Neutral Citation Number: [2009] UKUT 175 (TCC)

Appeal numbers LON/06/0069
LON/06/0067, LON/06/0094
LON/06/0096, LON/08/1101

VALUE ADDED TAX — tax paid in accordance with domestic law provisions later found to be incompatible with Sixth Directive — tax repaid to trader with simple interest — VATA 1994 s 78, FA 1996 s 197, APD etc (Interest Rate) Regs 1998 — whether sufficient remedy — whether tribunal able to interpret statutory scheme so as to award compound interest — no

PRACTICE — whether appeal brought in time — nature of decision founding jurisdiction — appeals out of time — whether time should be extended — no

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JOHN WILKINS (MOTOR ENGINEERS) LIMITED
JOHN PUDNEY LIMITED trading as Horsham Car Care
SQUIRE FURNEAUX GROUP
ROBMAR LIMITED trading as Worthing Kia
LOOKERS plc

Appellants

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: The President, Mr Justice Warren
Judge Colin Bishopp

Sitting in public in London on 8 to 11 June 2009

Michael Conlon QC and Nicola Shaw, counsel, instructed by McGrigors, for the first to fourth appellants

Laurence Rabinowitz QC, James Henderson and David Yates, counsel, instructed by Deloitte LLP, for the fifth appellant

Jonathan Swift, Peter Mantle and Philip Woolfe, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

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DECISION

Introduction

1. These are the joined appeals, all raising the same issues, of five unconnected appellants. They were brought to the VAT and Duties Tribunal and joined, so that they could proceed and be heard together, by direction of that tribunal. Several appeals by other traders have been stood over, by direction, to await the outcome of these appeals. On 1 April 2009 the VAT and Duties Tribunal ceased to exist, and the appeals came within the jurisdiction of the Tax Chamber of the First-tier Tribunal. They were then allocated to the complex category in accordance with r 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, following which a direction was made, pursuant to r 28 of those rules, that the appeals be transferred to and determined by the Upper Tribunal. They became the first appeals to be heard in the Finance and Tax Chamber (now re-named the Tax and Chancery Chamber) of the Upper Tribunal.

2. The five appellants all carry, or carried, on business as motor dealers. The fifth appellant, Lookers plc, is the representative member of a VAT group which includes many subsidiaries trading at locations throughout the United Kingdom; at the other extreme are some of the remaining appellants, each with a single outlet. There are other differences of detail between the appellants, but they have two features in common: that they paid excess output tax on bonus payments made to them by motor manufacturers, and that they paid further excess output tax on the sales of demonstrator vehicles they had used for the purposes of their businesses.

3. The excess tax was exacted because, as is now accepted by the Commissioners the United Kingdom failed to implement provisions of the Sixth VAT Directive (77/388/EEC) correctly (at least, from 1 January 1978 when the directive came into force). It wrongly treated bonus payments as the consideration for a supply of services rather than, as arts 11A(1)(a) and 11C(1) of the Sixth Directive required, as a discount from the price paid by the dealer to the manufacturer. By the operation of the VAT (Input Tax) Order 1992, art 7 and its predecessor equivalents, as they were then in force, input tax credit on the purchase of demonstrator cars was blocked, but dealers were required to account for output tax on the profit, if any, they made on the eventual sales of the vehicles. The sales should instead have been treated as wholly exempt.

4. The Commissioners accepted, following the judgments of the Court of Justice ("ECJ") in *Elida Gibbs v Customs and Excise Commissioners* (Case C-317/94) [1996] STC 1387 ("*Elida Gibbs*") and *EC Commission v Italian Republic* (Case C-45/95) [1997] STC 1062 ("*Italian Republic*"), that the UK's tax treatment of bonuses and demonstrator car sales respectively had been wrong and that the appellants had paid excess tax from as early as 1973, when VAT was introduced in the UK. Eventually, though not until litigation about the introduction of the three-year cap for the making of repayment claims had run its course, they repaid the excess tax to the appellants. The amounts so paid are not disputed. The Commissioners also paid simple interest on the capital sums.

5. The appellants argue, however, that simple interest is not sufficient recompense and that the Commissioners should instead pay, in addition to the tax itself, a sum which, whether as a matter of principle **or** of practical convenience,

is calculated as compound interest. They rely particularly on what was said by the ECJ in *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* (Case C-446/04) [2007] STC 326 ("*FII*"), by the House of Lords in *Sempra Metals Ltd v Revenue and Customs Commissioners* [2008] 1 AC 561, (2007) STC 1559 ("*Sempra Metals*") and by Henderson J in *F J Chalke Ltd and another v Revenue and Customs Commissioners* (also known as *Test Claimants in the VIC Group Litigation*) [2009] EWHC 952 (Ch) ("*Chalke*"), cases to which we shall make many further references. The last of those cases was an attempt by several motor dealers, including some of the present appellants, to recover compound interest by means of a restitutionary claim; the attempt failed as the claims were found to be defeated by a limitation defence.

