no extensions for cases of mistake.

BT's appeal

15. It is not disputed that at all material times, taxpayers enjoyed directly effective rights under Article 11C(1) of the Sixth Directive, including that the consideration in respect of which

they had to account for VAT was to be reduced in the event of total or partial non-payment of that consideration.

16. This appeal concerns BT's rights under Article 11C(1) arising in consequence of the non-payment of consideration by customers who did not pay their phone bills.

17. From 1 January 1978 until 1 October 1978, UK domestic legislation made no provision for the reduction in taxable consideration due to bad debts. From 1 October 1978, although UK domestic legislation made provision for bad debt relief under the Old Scheme, BT was unable to claim relief because it was not able to satisfy the Insolvency Condition. This was because the amounts owed by consumers were typically too small to trigger a formal insolvency process as required by the Insolvency Condition. To take an obvious example, most unpaid phone bills were not large enough to reach the threshold at which BT was able to issue a bankruptcy petition.

18. On 30 March 2009, BT invoked its directly effective rights under the Sixth Directive and wrote to HMRC claiming repayment of VAT for which it had accounted on supplies made to customers in the period from 1 January 1978 to 31 March 1989 where the customer had failed to pay BT either in part or at all for the supplies ("the bad debt claims"). HMRC refused the bad debt claims and BT appealed against that decision to the FTT on 29 April 2010.

19. It is helpful to divide the bad debt claims into two elements - the first covering claims for the period from 1 January 1978 to 30 September 1978 ("the Nine Month Claim") when there was no bad debt scheme in the UK, and claims relating to the remaining period ("the Main Claim").

20. On 6 May 2010, the FTT released its decision allowing the appeal of GMAC UK plc against HMRC's refusal of bad debt relief in respect of supplies of cars on hire purchase made between 1978 and 1990 ([2010] UKFTT 202 (TC)). HMRC appealed against that decision to the Upper Tribunal.

21. The legal issues that arose in relation to GMAC's appeal were similar to those that arose in BT's case, and BT wanted to "catch up" with GMAC's appeal. BT therefore sought to have the determination of its appeal transferred from the FTT to the Upper Tribunal, pursuant to Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Procedure Rules"). Such a transfer can take place for appeals categorised as "complex" (as was BT's), at the direction of the Chamber President of the FTT with the concurrence of the President of the Tax and Chancery Chamber of the Upper Tribunal. Following a joint application by both BT and HMRC, Judge Bishopp (then Chamber President of the FTT) wrote to the parties on 26 April 2011 stating that he was prepared to direct such a transfer providing that the Upper Tribunal would not be required to determine issues of fact and quantum, and that Mr Justice Warren (then President of the Tax and Chancery Chamber of the Upper Tribunal) was prepared to concur in a transfer on that basis.

22. BT and HMRC were unable to reach agreement on a statement of facts. Following correspondence between the parties and the Tribunals, the Tribunals notified the parties that Judge Bishopp and Mr Justice Warren were willing to agree to the transfer of a preliminary issue under Rule 28 (again subject to the proviso that the Upper Tribunal would not be required to determine any issues of fact). BT proposed that five questions be referred to the Upper Tribunal as a preliminary issue – however HMRC objected to two of these questions (relating to the incompatibility of the insolvency condition in the VAT bad debt scheme with EU law) on the grounds that they could not be addressed without the tribunal having made relevant findings of fact.

23. Ultimately the parties were able to reach agreement that three questions be determined by the Upper Tribunal as a preliminary issue. On 26 January 2012 directions were released by the FTT and the Upper Tribunal transferring the following three questions to be determined by the Upper Tribunal as a preliminary issue:

> Issue 1: On the assumption that BT could otherwise have relied on an EU law right to bad debt relief, in respect of bad debts allegedly arising in the prescribed accounting periods running from 1 January 1978 to 31 March 1989, by virtue of Article 11C(1) of the Sixth VAT Directive, was the exercise of that right in 2009 barred in accordance with the general principles of EU law and/or subject to section 39(5) of the Finance Act 1997?
>
> Issue 2: If the answer to Question 1 is in the negative in relation to the general principles of EU law, but affirmative in relation to section 39(5), does section 39(5) fall to be disapplied, or construed, under EU law, in such a way as not to affect the exercise of BT's right under EU law?
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> Issue 3: Do section 80 of the Value Added Tax Act 1994 and section 121 of the Finance Act 2008 apply to BT's claim irrespective of the answer to Question 1.

