Value added tax (VAT) – what constitutes a new claim as compared to an amended claim under VATA section 80 – whether HMRC can rely on a defence of unjust enrichment in relation to claims made after 26 May 2005 – application of EU principles of effectiveness, equal treatment and fiscal neutrality

Appeal number FTC/39/2011
[2013] UKUT 0109 (TCC)

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Before :

MR JUSTICE ROTH

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Between :

REED EMPLOYMENT LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondent

Sitting in public at Rolls Building, Royal Courts of Justice, Fetter Lane, London EC4A 1NL on 23-25 May 2012

Jonathan Peacock QC and Mr John Brinsmead-Stockham (instructed by Slaughter and May) for the Appellant

Philippa Whipple QC and Mr Richard Smith (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Respondents

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Mr Justice Roth :

DECISION

INTRODUCTION

1. This case concerns the right of the Respondents ("HMRC") to raise a statutory defence of unjust enrichment to claims for repayment of overpaid value added tax ("VAT"). It arises in the context of successive amendments to the UK statutory regime governing such claims in the light of judgments of the European Court of Justice ("ECJ") that have found the domestic provisions to be in breach of principles of EU law.

2. The appeal by Reed Employment Ltd ("Reed") against the decisions of HMRC refusing to allow such claims was heard on a series of preliminary issues by the First-tier Tribunal (Judge Berner and Dr Caroline Small) (the "FTT"). The FTT issued its decision on 24 March 2011 ("the Decision"). Although some of those issues were decided in favour of Reed, by reason of its determination of two of the issues the FTT held that HMRC were entitled to resist on the ground of unjust enrichment two applications (to use a neutral word) by Reed for repayment of VAT in amounts of almost £64 million and £76 million. With permission granted by the FTT, Reed appeals as regards those two issues.

3. I should make clear at the outset that the question whether or to what extent Reed's applications would result in unjust enrichment has not been determined at this stage. For HMRC, Ms Whipple QC, appearing with Mr Richard Smith, submitted that there was a high probability that they would be subject to a defence of unjust enrichment in their entirety; whereas for Reed, Mr Peacock QC, appearing with Mr Brinsmead-Stockham, firmly rejected that submission. I would only observe that if the defence of unjust enrichment is available as a matter of law against the applications made by Reed, the expense and effort devoted by both sides to this case indicates that it is likely to be of significance.

THE FACTS AND LEGAL CONTEXT

4. The basic facts are set out in the Decision and are relatively simple. Reed is a well-known provider of recruitment services. Its business involves the recruitment and supply of both permanent and temporary employees to its clients. However, there is a fundamental difference in Reed's arrangements with its clients as regards permanent and temporary employees. On the placement of a permanent employee, the client pays Reed a commission and assumes all further responsibility as regards the employee's remuneration. By contrast, when a client hires a temporary worker, Reed issues a weekly invoice to the client covering both its commission and an amount corresponding to the hourly charge in respect of that worker multiplied by the number of hours worked (and also the employers' national insurance contribution). Reed itself is then responsible for paying the worker his or her remuneration. The present case is concerned only with Reed's business as regards the placement of temporary workers.

5. At the material time, Reed's business was organised with divisions specialised in certain sectors: eg, healthcare, catering, accountancy, etc. Save for its healthcare division, until 1993 Reed had at all times accounted for VAT on the whole of its receipts from its clients. Accordingly, it charged its clients VAT on both the commission element of its charges and the element that related to the remuneration paid over by Reed to the temporary worker. The failure to account in that way for workers in the healthcare sector was challenged, but the practice was upheld by the VAT and Duties Tribunal in August 1993 and then, on appeal, by the High Court: *Reed Personnel Services Ltd v Customs & Excise Commissioners ("Reed Nurse")* [1995] STC 588.

6. Following that decision, Reed sought in consultation with the tax authorities (then the Customs & Excise Commissioners, but for convenience I shall refer to them as HMRC throughout) to ensure that the same VAT treatment should be applied prospectively to the rest of its business as regards the supply of temporary workers, i.e. that VAT should be accounted for on the commission alone. That was accepted, and Reed also sought to obtain repayment of output tax that it contended it had overpaid in respect of such workers.

7. It is necessary in this regard to distinguish between two categories of trader for VAT purposes: those who are fully or partially exempt from VAT and the rest. Traders in the latter category who are charged VAT on supplies, deduct that input VAT from the VAT which they collect on their sales (output VAT) when accounting to HMRC. That category is therefore referred to as the "recoverable sector". Thus if a client of Reed in the recoverable sector was overcharged VAT, since it set off that VAT in accounting to HMRC for VAT on its own supplies, it would normally recover all the VAT overpaid and suffer no loss. By contrast, a client of Reed who is fully or partially exempt from VAT does not charge VAT on all or part of its supplies of goods or services, and thus has to bear (all or part of) the VAT that it pays for its inputs. That category is therefore referred to as the "irrecoverable sector" (and the traders in that sector are sometimes referred to as traders with "sticking VAT"). If a trader in the irrecoverable sector is overcharged VAT, it suffers a clear loss. The irrecoverable sector includes banks and other suppliers of financial services, and charities.