6. It is common ground that the only legislative provisions relating to the payment of interest by the Commissioners to a trader are now to be found in ss 78 and 85A of the Value Added Tax Act 1994 (the "1994 Act"). Section 84(8), a provision which allowed the tribunal to award interest in some circumstances, was repealed with effect from 1 April 2009 but would not have been of any application in these cases. Section 85A, added by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, Sch 1 para 223, is also of no application. Section 78 has been amended in consequence of the three-year cap litigation, though the amendment is not material here. Subsection (1) provides that

> "Where, due to an error on the part of the Commissioners, a person has—
>
> (*a*) accounted to them for an amount by way of output tax which was not output tax due from him …
>
> then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period …".

7. There is no dispute that the UK's failure to implement the Sixth Directive correctly is to be treated as "an error on the part of the Commissioners" for the purposes of that subsection. The "applicable period" is defined by sub-ss (4) and (5) as the period from the date of payment of the excess output tax to the date on which repayment of it is authorised. Section 78(3) states that "Interest under this section shall be payable at the rate applicable under section 197 of the Finance Act 1996" which in turn, by sub-s (1), provides that

> "The rate of interest applicable for the purposes of an enactment to which this section applies shall be the rate which for the purposes of that enactment is provided for by regulations made by the Treasury under this section."

8. Section 78 of the 1994 Act is among the enactments to which the section applies: see s 197(2)(*c*). The regulations referred to in sub-s (1) are the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998 (the "1998 Regulations"). The 1998 Regulations, as their name indicates, apply to several different types of tax and duty, and prescribe the rates of interest payable both to and by the Commissioners. They include tables setting out the applicable rates of interest for periods falling between specified dates; table 7 sets out the rates of interest which are payable for the purposes of s 78, for periods beginning with the introduction of VAT on 1 April 1973 and ending on 6 July 1998, after which date a different formula was adopted. The percentage rates so prescribed

are, in themselves, of no present importance. What is important is that none of s 78, s 197 of the Finance Act 1996 ("FA 1996") or the regulations qualify the word "interest" with "simple" or "compound", or any other adjective.

9. The appellants' case is that the tribunal should interpret those provisions, or one of them, so as to require the Commissioners to pay the compound interest to which they say they are entitled. The Commissioners argue that, while the appellants may, as a matter of principle, be entitled to more than simple interest, or at least something which is not calculated as simple interest, it is not possible so to interpret the statutory provisions as providing for something other than simple interest.

10. Before dealing with the parties' arguments on those issues we are required to determine some preliminary matters. One argument which had been pursued by the Commissioners, that the appellants were seeking relief beyond the tribunal's jurisdiction, can be disposed of quickly since it became apparent by the time of the hearing that there was in reality little or nothing between the parties. It is sufficient to record that, despite some apparent ambiguity in their notices of appeal, none of the appellants asked us to stray outside the confines of s 83(1)(*s*) of the 1994 Act, which enables us to adjudicate on "any liability of the Commissioners to pay interest under section 78 or the amount of interest so payable". Second, the Commissioners argue that all the appeals were brought after the relevant time limit had expired. The appellants say that their appeals are in time; but that if we find otherwise we should extend their time for appealing, a course which the Commissioners oppose.

Chronology

11. It is necessary to begin with the chronology. The details of it differ from one appellant to another, but the differences are of little lasting significance. The following outline is derived from the agreed statements of facts in each case; we heard no evidence.

12. The appellants have been registered for value added tax at all material times. As we have related above, they accounted for VAT on their bonus payments and demonstrator cars as they were, or believed they were, required by UK law to do. On 18 July 1996 the government announced in Parliament that the time limit for making a claim for overpaid VAT in accordance with s 80 of the 1994 Act was to be reduced, with immediate effect, to three years (in place of what had hitherto been a limit of six years from discovery of the mistake which led to the overpayment). On 4 December 1996 the House of Commons passed a resolution in accordance with the Provisional Collection of Taxes Act 1978 which gave, or purported to give, statutory effect to the announcement of 18 July 1996. The Finance Act 1997 translated the resolution into an amendment of s 80, deemed to have been in force since 18 July 1996, and applicable to any claim which had not already been made by that date.