24. GMAC's appeal and the BT preliminary issue were heard together on 13 to 15 February 2012. On 3 August 2012, the Upper Tribunal released its decision ([2012] UKUT 279 (TCC)) in relation to both. It answered the first two questions partly in favour of BT, and the third question in favour of HMRC:

> [244] The answers to the Preliminary Issues are therefore as follows:
>
> (a) Issue 1: On the assumption that BT could otherwise have relied on an EU law right to bad debt relief, in respect of bad debts allegedly arising in the prescribed accounting periods running from 1 January 1978 to 31 March 1989, by virtue of art 11C(1) of the Sixth VAT Directive, the exercise of that right in 2009 was not barred in accordance with the general principles of EU law but was no longer available as a result of s 39(5), FA 1997.
>
> (b) Issue 2: Section 39(5) falls to be disapplied, or construed, under EU law, in such a way as not to affect the exercise of BT's right under EU law. This conclusion turns on our view that inadequate notice of the termination of the Old Scheme was given. Accordingly, BT's claims were not time-barred when they made them in the claim letter dated 30 March 2009.
>
> (c) Issue 3: Section 80 of the VATA 1994 and s 121 of the FA 2008 have no relevance to BT's claim on the footing that its claims arise under s 22. If its claims arise, instead, under s 80, those claims were not made before 1 April 2009 and are now time-barred.

25. A reference was made to the Court of Justice of the European Union on an issue that arose in the GMAC appeal, but not in the BT preliminary issue. In consequence, the BT and GMAC appeals then moved forward on separate paths.

26. With the permission of the Upper Tribunal, HMRC appealed to the Court of Appeal, and BT cross-appealed.

27. The hearing in the Court of Appeal took place on 29 to 31 October 2013. A dispute arose in advance of the hearing (after the service of skeleton arguments in January and February 2013) as to whether the skeletons accurately reflected the factual background. An application was made to the FTT by BT for the determination of the disputed issues of fact. This application was dismissed by the FTT on the basis that if the Court of Appeal identified a residual factual issue, it could remit that matter to the FTT.

28. The Court of Appeal handed down its decision on 13 April 2014 ([2014] EWCA Civ 433). The Court of Appeal allowed HMRC's appeal against the Upper Tribunal's answer to issue 2, but dismissed its appeal against the answer to issue 1. It dismissed BT's cross appeal against the answer to issue 3. Applications for permission to appeal to the Supreme Court were dismissed.

29. On 9 May 2014 BT applied to the Supreme Court for permission to appeal. On 11 December 2014 the Supreme Court ordered that the application be refused

> […] because the application does not raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time bearing in mind that the case has already been the subject of judicial decision and reviewed on appeal.

30. We heard a number of submissions on the language that the Supreme Court used in refusing permission. We find that an analysis of the precise terms used by the Supreme Court does not take us forward. The only point to be taken is that the decision of the Court of Appeal was not subject to any further appeal.

31. On 17 February 2015, the FTT wrote to BT asking how it wanted to proceed with its appeal in the light of the decisions of the Supreme Court and the Court of Appeal.

32. In accordance with directions issued by the FTT, on 29 February 2016 BT provided a statement of the legal and factual issues that it considered remained to be resolved by the FTT. On 15 March 2016, HMRC applied to the FTT for an order pursuant to Rule 8(3)(c) of the FTT Procedure Rules that BT's appeal be struck out on the grounds that the statement disclosed no reasonable prospect of success. The FTT started to hear HMRC's applications on 17 July 2017, the application went part-heard and resumed on 6 to 7 February 2019. The FTT's decision allowing the strike-out was released on 29 June 2020.

33. An application by BT made on 8 May 2018 that HMRC be barred from taking any further part in the proceedings under Rule 8(3)(c) (on the grounds that there are no reasonable prospects of HMRC's case succeeding) has not been pursued in the light of the FTT's decision to strike-out BT's appeal.

34. BT now appeals, with the permission of the FTT, to the Upper Tribunal.

BT'S PRINCIPAL GROUND BEFORE THE FTT

35. BT submits that its claim for bad debt relief has not been finally resolved by the answers given by the Court of Appeal to the three preliminary questions. It submits that there remain open issues for determination by the FTT. In particular, BT submits that the answer given by the Court of Appeal to question 3 of the preliminary issue does not address whether BT's letter of 30 March 2009 can be construed as a claim falling within s80(1B) VAT Act 1994, and whether a claim under s80 is time barred.

36. Mr Cordara submits that there are two "routes" by which s80 is engaged in relation to bad debts. The first is that, in accounting for output tax on customer bills that subsequently go bad, BT is making a (retrospective) overpayment of VAT for the purposes of s80(1). The second is that BT was entitled to make a claim under s80(1B) because the VAT arising on a bad debt would automatically be set off against payments made in subsequent accounting periods – so that the subsequent payment would be in part an overpayment.

37. Mr Cordara acknowledges that the Court of Appeal decided that BT could not rely on s80(1) to make a claim for repayment of overpaid VAT (as a consequence of a customer not paying his bill) – see the judgment of Rimer LJ at [125]-[127]:

> [125] […] The question is whether BT's tax refund claims are correctly to be regarded as having been brought under s 80 of VATA 1994 and enjoyed the extended limitation period conferred by s 121 of FA 2008. The Upper Tribunal answered this in the negative. I set out the terms of s 80 at [29] and [37] above and s 121 at [44] above. The s 80 argument was advanced as an alternative basis for the enforcement of BT's directly effective rights (alternative, that is, to s 22). If well founded, it would follow that the FTT had jurisdiction to hear BT's appeal.
>
> [126] The Upper Tribunal's view, succinctly expressed at [181], was that s 80 applies to cases where the taxpayer has brought into account as output tax an amount that was not output tax due. When GMAC (and likewise BT) made its supplies, it accounted for tax which was then due. The subsequent failure of the customer to pay for the supply gave rise to a bad debt, and a possible claim for bad debt relief, which would be for the repayment of all or part of the output tax originally paid by BT. The arising of such bad debt did not, however, mean that the output tax earlier paid was not output tax due within the meaning of s 80. It was and remained so, and the arising of the bad debt did not retrospectively change that.
>
> [127] Mr Lasok supported the Upper Tribunal's reasoning and I too agree with it. Not even BT seems to have believed that s 80 was relevant. Its somewhat ill-drawn claim letter of 30 March 2009 was in respect of bad debt relief and made no suggestion that it had made any payment of tax which was not output tax due. This, I take it, is the sense of the second sentence of the Upper Tribunal's answer to preliminary issue 3.

38. However, Mr Cordara submits that the Court of Appeal said nothing about s80(1B), and its decision needs to be read in the light of its subsequent decision in *Iveco Ltd v HMRC* [2017] EWCA Civ 1982.

39. Mr Cordara submits that HMRC's position in BT's appeal is inconsistent with the position they adopted in *Iveco*, where they successfully argued that Iveco's analogous claim had to be made under s80. The taxpayer in *Iveco* was a trader selling commercial vehicles. The taxpayer gave a discount to its customers depending on the number of vehicles purchased during a specified period – this discount was effected through a rebate mechanism at the end of the period. Thus, the output tax recorded on the taxpayer's VAT return for the VAT accounting period in which a vehicle was sold would correctly reflect the undiscounted price paid by the taxpayer for the vehicle at the time of supply. However, because of the eventual rebate paid to the customer, there was an overall overpayment of output tax. Mr Cordara submits that BT's position is analogous to that of the taxpayer in *Iveco*, in that BT correctly accounted for output tax on the supplies made to its customers in the VAT accounting period in which the supply was made, but, because of the failure of some customers to pay their bills, there was an overall overpayment of output tax.

40. Mr Cordara referred us to the judgment of Newey LJ in *Iveco* at [53]-[54]:

> [51] Echoing Judge Berner, Mr Hitchmough argued that reg 38 should be used to give effect to Iveco's rights under art 11C(1). The Upper Tribunal, Mr Hitchmough said, was mistaken in thinking that Iveco could enforce its rights through s 80 (or a moulded version of it).
>
> [52] Mr Hitchmough's submissions were advanced on the premise that Iveco had a directly effective right to reduce the 'taxable amount' where there had been a rebate and that it was therefore necessary to look for a vehicle to achieve the reduction. This, he maintained, was to be found in reg 38, which had been enacted in order to implement art 11C(1) and specifically explained

> what entries should be made where the consideration had changed after the end of the accounting period in which the original supply had taken place. Mr Hitchmough contended that, in the circumstances, Judge Berner had been right to conclude (in para [50] of his first decision) that 'reg 38 should ... be construed so as to enable Iveco to obtain relief in order to secure compliance with EU law'.
>
> [53] Miss Mitrophanous, of course, did not accept the premise underlying Mr Hitchmough's submissions. She argued that there was no need to look to reg 38 to provide Iveco with a remedy. She suggested that, by 1990, when both reg 7 of the 1989 Regulations and s 24 of FA 1989 came into force, Iveco was already too late to pursue any claim arising from rebates between 1978 and 1984, since the restitutionary claim that (on her case) it would previously have had would by then have become time-barred. In so far, however, as Iveco still had a claim, its remedy was, she said, to be found in s 80. That provision was, she submitted, designed to apply where there had been an overpayment and could have afforded Iveco redress here. She drew an analogy with *Birmingham Hippodrome Theatre Trust Ltd v Revenue and Customs Comrs* [2014] EWCA Civ 684, [2014] STC 2222, [2014] 1 WLR 3867 and the *Leeds City Council* case, each of which proceeded on the footing that s 80 was applicable to overpayments flowing from failure to implement a directive correctly. In the *Leeds* case, Lewison LJ noted (at para [13]) that s 80 'is intended to be a complete statutory code for the repayment of overpaid VAT'.
>
> [54] I have already said that, in my view, Iveco was entitled to maintain that the relevant 'taxable amounts' should be treated as having been reduced and, accordingly, that it had overpaid even before reg 7 of the 1989 Regulations and s 24 of FA 1989 were enacted. That being so, I do not accept Mr Hitchmough's premise. I do not think that there is any need to identify a vehicle allowing Iveco to exercise a right to reduce the 'taxable amount' where there had been a rebate before 1990. Its remedy, as regards pre-1990 rebates, was to claim to recover overpayments, which it could do under s 24 of FA 1989 and, later, s 80 of VATA 1994. Section 24(1) provided for HMRC to be liable to a person who had 'paid an amount to the Commissioners by way of value added tax which was not due to them', and s 80 of VATA 1994 contained almost identical wording until 2005. Viewing matters in the way I do, the words were apt to apply. In 2005, s 80 of VATA 1994 was amended by the Finance (No 2) Act 2005, but one or other of sub-ss (1) and (1B) (I do not think it is necessary to decide which) will then have been applicable.