8. Following the *Reed Nurse* decision, Reed sought to issue credit notes in respect of overpaid VAT to any of its clients who requested them. On 18 July 1996, while Reed and HMRC were in correspondence regarding the credit notes, the government announced that a three-year cap on claims for overpaid VAT ("the three-year cap") would be introduced, with effect from the date of the announcement. This was achieved by amendment of s. 80 of the Value Added Tax Act 1994 ("VATA"), the legislative provision that deals with recovery of overpaid VAT.

9. As so amended, s. 80 provided as follows (insofar as material):

> **"80 Recovery of overpaid VAT**

> (1) Where a person has (whether before or after the commencement of this Act) paid an amount to the Commissioners by way of VAT which was not VAT due to them, they shall be liable to repay the amount to him.
>
> (2) The Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose.
>
> (3) It shall be a defence, in relation to a claim under this section, that repayment of an amount would unjustly enrich the claimant.
>
> (4) The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim.
>
> …
>
> (6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.
>
> (7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of VAT by virtue of the fact that it was not VAT due to them."

10. Accordingly, s. 80 limited the recovery of overpaid VAT on two distinct grounds:

    (a) by the three-year cap: s. 80(4); and

    (b) by a defence of unjust enrichment: s. 80(3).

11. The stages whereby Reed has sought to recover overpaid VAT are central to the issues in this case. They are helpfully set out at paras 6-10 of the Decision, on which the following account is based.[1]

12. In the first instance, Reed, with the agreement of HMRC, issued credit notes to its clients in respect of the period 3 November 1993-31 December 1996. Reed provided HMRC with lists of the credit notes that it had issued and HMRC allowed Reed credit, through its normal VAT returns, for all the overpaid

[1] All paragraph references hereafter are to the Decision, unless otherwise stated.

output tax claimed in this way. Thus Reed was effectively reimbursed for overpaid VAT in a manner that fed through to its clients.

13. The reason that this practice was restricted to VAT charged in the period 1993-1996 was the three-year cap. The total amount of overpaid VAT recovered by Reed in this way was £607,352. Although administered by a system of credit notes, I shall refer to it for convenience as "**the first repayment claim**".

14. Further, on 15 January 1997, Reed made a protective claim for the recovery of output tax that it had paid in the period 1 February 1991 to 27 October 1993: "**the second repayment claim**."

15. The Decision states that both the first repayment claim and the second repayment claim related to supplies to the irrecoverable sector: paras 6-7. However, Reed sought to challenge that finding in this appeal.

16. On 11 July 2002, the ECJ handed down its judgment in Case C-62/00 *Marks & Spencer plc v Customs and Excise Commissioners* [2002] STC 1036 ("*M&S 1*") holding that the three-year cap was unlawful. In summary, that was because of the manner in which it had been introduced, by retrospective legislation without any adequate transitional period. As a result, it was incompatible with the fundamental EU law principles of effectiveness and legitimate expectation.

17. Following the judgment in *M&S 1*, HMRC on 27 January 2003 accepted Reed's second repayment claim, subject to confirmation that Reed would not be unjustly enriched by that repayment. Reed confirmed that this was the case, on the basis that it would issue credit notes to its clients as it had done in respect of the first repayment claim. On that basis, HMRC satisfied the second repayment claim by making a payment to Reed in May 2003 in the sum of £1,471,952 plus interest.

18. On 17 June 2003, Reed submitted a claim for the period since the introduction of VAT (i.e. 1 April 1973) until 31 December 1990. This is referred to in the Decision as the "2003 Claim" and I shall call it "**the third repayment claim**". Again, the FTT stated that this related to the irrecoverable sector. It will be necessary to look at the methodology used to compute that claim, but the amount claimed was close to £4 million. That claim was not accepted, and indeed the question whether Reed was liable to account for output tax on the whole of its charge to its clients or only the commission element was the subject of the first issue before the FTT. Reed succeeded on that issue and that part of the Decision has not been challenged.

19. In January 2008, the House of Lords held in *Fleming v Revenue and Customs Comrs* [2008] UKHL 2, [2008] STC 324, that until an adequate transitional period had been introduced, the three year time limit had to be disapplied in the case of all claims for deduction of input tax that had accrued before

introduction of the time limit. In response, Parliament passed s. 121 of the Finance Act 2008, which provided that the three-year cap did not apply to claims made before 1 April 2009 and in respect of accounting periods ended before 4 December 1996. In consequence, the third repayment claim is not subject to the three-year cap.

20. Further, in April 2008, the ECJ handed down its judgment in Case C-309/06 *Marks & Spencer plc v Revenue and Customs Commissioners* [2008] STC 1408 ("*M&S 2*"). That judgment determined that the unjust enrichment defence, as set out above, also infringed fundamental principles of EU law because it applied only to a claim by a 'payment trader' and not a 'repayment trader'. But the consequence of *M&S 2* was that until there was a statutory defence that complied with EU law, no unjust enrichment defence applied.

21. In fact, about the time that the reference to the ECJ was made in *M&S 2*, the position was remedied by s. 3 of the Finance (No 2) Act 2005.[2] That introduced amendments to s. 80 VATA, in particular a new sub-section (1A), which eliminated the differential treatment of payment and repayment traders. Those amendments had effect only for claims made on or after 26 May 2005, but, and critically for a part of the present appeal, they did so irrespective of when the event occurred in respect of which the claim was made.