13. In the meantime, on 24 October 1996 the ECJ delivered its judgment in *Elida Gibbs*. It then became apparent that the appellants had overpaid VAT on the bonus payments for many years. On 25 June 1997 the ECJ delivered its judgment in the *Italian Republic* case, and the appellants learnt that they also had or, but for

the reduced time limit would have had, claims for the repayment of further overpaid VAT. Although numerous attempts were made by various traders, including motor dealers, to overcome the new time limit in order to make claims for the repayment of tax overpaid long in the past, the measure of success was at first very limited.

14. However, on 11 July 2002 the ECJ delivered its judgment in *Marks & Spencer plc v Customs and Excise Commissioners* (Case C-62/00) [2002] ECR I-6325, [2002] STC 1036 ("*Marks & Spencer*"), ruling that, by reason of the manner in which the three-year period had been introduced (that is, without sufficient transitional arrangements), it was incompatible with the Community law principles of effectiveness and of legitimate expectation. Following that judgment, and recognising that they could not apply the three-year time limit without some provision for transitional cases, the Commissioners published Business Briefs setting out the circumstances in which they would accept claims which would otherwise have been time-barred. The combined effect of the *Marks & Spencer* judgment and the Commissioners' new policy was that there was no time limit to the appellants' claims, which covered the entire period from 1973 to correction of the incorrect UK treatment of bonus payments and demonstrator cars in 1996 or 1997.

15. On various dates in May and June 2003 the appellants' representatives submitted claims to HMRC for repayment of the VAT which had been paid in excess of the amount which was properly due. A claim had already been made by the first appellant's accountants, but it had not been accepted because, until the delivery of the ECJ's judgment in *Marks & Spencer*, the Commissioners believed it was time-barred. The first four appellants had the same representatives whose letters of claim, in very similar form, for repayment of the capital sums included a request that "statutory interest is paid to my client". The fifth appellant's representatives wrote, in June 2003, to make the claim for payment of the capital sum and ended with a "request that our client is paid statutory interest". None of the requests was otherwise qualified.

16. Not surprisingly, some of the appellants' relevant records had been destroyed and some estimation and negotiation of the claims was necessary. The capital sums claimed were paid, in some cases after supplementary claims had been made, and in others not until disputes between the parties on the capital sums had been resolved, on various dates between August 2003 and January 2005. The capital sums due are no longer in issue.

17. On 2 September 2003, the first appellant received an interest calculation from the Commissioners showing £18,936.66 as due; it represented simple interest over a certain period. This amount was paid on or about 3 October 2003. **I**n fact, the interest had been calculated over too short a period, and in a letter also dated 2 September 2003 the first appellant questioned the arithmetic of the payment and asked for "the interest to be recalculated for the original claim compounded from 1973". A second payment was made on 12 December 2003; the document which accompanied it referred to "Statutory interest….under VAT Act Section 78" and said nothing about compounding. It is common ground that the interest represented by the two payments was calculated using the rates

prescribed by the 1998 Regulations, without compounding. Despite the earlier request for compound interest and the absence of any response to it, the second payment was accepted without immediate comment.

18. The remaining appellants received interest, also calculated at the statutory rates without compounding. The second appellant's claim for capital and interest was made on 23 June 2003 and the payment on 2 April 2004; the third appellant's claim on 29 May 2003 and the payment on 18 February 2005; the fourth appellant's on 28 May 2003 and 19 January 2005 respectively. The fifth appellant's claim was made on 27 June 2003 and payments of interest were made to it in August 2004 and on 24 January 2005. None of the accompanying letters, which appear to have been in a standard form, included any explicit comment about whether the interest had been calculated on a simple or compound basis, but the accompanying calculations made it clear that it was the former. In each case the payment was accepted, again without immediate comment.

19. On 3 August 2005—and therefore nearly 20 months after it had received the second interest payment—the first appellant wrote again to the Commissioners. It had noticed what it thought was an arithmetical error in the calculation of the capital sum due, which is of no present importance, but its letter went on to remind the Commissioners of its letter of 2 September 2003, and the request contained in it that the interest due be compounded, noting that interest had not in fact been compounded. It also referred to "a recent tax case (*Sempra Metals*) in the European Court of Justice" in which "it was decided that it was appropriate to award compound interest in the case of official error". Judgment in that case (under the name *Metallgesellschaft Ltd and others v Inland Revenue Commissioners and Attorney General* (Joined Cases C-397/98 and C-410/98) [2001] STC 452) ("*Hoechst*") had in fact been delivered in March 2001, rather more than four years earlier.