41. Mr Cordara submitted that paragraph [54] was particularly apt to describe BT's case – and asked us to consider reading that paragraph substituting "BT" for "Iveco" wherever it occurred.

42. Mr Cordara submits that in *Iveco* the Court of Appeal held that:

> (a) there is a direct "dialogue" between Article 11C(1) and the taxpayer's state of account with HMRC, conducted without reference to the state of any domestic legislation;
>
> (b) given the inherent retrospectivity built into Article 11C(1), it will always operate retrospectively to adjust the taxable amount, without any need for the taxpayer to make a claim;
>
> (c) it achieves this retrospective adjustment by means of rending subsequent (otherwise due) payments of VAT, not due – they become overpayments notwithstanding that the original payments were due when originally paid;

(d) section 80(1) or s80(1B) are engaged as a consequence; and

(e) because the taxpayer's rights under Article 11C(1) are directly effective, the implementation or non-implementation of these rights into UK domestic law is of no relevance.

If this analysis is applied to BT, it follows that BT's claim must automatically fall within s80(1) or s80(1B) and irrespective of whether BT had actually made a claim (or not).

43. Mr Cordara further submits that there is nothing on the face of the decision of the Court of Appeal in its judgment in *BT* which prevents BT from arguing that s80(1B) is engaged by its claim. Mr Cordara submits that he raised s80(1B) before the Court of Appeal, but this point was not addressed in its decision. He also submits that the Court's judgment focussed exclusively on s80(1). Mr Cordera drew attention to [126] and submitted that Rimer LJ was making the point that in BT's case, output tax was properly due when it made its supply to its customer, and at the time when BT filed its VAT return for the relevant accounting period, there was no overpayment. The overpayment only arose as a consequence of a subsequent event, namely, the non-payment by the customer of his bill. This was the reason, so he submitted, why Rimer LJ held that s80(1) is not engaged.

44. Mr Cordara then submits that by contrast the same argument does not apply to s80(1B) which the Court of Appeal did not consider in their judgment. Section 80(1B)(a) is engaged when a VAT overpayment arises "… otherwise than as a result of … an amount that was not output tax due being brought into account as output tax." Mr Cordara submits that Rimer LJ's reasoning at [126] does not apply in the case of s80(1B)(a) because this provision is only engaged in circumstances where the amount paid to HMRC is *not* output tax that was *not* due. In other words, says Mr Cordara, the payment has to be output tax that was due as output tax at the time but in respect of which there was a particular reason why it was not due (such as an unexercised set-off of the kind discussed in *Iveco*).

45. Finally, Mr Cordara submits that the Court of Appeal's judgment in *Iveco* covered all elements of Article 11C(1), including unpaid debts. As such, they are the principles that govern this case, even if they are inconsistent with those applied by that same Court in its determination of the preliminary issue. The failure by the Court of Appeal in BT's appeal to address the s80(1B) point limits the scope and effect of its decision to this case. Mr Cordara submits that the failure by the Court of Appeal to address the s80(1B) point leaves it open and means that we can follow *Iveco* for the purposes of the appeal before us.

46. We do not agree with Mr Cordara.

47. Mr Cordara acknowledges that he made submissions on the application of s80(1B) before the Court of Appeal (and they were also raised in BT's application for permission to appeal to the Supreme Court). We find that the Court did in fact address BT's submissions on the engagement of both s80(1) and s80(1B) in its judgment. Rimer LJ's judgment at [125] to [127] addressed s80 as a whole, possibly because preliminary issue 3 is phrased by reference to s80 as a whole and not by reference to its individual subsections. It would have been strange if the Court had not responded to Mr Cordara's submissions. At [125] to [127] Rimer LJ held that s80 is not engaged in relation to claims for bad debt relief, and we read his judgment as referring to s80 as a whole, including both s80(1) and s80(1B).

48. Although the Old Scheme did not give effect to BT's directly effective rights because of the Insolvency Condition, it was nonetheless the prescribed or accepted mechanism for giving effect to Article 11C(1) in respect of claims for bad debts under domestic UK law. In those circumstances, we find that EU law principles required BT to make its bad debt claim under the domestic regime, but suitably moulded to give effect to the taxpayer's directly effective EU

law rights. In the case of BT's bad debt claims, it was straightforward to mould the domestic regime by eliminating the Insolvency Condition. Moreover, this was the express finding which Rimer LJ made in the Court of Appeal at [88] in answer to preliminary issue 1:

> [88] BT could, as I would hold, and had it grasped the point at the time, also have made direct claims under art 11C(1) of the Directive for bad debt relief in all cases (whether or not the insolvency condition was satisfied) on the basis that the insolvency condition was unlawful and incompatible with its EU law rights under the Directive. But the only procedural way in which it claims it was then entitled to do so was by way of an appropriate adaptation and moulding of ss 12, 22 and the regulations so as to accommodate the rights it was exercising and which ought to have provided for them in the first place. The adaptation and moulding required was, however, no more than was necessary to enable it to enforce its rights: it could not extend to incorporating time limits for making claims that were not already in the regulations.