22. Section 80 as so amended provides (insofar as material):

> "(1) Where a person—
>
> > (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
> >
> > (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> …
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (2A) Where—

[2] This was enacted following the EU Commission's notification to the United Kingdom of the commencement of infringement proceedings: see *M&S 2* , para 53

> (a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and
>
> (b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,
>
> the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.
>
> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.
>
> …
>
> (6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.
>
> (7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

23. Following the judgments in *Fleming* and *M&S 2*, on 27 March 2009 Reed submitted two further applications for payment:

    (a) In respect of the years 1973-1990, in the amount of about £63.8 million (plus interest). This was additional to the sum in respect of those years that was covered by the third repayment claim and was expressed to be an amendment to that claim. It has been referred to as "**the 2009 Demand**." The FTT stated that this was for VAT on supplies to clients in the recoverable sector;

    (b) In respect of the period 1 January 1991 to, effectively, 2 July 1995, for about £75.8 million (plus interest). The FTT stated that this was similarly in respect of the recoverable sector. In any event, it is additional to the amounts claimed in respect of those years in the first and second repayment claims. However, Reed accepts that this application cannot be an amendment to those claims since by this stage they had been paid. This application is referred to as "**the 2009 Claim**".

24. The appeals before the Upper Tribunal concern the 2009 Demand and the 2009 Claim.

THE ISSUES

25. Since they were submitted before 1 April 2009, it is common ground that neither the 2009 Demand nor the 2009 Claim is subject to the three-year cap. The relevant issues concern the application of the unjust enrichment defence.

26. If a claim was made before 26 May 2005, it is not subject to an unjust enrichment defence. Therefore as regards the third repayment claim (the 2003 Claim), the parties agree that there is no unjust enrichment defence even if Reed will be unjustly enriched. If the 2009 Demand is properly to be regarded as an amendment to the third repayment claim, then it dates back to the time of that claim and is not subject to an unjust enrichment defence. That also is common ground. Reed contends that it is such an amendment. HMRC say that, properly viewed, it is a distinct claim. That is the first issue on this appeal ("the Amendment Issue").

27. Reed further contends that the unjust enrichment defence, because of the manner in which it applies in the light of the factual circumstances created by the unlawful three-year cap, itself violates EU law principles and cannot apply. The principles relied on are, cumulatively or alternatively, effectiveness, equal treatment and fiscal neutrality. If Reed is correct, then there is no unjust enrichment defence to the 2009 Claim or to the 2009 Demand even if the latter is held to be a distinct claim (i.e. if Reed loses on the first issue). Whether that contention is correct is the second issue on this appeal ("the Unjust Enrichment Issue").

(1) THE AMENDMENT ISSUE

(a) What constitutes a distinct claim?

28. It is fundamental to the VAT regime that it is a tax on the supply of goods or services, or the acquisition of goods or services from other Member States: VATA, s. 1. Further, there is a right to deduct or offset input tax against a liability for output tax. VATA s 25(1)-(2) provide:

> **"25 Payment by reference to accounting periods and credit for input tax against output tax**
>
> (1) A taxable person shall -
>
> (a) in respect of supplies made by him, and
>
> (b) in respect of the acquisition by him from other member States of any goods,

> account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
>
> (2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

29. The statutory provision for making a claim for overpaid VAT is s. 80, set out above. Pursuant to s. 80(6), it is supplemented by the Value Added Tax Regulations 1995, reg 37, which provides:

> "Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

There are no further formal requirements for submission of a claim.

30. There is no statutory definition of "claim" for the purpose of s. 80 that would provide a basis for distinguishing an amendment to an existing claim from a new claim. Nor is there any authority on this question, save for two VAT Tribunal decisions holding that once a claim has been paid, any further demand cannot constitute an amendment to that claim. This was accepted by Reed in this case, and thus the 2009 Claim cannot be regarded as an amendment to the first or second repayment claims.

31. In those circumstances, I consider that "claim" should here be given its ordinary meaning. In this context, it means a demand for repayment of overpaid tax. It may relate to one accounting period or many, to one particular supply or many, and to a part of the taxpayer's business or the whole of its business. There is no reason, in my view, why any of these cannot constitute a self-standing claim.

32. The FTT approached the question of whether a further demand is an amendment to an existing claim by adopting the test of whether it was shown to be "in essence as one with an earlier claim": para 110. In my judgment, there is nothing wrong with this test, but I am not sure it advances the matter significantly, and I do not think it is appropriate to add a gloss to the statutory wording. The FTT proceeded to hold as follows:

> "111. That test, in our view, will be satisfied only if the later claim arises out of the same subject matter as

> the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim. Without deciding matters outside of this appeal, we consider, for example, that this would generally include cases where a particular computation was not made at the time of the original claim, but the subject matter of the claim was sufficiently identified for such a calculation made subsequently to be related back to the original claim. Simple calculation errors would similarly be included. It should also cover, we think, cases where particular items within the category of the subject matter of the original claim are unknown or not fully identified at the time of the original claim, and would but for that fact have been included in the original claim, but only subsequently come to light."