20. The Commissioners replied promptly, on 16 August 2005. The letter acknowledged that the Court of Appeal had agreed in principle, in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2005] STC 687 (it seems probable that the first appellant's reference to the ECJ decision should have been to the Court of Appeal's judgment) "that compound interest should be paid in certain circumstances" but added that "at present UK domestic law does not permit the award of compound interest" which they would, accordingly, not pay.

21. The first appellant's representatives continued to correspond with the Commissioners about the matter until December 2005, neither side changing its position. The correspondence included a letter from the Commissioners of 16 August 2005 firmly rejecting the claim, followed by a request, of 14 September 2005, for a "formal independent reconsideration of the Commissioners decision not [to] pay compound interest to our client" which led to a reply, simply re-stating the Commissioners' position, on 14 December 2005. This appeal was commenced on 9 January 2006. The disputed decision was identified as the letter of 14 December 2005.

22. The other appellants also made claims for compound interest some months after they had accepted the payments of simple interest, and each ultimately

received a letter in similar vein to that sent to the first appellant on 14 December 2005. The second to third appellants made their claims in October and November 2005 and received their letters in December 2005; they served notices of appeal on 9 or 11 January 2006. The fifth appellant did not make its claim until 25 April 2006, received a letter of refusal dated 9 May 2006 and served its notice of appeal on 8 June 2006. All those appellants, too, identified the letters of refusal they had recently received as the disputed decision.

Whether the appeals were in time

23. The time limit for the bringing of an appeal to the VAT and Duties Tribunal, to which these appeals were made and before which they were pending until that tribunal's abolition on 1 April 2009, was prescribed by r 4(1) of the Value Added Tax Tribunals Rules 1986, as amended, as "the expiration of 30 days after the date of the document containing the disputed decision of the Commissioners". The time limit, of the same period, is now at s 83G(1)(*a*)(i) of the 1994 Act, introduced by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, Sch 1 para 220. A "disputed decision" was defined, uncontroversially but unhelpfully, by r 2 as "the decision of the Commissioners against which an appellant or intending appellant appeals or desires to appeal to a tribunal". It is, however, trite law that such a decision must be of a character which engages the tribunal's jurisdiction, first, by falling within one of the paragraphs of what is now sub-s 83(1) of the 1994 Act and, second, by amounting to a decision in the ordinary sense of that word (rather than, for example, an expression of opinion or an answer to a hypothetical question).

24. It is common ground that if, as the appellants maintain, the disputed decisions were those identified in their notices of appeal, the appeals were in time. There is some disagreement about whether, in the first appellant's case, the disputed decision is that set out in the letter of 16 August 2005 (in which case its appeal was out of time) or 14 December 2005; for present purposes we assume the latter since, as will become clear, the point is of no more than academic interest. The Commissioners' argument is that the decisions which are now disputed are contained in the letters or other communications by which they notified the appellants that they had agreed to pay the "statutory interest" which had been asked for, and set out their calculation of the amount due, from which it could be readily ascertained that only simple interest was being paid. If that argument is right, the appeals were brought between, at one extreme, about 10 months and, at the other, just over two years out of time.

25. Michael Conlon QC, for the first to fourth appellants, argued that a decision to pay simple interest could not be construed as a decision not to pay compound interest. He referred us to an observation of Henderson J in *Chalke*, at 149:

> "I will begin with the Commissioners' second point, because it is in my opinion plainly correct. The payment by the Commissioners of each uncapped claim was a payment in respect of the claimant's right to repayment under section 80, no more and no less. It cannot be treated as a payment which was made in respect of, or which somehow recognised or acknowledged, the non-statutory common law restitutionary right to

> compound interest which the claimant now seeks to establish in the present action."

26. In the same way, Mr Conlon said, the payment of simple interest did not address the question whether compound interest should be paid; the point was not in issue at all at that stage. The appellants had not known that compound interest might be available to them until they became aware of the Court of Appeal's decision in *Sempra Metals*, they had only then asked for compound interest, and they had only then received decisions denying those claims.

27. There is nothing in s 78 which precludes the making of more than one claim. There had been a request for "interest", or "statutory interest", based on what was then understood to be the taxpayer's entitlement, followed by a second claim when it became clear that the earlier understanding was incorrect. The second claims, expressly for compound interest, had been made within the time limit for the making of such claims, fixed by s 78(6) and (11) at three years from the date on which the Commissioners authorised payment of the capital sums. The argument that the appeals against refusals to pay compound interest were out of time because the Commissioners had met an entirely different claim some time earlier could not be correct.