49. The same requirement for the moulding of domestic law can also be seen, for example, in the judgment of Henderson LJ of the Court of Appeal in *Répertoire Culinaire v HMRC* [2017] EWCA Civ 1845. Following a referral to the CJEU, it was determined that the UK's implementation of an EU exemption from excise duty for cooking wine was too restrictive. Henderson LJ determined that the appropriate mechanism to give effect to the appellant's directly effective rights was that it should have made a claim under the relevant domestic regulations, but disapplying the irregular provisions.

50. The potential for s80 to be used as the mechanism for making claims for relief for bad debts was also considered by the Court of Appeal in GMAC's appeal: see [2016] EWCA Civ 1015. It is not disputed that the key deficiency in the Old Scheme (at least as regards BT) was the inclusion of the Insolvency Condition, which failed the EU requirement of proportionality. This was discussed by Floyd LJ at [126] to [134] of his judgment who also confirmed that bad debt relief must be claimed under the Old Scheme (appropriately moulded) and not under s80:

> 126. It is, I think, first necessary to draw attention to the fact that the focus of the successful EU law attack on section 22 was the property and insolvency conditions. It was not GMAC's case that the United Kingdom had failed to put in place any scheme for bad debt relief, only that the scheme which had been put in place, because it included the property and insolvency conditions failed the EU law test of proportionality. It would not therefore be a correct exercise of the power to mould section 22 to conform with the Directive to set the section aside in its entirety. Rather, this aspect of the case has to be approached on the basis that there remains in place a scheme for the relief of bad debts but without those parts of it which fall foul of EU law.
>
> 127. Secondly it is common ground that the right to claim a reduction in the case of non- payment is not absolute. It is open to member states to impose formal conditions on the exercise of the right, and to subject its exercise to reasonable time limits. It is also open to member states to make changes to the scheme, whether by changing the conditions, or by exercising, in a proportionate way, its power to derogate from the right. To that extent, therefore, the debate about whether the regime is a mandatory or discretionary one is not susceptible of a binary answer. It is mandatory in the sense that effect must be given to the EU law right, but the manner in which that is done, in terms of conditions and time limits, affords the member state a margin of discretion. Taxpayers cannot rely on the conditions for relief remaining the same.
>
> […]

130. Fifthly, it is important to appreciate what section 39(5) did. It is true that it ended the old scheme, and, in respect of a given supply, did not give the taxpayer access to the new scheme. It was not therefore an alteration in the conditions for claiming bad debt relief for that supply, in the sense that the relief could continue to be claimed subject to the altered condition. Claiming relief in respect of that supply was no longer possible after the enactment of that section. The effect was, however, not different to an alteration in a time limit for making claims, which would also terminate the right to claim relief in respect of that supply. The imposition of procedural hurdles of this kind plainly lies within the discretion of the member state, provided it acts in accordance with the principles of effectiveness and protection of legitimate expectations.

131. Sixthly, for the reasons explained by the Court of Appeal in BT CA with which I am in full agreement, there was in truth a prolonged crossover arrangement between the old scheme and the new scheme. Section 22 was repealed by the Finance Act 1990 in relation to supplies made after 26 July 1990 but was left in place in respect of supplies before that date with the rider that supplies between 1 April 1989 and 26 July 1990 could be made under either scheme. A supply which only had available to it a claim under the old scheme was therefore of considerable antiquity when section 39(5) was enacted in 1997. The four month notice period must, in my judgment, be seen in that context.

132. Seventhly, I think that the UT was wrong to speculate that there might be bad debts accruing to GMAC after the enactment of section 39(5). What is relevant for the purposes of EU law is whether there has been "total or partial non-payment". We were not referred to any authority which established an EU law definition of these terms, although Mr Cordara referred to an International Financial Reporting Standard which defined a bad debt as one more likely than not to remain unpaid. As Mr Beal explained, the last of the relevant GMAC supplies will have been on or before 31 March 1989, and the longest HP contract would have its final payment five years later. That left three years even in this extreme case for GMAC to establish that it was unlikely to be paid. It is not relevant in this context to consider how long insolvency procedures might have taken.

133. Against that background, was the exercise of GMAC's EU law rights rendered excessively difficult or virtually impossible by section 39(5)? I do not consider that it was. GMAC had more than adequate time to exercise their EU law rights and were given adequate notice of the withdrawal of the scheme. It is no answer to say that GMAC's claim would have been rejected by the Commissioners in the same terms as their actual claim was rejected when it was eventually made in in 2006. As I have said, this part of the case must be approached on the basis of EU law for which GMAC contend and which I have held to be correct.