33. If subsequent to the submission of a claim, the taxpayer sends in the correction of a mistake, whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included, then I consider that would clearly not be a new claim but an amendment. Further, if the taxpayer making a claim says that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so and will provide such further details as soon as possible, such further submission would not constitute a new claim but fall within the scope of the existing claim. Thus I consider that what is an amendment is very much a question of fact and degree, judged by the particular circumstances. I therefore respectfully agree with the test set out by the FTT in the first sentence of para 111. However, of the examples given in that paragraph, I would not wish to approve in the abstract the final example: that would be for consideration on the particular facts of the case should it arise.

34. It follows that I reject the submission of Mr Peacock that the crucial issue for determining this question is the relationship between Reed and HMRC and thus whether the later application relates to the same accounting period or periods; and that if the later application arises out of the same underlying error (i.e. here accounting for the whole of the sum received by Reed rather than just its commission) and the only difference is one of quantum the latter cannot be a new claim. I consider that there is no warrant for such a prescriptive requirement given the statutory language to which I have referred.

35. I should add that the fact that the 2009 Demand is drafted in the form of an amendment to the third repayment claim cannot serve to constitute it as such an amendment if in substance it is not.

36. Nor do I find the cases under the Limitation Act, on which Mr Peacock relied, of assistance. They are concerned with the question of what constitutes a "cause of action" for the purpose of what is now s. 35 of the Limitation Act 1980. Hence, s. 35(2) provides:

> "(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either-
>
> (a) the addition or substitution of a new cause of action; …"

37. What constitutes a distinct cause of action is of course the subject of much authority. But a claim in the ordinary sense as used in s. 80 VATA does not mean a cause of action, and is thus different from the special meaning of "claim" under the Limitation Act. As Auld LJ observed in *Lloyd's Bank plc v Rogers* [1999] 3 EGLR 83, at 85F, in a passage approved by the Court of Appeal in *Aldi Stores Ltd v Holmes Buildings PLC* [2003] EWCA Civ 1882, [2005] PNLR 9, at [21]:

> "It is important to note that what makes a 'new claim' as defined in s.35(2) is not the newness of the claim according to the type or quantum of remedy sought, but the newness of the cause of action that it involves. The formula employed in s.35(2)(a) and (5) is 'a claim involving … the addition or substitution of a new cause of action'. … Diplock L.J.s widely accepted definition of a cause of action in *Letang v Cooper* [1965] 1 Q.B. 232, CA, at pp.242-3, as 'simply a factual situation the existence of which entitles one party to obtain from the court a remedy against another person', as distinct from 'a form of action … used as a convenient and succinct description of a particular category of factual situation', is of importance. It makes plain that a claim and a cause of action are not the same thing."

38. Mr Peacock gave the example of a claim for a particular accounting period in respect of supplies in London, where the taxpayer subsequently wrote to ask for repayment in respect of supplies made for the same accounting period in the rest of England. However, in my judgment, unless there was some express reservation in the initial claim of the kind that I have indicated, the later request would clearly constitute a separate claim. So also if Reed initially sought to claim reimbursement of allegedly overpaid VAT only for its placement services in the healthcare sector, and subsequently made a demand for repayment as regards another part of its business, notwithstanding that this was for the same accounting period and arising out of the same error.

(b) Was the 2009 Demand an amendment of the third repayment claim?

39. The FTT held that it was not an amendment, applying the test to which I have referred. It relied in particular on its findings that the third repayment claim related to the irrecoverable sector whereas the 2009 Demand was for the recoverable sector.

40. On this appeal, Reed sought to challenge those findings. Mr Peacock suggested that they were inferences drawn from the facts, but in my view they were clearly factual findings set out in paras 9, 10 and 107.

41. On that basis, Mr Peacock sought to challenge those findings on *Edwards v Bairstow* grounds, i.e. that these were findings that no tribunal, properly directing itself, could reasonably make on the evidence. Ms Whipple submitted that this course was not open to Reed since it was not raised in its Grounds of Appeal. I see force in that objection. If a factual finding by the FTT is challenged, I consider that this should be clearly stated in the Grounds of Appeal.

42. However, it is unnecessary to reject that submission as inadmissible. Here, the reason why the FTT made those findings is that this is the way that the case was presented to it by Reed itself. Hence, in his opening of the appeal below, Mr Peacock explained the successive repayment claims made by Reed as follows:

> "…the three year cap was introduced in July 1996.
>
> That meant a number of things, but one of which was that the credit notes that Reed issued were limited to the period 1993 to 1996, and pursuant to those credit notes Reed recovered about £600,000 plus interest. Reed also claimed for 1991 to 1993, but only in respect of supplies that it made to clients who couldn't recover all of the VAT.
>
> Again just so we understand the debate, I'm going to call that the irrecoverable sector, as opposed to clients who could recover where they were the recoverable sector. So from 1991 to 1993 Reed claimed for the irrecoverable sector, but that at the time seemed to be barred by the cap.
>
> We know, though, that pursuant to litigation involving Marks & Spencer, that ultimately the cap was declared to be unlawful and once that was clear the Commissioners paid out for 1991 to 1993 and Reed recovered about £1.4 million plus interest.