134. I do not therefore consider that it is necessary for the court to find some other route to give effect to GMAC's EU law rights, so as to avoid collision with section 39(5). I would simply record my view, which is in conformity with the view which GMAC expressed to the Commissioners in their original claim, that section 80 is not the appropriate domestic provision for giving effect to bad debt relief. When GMAC accounted for VAT on the whole value of the supply it did not account for VAT which was not due. That did not change at the point when GMAC considered the debt to be bad. To that extent, to the extent they are different, I prefer the views of the UT expressed in the present case to those expressed in Iveco.

51. In *Iveco*, Newey LJ considered the decisions of the Court of Appeal in both *BT* and *GMAC* and expressly referred to the paragraphs from Floyd LJ's judgment which we have cited above. He confirmed at [38] that VAT bad debt relief does not arise automatically, but "has always been something that a creditor must claim". In other words, absent a claim by the taxpayer, bad debt relief does not arise.

52. We also reject Mr Cordara's argument that s80(1B) was engaged (even if s80(1) was not). He faces the difficulty that subsection (1B) applies to payments to HMRC of "an amount by way of VAT that was not VAT due to them" (otherwise than as a result of bringing into account as output tax an amount that was not output tax due which properly falls within the ambit of subsection (1)). But in BT's case, output tax was properly due and charged when the supply was made. Mr Cordara's answer to this point is that an automatic set-off takes place between VAT currently due and VAT no longer due on the bad debt in a prior accounting period and that an overpayment arises when BT makes a payment in a subsequent accounting period. He described this as a kind of statutory magic which is brought about by Article 11C(1). However, Rimer LJ specifically addressed and rejected this argument in the Court of Appeal at [30]:

> In a bad debt case, there was no payment of VAT that was not due, or therefore any overpayment of VAT. A failure to make a bad debt relief claim in a subsequent return still did not mean that there was any overpayment in the tax actually paid. If no relief claim was made, the tax paid was the tax due.

53. Further, in both *Iveco* and *GMAC,* the respective appellants submitted that s80 produced an inconsistency of treatment because it applies to price reduction cases (such as bulk discount rebates given as incentives to customers) but not to bad debts. In both cases, the Court of Appeal rejected that argument and held that there was no such inconsistency. Article 11C(1) expressly provides that member states can determine conditions to give effect to the reduction in the VATable consideration and the inclusion of a requirement in UK domestic legislation for a claim to be made is both consistent with Article 11C(1) and not disproportionate. We agree with Mr Beal that there are good reasons for the different treatment of claims for bad debts and claims for other reductions in the amount of the consideration. For example, in the case of bulk discount rebates, it is clear when the reduction in the consideration occurs. But the same cannot be said for the timing of the reduction in consideration due to a bad debt. There may be many reasons why consideration may be left unpaid, and a debt does not become "bad" purely as a result of its non-payment. Moreover, the precise timing of recognition is usually a decision for the creditor. It is for these reasons, therefore, that the bad debt regulations do not prescribe a specific time at which the consideration is reduced but rather for the taxpayer to determine whether the debt is bad and then give the taxpayer the option of claiming relief.

54. We find that in relation to its Main Claim, BT should have claimed bad debt relief under the Old Scheme moulded to give effect to the requirements of the Sixth Directive. We also find that the Court of Appeal decided this issue and rejected the argument which Mr Cordara also advanced before us.

55. As for the Nine Month Claim, it raises two separate issues. The first is the treatment of bad debts where the supply was made before the Old Scheme came into effect on 1 October 1978, but the debt became bad after that date. The second is the treatment of bad debts where both the supply and debt became bad before 1 October 1978. The Upper Tribunal considered that both situations were covered by the Old Scheme (suitably moulded):

> 240. It was not necessary, in the GMAC appeal, to address supplies made in the period 1 January 1978 to 1 October 1978. There are two situations to consider. First, where the bad debt also arose in that period; secondly where it did so after 1 October 1978. In relation to the latter situation, it is clear that s 12 FA 1978 could apply even where the supply pre-dated 1 October 1978.

> That appears from s 12(6) which provides for the section to apply where the debtor becomes insolvent after that date: there is no reason to doubt that an insolvency taking place after that date would engage s 12 even where the supply was before that date. On that footing, the necessary adaptation or moulding of s 12 can be effected to give effect to a taxpayer's directly enforceable rights in respect of supplies made before 1 October 1978. The resulting position is, in our view, no different from that which obtains in respect of supplies made after 1 October 1978.
>
> 241. So far as concerns bad debts arising before 1 October 1978, the position is marginally less clear. At the time when the directly enforceable right arose, s 12 was not on the statute book and effect could not, at that time, have been given to the directly enforceable right through the mechanism of s 12. However, once that mechanism came into being, we see no reason to conclude that it should not apply to the taxpayer's directly enforceable rights. The position is then precisely the same as that addressed in the preceding paragraph. If we are wrong about that, then the mechanism has to be found elsewhere, an aspect we consider when dealing with Issue 3.

56. The Court of Appeal held that either the Old Scheme (suitably moulded) applied or that BT had a claim in restitution which had become long since statute-barred. Rimer LJ stated as follows at [118]:

> Taking first the period 1 January to 30 September 1978 […] Either they are blighted by the same problem as relates to the main claim; or else the only right that BT ever had to claim relief in respect of these bad debts was a common law restitutionary claim, which is long since statute barred.