> Once the cap had gone, there was then another period in which claims could be made for periods up to December 1996. Reed made a claim in June 2003 for the period April 1973 through to the end of 1990 for the irrecoverable sector. So at that point it was making the last claim to fill the last hole in its claims for the irrecoverable sector. That is the 2003 claim that is before you now, and it has been amended a couple of times, once up and once down, but it is now about £3.9 million plus interest.
>
> Reed then later claimed for the 1991 to 1996 period as regards the recoverable sector, and that is the 2009 claim, and they also -- this is in dispute, but they also amended the 2003 claim for the period 1973 to 1990 to add in the recoverable sector. One of the issues is: is that an amendment or is it a new claim?"

43. That is reflected in issue (b) of the Agreed Statement of Preliminary Issues formulated by the parties for the hearing below:

> "As regards the claim made by the Appellant on 17 June 2003 for the repayment of VAT overpaid on its introduction of workers *to exempt and partially exempt clients* in the period 1973 to 1990 ("the 2003 Claim"),
>
> i whether the Tribunal has jurisdiction to determine if the request for repayment, notified by the Appellant to HMRC on 27 March 2009, in relation to VAT that the Appellant asserts was overpaid on the introduction of workers *to fully taxable clients* in the period 1973-1990, was an amendment to the 2003 Claim (as the Appellant contends) or whether that question falls outside the Tribunal's jurisdiction (as the Commissioners contend);
>
> ii if the Tribunal decides that it has jurisdiction to determine the question set out in (b)(i), then whether the request for repayment, notified by the Appellant to HMRC on 27 March 2009, in relation to VAT that the Appellant asserts was overpaid on the introduction of workers *to fully taxable clients* in the period 1973-1990, should proceed as an amendment to the 2003 claim (as the Appellant contends), or whether it should proceed as a new claim (as the Commissioners contend)." [emphasis added]

44. In those circumstances, the FTT understandably did not need to consider the evidence and whether that would support this factual description of the various claims and demands. The *Edwards v Bairstow* challenge to those findings amounts in effect to a submission by Reed that no reasonable tribunal could or should properly have accepted its own description of the subject-matter of its repayment demands. That argument is, frankly, hopeless and it is somewhat surprising that it was advanced at all.

45. Not only was the FTT therefore fully entitled to make those findings, but I would add that they were manifestly correct. I was taken to the detailed computation of the third repayment claim and the 2009 Demand. It is significant to observe at the outset that the third repayment claim was a claim for a little over £4 million (plus interest) and the 2009 Demand sought payment of a further sum of close to £64 million (plus interest). Since both applications were prepared for Reed by Price Waterhouse Coopers ("PWC"), that huge difference in amount suggests that unless there had been serious incompetence by PWC in the preparation of the third repayment claim, the 2009 Demand is unlikely to be simply an amendment to the earlier figure but something fundamentally different.

46. The second repayment claim had been prepared on behalf of Reed by Robson Rhodes and was clearly concerned with the irrecoverable sector in the years 1991-1993. See Robson Rhodes' letter of 8 July 2002 pursuing that claim which had been submitted on 15 January 1997, which stated:

> "Please note that the claim is only in respect of VAT overpaid on supplies to clients who could not recover part, or all, of the VAT at the time".

It is apparent from the detailed schedules which had accompanied that claim that it concerned mostly supplies to clients in the financial services, education and charity sectors and the Post Office.

47. The third repayment claim covered the years 1973-1990. Reed did not have in 2003 when it made this claim records going back over that period showing the split of charges to its clients as between the recoverable and irrecoverable sectors. Thus it had to extrapolate the latter element from the total figures for its charges for each year. PWC conducted this exercise on its behalf, and their methodology was to take the period of almost three years covered by the *second* repayment claim, for which Reed had made claims based on its credit notes to clients, and calculate the quantum of all temporary wages paid by Reed that this represented in each of those years. Those figures were used to calculate the percentage of Reed's total recruitment business turnover in each of those three years which those wages represented. The average of those three figures (3.22%) was then applied to the turnover for each year that was the subject of the third repayment claim (derived from Reed's accounts). On that basis, the VAT paid on that element of the turnover could readily be calculated.

48. Thus PWC on behalf of Reed were manifestly seeking to estimate the proportions in the years 1973-1990 accounted for by the irrecoverable sector. That is confirmed by PWC's own explanation of their method which accompanied the claim. Reed had data for more recent years showing the proportions attributable to the irrecoverable sector. The reason for not using those figures to estimate the share in 1973-1990 was explained by PWC as follows:

> "… it is considered that based on the data Reed do have, that the percentage of their business related to the Financial Services Sector, in particular, has significantly increased over the past six years and to include these years would distort the basis periods."

In other words, to have used more recent years would have shown a higher proportion for the irrecoverable sector and thus would not provide a fair proxy in estimating the share over the earlier period. In short, PWC were seeking responsibly to get a fair estimate for the irrecoverable sector in the earlier years, since the actual figures were not available.

49. I should add that a correction was subsequently submitted by PWC as regards the third repayment claim. This arose from calculation errors in the application of the methodology to the figures, and resulted in revision of the percentage from 3.22% to 3.6%. That was indeed an amendment to the earlier claim as it corrected computing mistakes. Although it was submitted to HMRC only in March 2009 and led to an increase in the total claimed, it was accepted as a true amendment.

50. Ms Whipple submitted that there is good reason why Reed had sought in 2003 to include only the irrecoverable sector: at the time there was an unjust enrichment defence in the statute and no one anticipated that it would be annulled five years later by the ECJ. I have little doubt that this is correct. Reed, and PWC on its behalf, would naturally have sought to calculate the maximum amount of reimbursement for which it could claim, and there is no other apparent reason for the claim to have been limited in this way. That is supported by Reed's Grounds of Appeal which state (at para 9): "Reed was unaware at the time of making the 2003 Claim that there was no valid defence of unjust enrichment to such a claim."

51. Once the ECJ gave its judgment in *M&S 2*, and the defence of unjust enrichment was effectively annulled for claims submitted before 26 May 2005, Reed put in the 2009 Demand covering the rest of its temporary placement business, i.e. the recoverable sector. But as a new claim could be expected to be met by an unjust enrichment defence, Reed sought to present the 2009 Demand not as a new claim but an amendment to the third repayment claim.

52. However, applying the test set out above, the 2009 Demand covering the much larger recoverable sector, and thus seeking a further sum of close to £64

million, cannot be viewed as an amendment to the third repayment claim made in 2003 for the irrecoverable sector in an amount now calculated at just under £4 million. It was a new claim, covering supplies to a different category of clients (i.e. those not wholly or partially exempt from VAT) who had been consciously excluded from the 2003 Claim.

THE UNJUST ENRICHMENT ISSUE

53. The unjust enrichment defence is provided by s. 80(3) VATA, set out in para 22 above. Reed contends that the way this defence was introduced, in the light of *M&S 2* and the previous three-year cap held to be unlawful in *M&S 1*, means that it contravenes fundamental principles of EU law and must be disapplied (either as regards claims with the chronological features of Reed's claims at issue or generally).

54. Reed's case is based on the fact that if it had submitted the claims which constituted the 2009 Demand (in the light of my holding on the Amendment Issue) and the 2009 Claim not in 2009 but before 26 May 2005, then HMRC would have had no unjust enrichment defence. Those two claims related, respectively, to the periods 1973-1990 and 1991-1995. But it was the three-year cap, implemented from December 1996, that prevented Reed from making such claims at the time. The government only accepted after the *Fleming* judgment in 2008 that the three-year cap could not apply to claims for the recovery of VAT overpaid prior to December 1996. Accordingly, it was only then that Reed prepared and submitted these two claims. As noted above, by s. 121 of the Finance Act 2008, Parliament legislated to provide that that three-year cap did not apply to claims made before 1 April 2009 and in respect of accounting periods ended before 4 December 1996. The 2009 Demand and 2009 Claim were submitted within that time limit.

55. The amendments to s. 80 VATA, to correct what was found by the ECJ in *M&S 2* to constitute an infringement and substitute a compliant unjust enrichment defence, were made by s. 3 of the Finance (No. 2) Act 2005, and s. 4(6) of that Act provides:

> "The amendments made by section 3 … have effect in any case where a claim under section 80(2) of VATA 1994 is made on or after 26th May 2005, whenever the event occurred in respect of which the claim is made."

56. Reed contends that reliance on the unjust enrichment defence in response to its claims breaches the EU law principle of effectiveness; and that the manner in which the defence was introduced breaches the EU law principles of equal treatment and fiscal neutrality.

(a) The principle of effectiveness

57. The principle of effectiveness provides that national rules must not render virtually impossible or excessively difficult the exercise of rights conferred by EU law: see, e.g., *M&S 1* at para 34.

58. Reed emphasises that it does not challenge an unjust enrichment defence as a matter of principle, or indeed assert a right to be unjustly enriched. Moreover, it accepts that such a defence can be retroactive.

59. As regards retrospectivity, Case C-147/01 *Weber's Wine World* [2003] ECR I-11365 is significant. The case concerned an Austrian rule introduced to restrict reimbursement of taxes wrongly levied, following an earlier judgment of the ECJ holding that certain local and regional taxes in Austria were prohibited by the Excise Duty Directive 92/12. In his Opinion, Jacobs AG said this:

> "63. In the context of national rules concerning the recovery of charges unduly levied, the Court has held that, where it has declared a charge to be contrary to Community law, the Member State in question is not precluded from adopting new conditions applying to its reimbursement, such as a shorter time-limit, provided that the principles of equivalence and effectiveness are observed.[3]
>
> ...
>
> 66. A national rule which does no more than preclude unjust enrichment is compatible with Community law.
>
> 67. Where such a rule applies to claims in respect of situations which arose before its enactment, that effect does not seem to me incompatible with Community law. On the one hand, in so far as it seeks to preclude unjust enrichment, it in fact precludes only enrichment which would have occurred after its enactment, provided that there is no provision for recovery of any amount already reimbursed. On the other hand, there can in any event be no legitimate expectation of any such enrichment, since the very concept of legitimacy cannot embrace what is unjust.
>
> 68. It is true that in other circumstances a retroactive effect may fall foul of the principle of effectiveness: in *Marks & Spencer* (para 35 et seq) and *Grundig Italiana* (para 34 et seq), for example (to cite only the most recent cases), the Court has indicated that a retroactive reduction of the period within which reimbursement may be claimed is incompatible with the principle of effectiveness if, in the absence of adequate transitional provisions, it deprives some individuals of their right

[3] See the judgment in the *Dilexport* case (para 43) and para (2) of the operative part of the judgment.