57. We are satisfied, therefore, that both the Upper Tribunal and the Court of Appeal determined the Nine Month Claim just as they determined the Main Claim. For completeness' sake, we note that Rimer LJ also held at [127] that BT's letter of 30 March 2009 was a claim for bad debt relief, and could not be construed as a claim in respect of an overpayment of VAT under s80.

RES JUDICATA

58. Cause of action estoppel was defined by Lord Sumption in *Virgin Atlantic Airways v Zodiac Seats UK Ltd* [2013] UKSC 46 at [17] as follows:

> The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.

59. Issue estoppel arises where the necessary ingredient of one claim or appeal involves an attack on the same finding made in an earlier decision. It was also described by Lord Sumption in *Zodiac* at [17] as follows:

> […] the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties.

60. Because of the *Caffoor* principle, issue estoppel does not strictly arise in relation to a tax appeal where the tax is charged on a periodic basis and the appeal in question relates to a different period. In *Littlewoods v HMRC* [2014] EWHC 868 (Ch) Henderson J held that the *Caffoor* principle applied to VAT.

61. Although issue estoppel may not apply to tax appeals, Henderson J held in *Littlewoods* that repeated attempts to re-litigate the same issue without good reason might amount to *"Henderson v Henderson"* abuse of process, and that the FTT retained a discretion to strike-out an appeal on those grounds (see [191]). He referred in particular to Lord Bingham of Cornhill's speech in *Johnson v Gore Wood & Co* [2002] 2 AC 1, where he articulated the following principle at 31B:

> The underlying public interest is…that there should be finality in litigation and that a party should not be twice vexed in the same matter. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse maybe found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present the latter proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

62. Although issue estoppel has a diminished role to play in many tax cases under the *Caffoor* principle, that principle has no application here. Not only are BT seeking to redetermine matters relating to the same accounting periods, but they are seeking to redetermine matters decided in these very same proceedings. We consider the relevant principle here to be that stated by Diplock LJ (as he then was) in *Fidelitas Shipping v V/O Exportchleb* [1966] 1 QB 630 at 642B:

> In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: but such application will only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence.
>
> This is but an example of a specific application of the general rule of public policy, *nemo debet bis vexari pro una et eadem causa*. The determination of the issue between the parties gives rise to what I ventured to call in *Thoday v. Thoday* an "issue estoppel." It operates in subsequent suits between the same

> parties in which the same issue arises. *A fortiori* it operates in any subsequent proceedings in the same suit in which the issue has been determined.

63. We have found that both the s80(1) and the s80(1B) issues were raised before the Court of Appeal, and that the Court decided these issues in favour of HMRC. The Supreme Court then refused permission to appeal. We find that the decision of Court of Appeal binds BT and BT is estopped from continuing to pursue these issues. If there was any doubt about the matter, we would have found that it would be an abuse of process for BT to continue to pursue the s80 point applying the test set out by Lord Bingham in *Johnson v Gore-Wood*.

OTHER ISSUES

64. Having decided that BT cannot make a claim under s80 in respect of relief from bad debts, the other issues raised by BT can be addressed briefly.

65. The Old Scheme was closed by s39(5) FA 1997, which prohibited Old Scheme claims from being made after 19 March 1997. In its answer to preliminary issue 2, the Court of Appeal held that the termination of the Old Scheme by s39(5) was effective, and so BT's bad debt claim under the Old Scheme (appropriately moulded) was time barred from 19 March 1997. To the extent that BT has a claim in restitution for the Nine Month Claim, that too was clearly statute barred. In summary, the Court of Appeal decided that:

> (a) The Main Claim for bad debt relief should have been made under the Old Scheme, appropriately moulded to ignore the impermissible Insolvency Condition.
>
> (b) The Nine Month Claim should have been made either under the Old Scheme or in common law restitution.
>
> (c) Neither s80(1) nor s80(1B) can be utilised for the purposes of claiming relief for bad debts.
>
> (d) The termination of the Old Scheme under s39(5) did not infringe BT's EU law rights.
>
> (e) Any common law restitutionary claim was long since statute barred.

66. It follows, therefore, that BT's 30 March 2009 claim must fail, and that there are no other issues that remain to be resolved.

STRIKING OUT

67. The FTT Procedure Rules gives the FTT discretion to strike out an Appellant's case if it has no reasonable prospect of success. Rule 8(3)(c) states as follows:

> 8(3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> […]
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

68. In *HMRC v Fairford Group plc* [2014] UKUT 329 (TCC) the Upper Tribunal addressed the approach that should be taken in the FTT when dealing with an application to strike out. The *Fairford Group* appeal related to an MTIC fraud and Judge Brooks declined to strike-out the appeal in the FTT because he could not conclude that the taxpayers had no reasonable prospect of challenging HMRC's evidence without a detailed examination of that evidence. In doing so he formulated the following test at [41]:

> In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider

> whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all.