> to reimbursement or allows them too short a period in which to assert that right.
>
> 69. Here, by contrast, since Community law does not require a right to reimbursement at all where unjust enrichment would ensue, the fact that, following a change to national law, a claim which might previously have succeeded can on that ground no longer succeed has no impact on the effectiveness of a right conferred by Community law."

60. The ECJ broadly followed the views of Jacobs AG. It said, at para 92:

> " It must be concluded on this point, therefore, that the adoption by a Member State of rules which retroactively restrict the right to repayment of a sum levied but not due, in order to forestall the possible effects of a judgment of the Court holding that Community law precludes the maintenance of a national duty, is contrary to Community law and, more particularly, to Article 10 EC *only in so far as it is aimed specifically at that duty*, a point which falls to be determined by the national court. Accordingly, the fact that such a measure has retroactive effect does not in itself amount to an infringement of Community law, where the measure is not aimed specifically at the duty which formed the subject-matter of a judgment of the Court." [emphasis added]

61. And the Court continued, specifically on the question of unjust enrichment:

> "93. The Court has consistently held that individuals are entitled to obtain repayment of charges levied in a Member State in breach of Community provisions. That right is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court. The Member State in question is therefore required, in principle, to repay charges levied in breach of Community law (see, in particular, *Comateb and Others*, cited above, paragraph 20; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 84; and *Marks & Spencer*, paragraph 30).
>
> 94. According to the case-law, there is only one exception to that obligation to make repayment. A Member State may resist repayment to the trader of a charge levied though not due only where it is established by the national authorities that the charge has been borne in its entirety by someone other than the

> taxable person and that reimbursement of the charge would constitute unjust enrichment of the latter. It follows that, if the burden of the charge has been passed on only in part, the national authorities are required to repay the amount not passed on …."

62. The Court held that the mere fact that the trader has passed on the charge is not sufficient to establish unjust enrichment per se: the degree of unjust enrichment must be established following economic analysis, taking account of all the relevant circumstances: paras 100-102. Thus there can be no presumption of unjust enrichment from a passing on of the charge, or imposition of a burden of proof on the trader to show that he was not unjustly enriched. Such rules would offend against the principle of effectiveness: judgment at paras 109-114. But the judgment makes clear that an unjust enrichment defence which does not have those conditions does not violate the principle of effectiveness although it applies retrospectively, i.e. to claims in respect of periods before the defence was enacted.

63. Therefore in the present case, Reed has the right as a matter of EU law to obtain repayment of overpaid VAT subject to an unjust enrichment defence that has been properly introduced into UK law. Reed's claims were made in 2009, at the time when there was a valid unjust enrichment defence and it is the subsequent payment of those claims which could cause Reed to be unjustly enriched (see in that regard *M&S 2* at para 52). Reed's EU law right is not the right to be put back in the position that it would have been in while the invalid three-year cap was in force when there was no valid unjust enrichment defence.

64. Once Reed's EU law right is properly characterised, it is clear that it is no violation of the principle of effectiveness that an unjust enrichment defence can apply to these claims made in 2009 that relate to the years 1973-1995. Thus I respectfully agree with the FTT when it stated, at para 134:

> "Although in *Marks & Spencer 2* the fact that Marks & Spencer had been unjustly enriched did not prevent the then s 80 being found to have infringed EU law, that was not because there existed any right to repayment unqualified by a valid defence of unjust enrichment. It was solely that the defence under the then s 80 offended against the principles of equal treatment and fiscal neutrality. Once that infringement was remedied by the 2005 Act, there was, in our view, no longer scope for Reed to assert any unqualified right in respect of a claim made on or after 26 May 2005."

(b) The principle of equal treatment

65. Mr Peacock relied on the fact that whether or not an unjust enrichment defence was available to HMRC in respect of a claim to recover for overpaid tax for a period prior to 26 May 2005 depended on when the claim was made. If it was submitted before 26 May 2005, there was no unjust enrichment defence, whereas if it was submitted afterwards there was. Hence if a competitor of Reed had made such a claim before the critical date, it might be in a better position than Reed which put in its claims only in 2009.

66. However, it follows from the fact that an unjust enrichment defence can lawfully be introduced with retrospective effect, as the ECJ found in *Weber's Wine World*, that those who claimed and were paid before the defence was enacted will be in a better position than those who only claim afterwards. But this does not constitute unequal treatment. As the ECJ stated in *M&S 2* at para 52:

> "The fact that a trader benefits from unjust enrichment is unrelated to the position of that trader vis-à-vis the tax authorities before repayment of the VAT, as the unjust enrichment stems, when it occurs, from the refund itself, and not from that trader's previous situation as a creditor or debtor vis-à-vis the tax authorities."