69. The Upper Tribunal amplified this guidance in *First de Sales Limited Partnership v HMRC* [2019] 4 WLR 21. The tribunal cited the judgment of Lewison J (as he then was) in *Easyair Limited v Opal Telecom* [2009] EWHC 339 and stated as follows at [33]:

> Although the summary in *Fairford Group plc* is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Son v Caitlin Five Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real

> prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

70. In *Shiner and Sheinman v HMRC* [2018] EWCA Civ 31 the Court of Appeal also held that Rule 8(3)(c) extends to striking out on the grounds that the proceedings amount to an abuse of process including appeals subject to either cause of action estoppel or issue estoppel: see [19].

71. We have reached the conclusion (a) that all issues in this case were resolved by the Court of Appeal's answers to the three preliminary questions and, in the alternative, (b) that it would be an abuse for BT to continue to pursue the s80 issues. It must follow, therefore, that Judge Morgan was right to strike out BT's appeal on the grounds that BT's case no longer has any reasonable prospect of success. Mr Cordara recognised this in his submissions, when he said that our answer to the arguability of the s80 points will be the answer to whether Judge Morgan was right to strike BT out: "If you are persuaded that we have an arguable point, then she was wrong and if you're not, then she was right". We therefore uphold her decision to strike out BT's appeal.

OTHER MATTERS

72. BT raised a number of other issues in relation to the FTT's decision. Many of these fall away as a consequence of our finding that the Court of Appeal decided that a claim for relief for bad debts could not be made under s80. Accordingly, we do not propose to address BT's submissions on those issues. In particular, because the Court of Appeal found that s80 is not engaged, it is irrelevant to decide what (if any) facts it is necessary to prove in relation to the terms or validity of a s80 claim.

73. Other issues were raised in BT's Skeleton Argument including a number of issues going to the procedural fairness and due process of the proceedings before the FTT. But as BT did not pursue them in the course of oral argument before us, we do not propose to address those submissions in this decision.

74. Finally, BT complains that by striking out the appeal, the FTT prevented it from leading factual evidence, even though the stage for consideration of factual evidence had not yet been reached. Mr Cordara also submits that the Court of Appeal did not purport to make findings of fact and that any comments that it made on factual matters should be treated as provisional and subject to later proof (if challenged).

75. We disagree. We are satisfied that it was unnecessary for the Court of Appeal to assume or decide any contested issues of fact in coming to its decision. To the extent that the Court relied on or assumed any matters of fact, these related either to the construction of documents which had already been introduced in evidence or a general understanding of how BT's bad debts arose. For example, the Court of Appeal referred to BT's letter of claim letter dated 30 March 2009. But BT itself chose to introduce the letter before the Upper Tribunal and the Court of Appeal. Further, there was no real dispute as to why the Insolvency Condition could not be satisfied, and quantification of BT's claim becomes irrelevant given that BT's claim has failed, and there are no other issues that remain to be resolved.

76. BT also submitted that it was necessary for the FTT to decide the factual issue whether it had an expectation that the Old Scheme would not be abolished and, if so, whether this expectation was a legitimate one. We reject that submission. In our judgment, it is based on a misunderstanding about the general principles of EU law relating to the amendment of legislation, which include a principle that no reasonable and circumspect operator is entitled to expect that a legislative regime will continue indefinitely. The question what a reasonable and circumspect operator would have expected is an objective test and is a matter of law (see *Plantanol GmbH & Co KG v Hauptsollant Darmstadt* (Case C-201/08)). The Court of Appeal clearly took the view that the passage of time coupled with the long run off for the old regime was sufficient to conclude that a four-month notice period was satisfactory for the termination of the Old Scheme. We are satisfied that evidence of BT's subjective expectations would not have been relevant to any decision on the compatibility of the termination of the Old Scheme with EU general law principles.

77. If BT had considered that the Court of Appeal had made inappropriate findings of fact, its remedy was to raise these when seeking permission to appeal to the Supreme Court. It did not do so. We note that BT's Grounds of Appeal before the Supreme Court included a submission that the Court of Appeal had overlooked the fact that there had yet to be any factual enquiry in this case, but this was raised in the context of whether BT had behaved prudently in the period prior to bringing its claim, which is irrelevant to any factual determinations made by the Court of Appeal (including, but not limited to, the determination of whether adequate notice had been given of the termination of the Old Scheme).

78. Finally, we note that BT's submission, that the FTT should have directed a further hearing to decide the contested issues of fact, was inconsistent with BT's opening submissions to the Upper Tribunal in February 2012 that a decision on the three preliminary questions would dispose of the whole appeal and that the construction of the 30 March letter was a question of law. We are fully satisfied that BT was right first time.

CONCLUSION

79. In the light of the decision of the Court of Appeal in respect of the three preliminary questions, we conclude that there is no reasonable prospect of BT's bad debt claims succeeding. We find that the FTT made no error of law in deciding to strike-out BT's appeal.

80. For these reasons, the appeal is dismissed.

81. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is the order be made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE LEECH
JUDGE NICHOLAS ALEKSANDER

Release date: 30 May 2023