67. Furthermore, there is no violation of this principle just because, as between competitors, one who submits a claim for reimbursement or compensation in respect of a particular period may be in a better legal position than another who submits his claim in respect of the same period only several years later. That is inherent in the concept of a limitation period, which, if properly introduced, has never been held to contravene the principle of equal treatment.

68. As Ms Whipple pointed out, if Reed's contention was correct, it would mean that as between two traders who both claimed repayment in 2009, the one whose claim related to a period after 26 May 2005 would be subject to an unjust enrichment defence whereas the other whose claim related to an earlier period would not. That distinction could indeed amount to unequal treatment.

(c) The principle of fiscal neutrality

69. Reed does not appear to have placed reliance on this as a distinct principle before the FTT and it therefore receives no separate consideration in the Decision. But it was the subject of sustained argument on this appeal.

70. The principle of fiscal neutrality is in a sense a sub-set or reflection in the sphere of VAT of the more general principle of equal treatment: see *M&S 2* at para 49. As explained by Kokott AG in her Opinion in that case, it requires that in application of the VAT regime supplies of similar, and thus competing, products must be treated in the same way. The principle is therefore relevant

both at the time of imposition of VAT on supply and at the time of any refund of VAT: Opinion at paras 57-60.

71. Since I have found that there was no infringement of the more general principle of equal treatment, it follows that there was no infringement of the principle of fiscal neutrality. Moreover, the latter involves a further consideration. To establish infringement of fiscal neutrality, there must be a comparator who has been more favourably treated. Hence in *M&S 2*, Marks & Spencer, which was a payment trader, could point to another trader engaged in the supply of teacakes that was its competitor (Tesco) and as a repayment trader did not face an unjust enrichment defence: Opinion of Kokott AG at para 55. The Advocate General proceeded to explain that the evidential burden on the taxpayer is not high, but some evidence is required:

> "62. Infringement of the principle of neutrality is established if the zero-rating was applied from the outset to the supply of teacakes by other traders whereas corresponding supplies by Marks & Spencer were taxed at the standard rate. The infringement is also established if, in contrast to Marks & Spencer, other traders subsequently obtained a refund of the VAT as a consequence of the reappraisal of the relevant supplies, but no recourse was had to the defence of enrichment. The burden of proof does not call for any further-reaching economic disadvantage. After all, the different tax treatment of similar transactions is sufficient indication that competition has been distorted.
>
> 63. Since the tax authority alone has the information necessary for establishing conclusively whether the principle of neutrality has been infringed as a result of a specific administrative practice, only a limited burden to provide information can be imposed on the taxable person concerned. It should normally be sufficient for the party concerned to name other traders which supply comparable products and which may have benefited from more favourable tax treatment. It will then fall to the tax authority to provide information on the tax which those other traders have actually been charged."

72. Realistically, an unjust enrichment defence would only apply when a claim is made in respect of the recoverable sector of a recruitment business. Just as Reed, no doubt advised by PWC, limited its claim in 2003 to the irrecoverable sector, I expect that Reed's competitors would have framed their claims on the same basis. It seems inherently unlikely that they would at that time have sought to claim for the recoverable sector. But it is unnecessary to speculate. No evidence whatever was advanced regarding a competitor of Reed who it is suggested made or may have made such a claim and thus may have been

unfairly advantaged (or in comparison to whom Reed was unfairly disadvantaged) if an unjust enrichment defence could be applied to Reed's claims for the recoverable sector as set out in the 2009 Demand and the 2009 Claim. I acknowledge the point made forcefully by Mr Peacock that HMRC are in a much better position than Reed to know what claims were made. From the judgment in *M&S 2,* it is not clear to me that the ECJ was altogether endorsing the evidential approach of the Advocate General that I have quoted. Nonetheless, the ECJ states that to determine if the principle of fiscal neutrality was infringed requires the national court to decide as a matter of fact whether competitors were placed in a better position: judgment at para 54. Here, the factual position in this regard was not explored in the hearing below, and therefore no such factual finding was made, because no particular argument on the grounds of fiscal neutrality was advanced.

73. Thus the challenge on the basis of the principle of fiscal neutrality fails.

REFERENCE TO THE ECJ

74. In the FTT, neither party sought a reference to the ECJ for a preliminary ruling.[4] On this appeal, Reed submitted that if there was a serious question as regards the Unjust Enrichment Issue that was not *acte clair*, the Upper Tribunal should made a reference. The test of *acte clair* of course is not determinative as regards a reference at this level of the judicial hierarchy. However, I consider that this issue falls to be resolved on the basis of the existing jurisprudence of the ECJ in *M&S 1* and *M&S 2*, supplemented by *Weber's Wine World*. I regard the position as clear, and there is no need for a yet further reference as regards the United Kingdom's implementation of a statutory regime governing repayment of overpaid VAT.

CONCLUSION

75. For the reasons set out above, this appeal is dismissed.

MR JUSTICE ROTH
UPPER TRIBUNAL JUDGE
RELEASE DATE: 28 FEBRUARY 2013

[4] Reed's skeleton argument before the FTT did invite a reference, but I was told that this was not pursued at the hearing.