28. For the fifth appellant Laurence Rabinowitz QC relied on what was said about decisions which were the subject of an appeal in the VAT and Duties Tribunal (Mr Theodore Wallace) in *Olympia Technology Ltd v Revenue and Customs Commissioners* (2006, Decision 19984) ("*Olympia Technology*") at paragraph 12:

> "In my judgment in order for the Tribunal to have jurisdiction there must be an issue between the parties which has been sufficiently crystallised to constitute a decision falling within one of the paragraphs of section 83. Such [a] decision will normally be in writing and be clearly expressed as a decision subject to appeal whether or not the word decision is used."

29. The letter which accompanied, or preceded, the payment of simple interest to the fifth appellant could not be regarded as a decision at all. It said that "we have now calculated the statutory interest due under s 78 of the 1994 Act to be £9,157,928.41" and provided details of the calculation. There was, to adopt the term used in *Olympia Technology*, no crystallised issue which could constitute a decision; the letter amounted to no more than a notification of the amount of "statutory interest" (at that time understood on both sides to be no more than simple interest) which was to be paid. It did not identify itself as a decision, said nothing about the basis of calculation (that is, whether simple or compound interest was being paid) and did not indicate that the recipient could, if aggrieved, appeal to the tribunal. Time should not be found to have started to run against a person until he might reasonably know that this was the case, a proposition for which Mr Rabinowitz relied on *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 767G, *per* Lord Steyn, and *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm) at 10, *per* Gloster J.

30. By contrast, the letter of 9 May 2006 which immediately preceded the fifth appellant's notice of appeal addressed for the first time the specific claim for compound interest which had not even been made until April 2006, was reasoned,

and contained no contention that the earlier notifications were decisions about the payment of compound interest, or indeed decisions at all. That letter plainly did contain a decision of a kind which could form the basis of an appeal to the tribunal, and it had prompted the present appeal.

31. The Commissioners' response, as it was put by Jonathan Swift of counsel, was that the appellants' arguments did not address the limited nature of the tribunal's jurisdiction. When the appeals were brought, its jurisdiction was governed by s 83 of the 1994 Act and the Value Added Tax Tribunals Rules 1986. Although the Act has since been amended and the rules have been replaced the underlying principles are unchanged. Section 83(1)(*s*) confers on the tribunal the power to adjudicate on "any liability of the Commissioners to pay interest under s 78 or the amount of interest so payable". The jurisdiction of this tribunal, in this respect, is identical to that of the VAT and Duties Tribunal or, now, of the First-tier Tribunal: see s 82 of the 1994 Act, as amended by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, Sch 1 art 218.

32. Each of the appellants asked, by its representatives, for repayment of the capital sum and "statutory interest", meaning the interest for which s 78 provided. None of the requests for interest was accompanied by any further detail, such as the representatives' calculation of the amount due, and none limited the request to simple interest, even though the common understanding at the time may have been that only simple interest was payable. What they received in return was plainly a decision about the amount of interest so payable: the letters sent by the Commissioners set out the amount to be paid, and were accompanied by detailed calculations from which it was apparent that only simple interest was to be paid.

33. The appellants then asked for compound interest, but their requests were in reality nothing more than requests for reconsideration of what had been paid many months before. They were necessarily requests for interest pursuant to s 78, since there was no other basis on which interest might be payable, and no other basis upon which an appeal in relation to the amount paid could be brought before the tribunal. The appellants had not made new requests leading to new decisions, but were merely seeking to re-open the existing decisions, while the Commissioners had done no more than maintain those decisions by arguing that what had already been paid was all that was due. It was quite irrelevant that the appellants did not know, until they learnt of what was said in other cases, that compound interest might be available; the fact was that they had asked for, and had received, decisions on the amounts of interest payable pursuant to s 78 long before the appeals were brought.

34. In our judgment the Commissioners are right, and for the reasons advanced by Mr Swift. Section 83(1)(*s*) of the 1994 Act enables the tribunal to adjudicate on two issues: whether the Commissioners are liable to pay interest, and on the amount of any interest so payable. The communications the appellants received between September 2003 and February 2005 had two elements: the Commissioners' acceptance that some interest was due, and a determination of the amount they thought was payable. It does not seem to us that what was received then could amount to anything other than a decision susceptible of adjudication by the tribunal. There cannot, we think, be any real doubt that had the appellants

wished to challenge, for example, the period covered by the calculations, they could have brought appeals to the VAT and Duties Tribunal.

35. We do not consider there is merit in the argument that the communications the appellants received notifying them of the amount of interest the Commissioners were paying did not identify themselves as decisions, which the appellants might challenge by appeal to the tribunal if they were dissatisfied. The cases on which Mr Rabinowitz relied establish no more than that it is necessary for the recipient of a communication of this kind to be able to determine what it is he has received. Although it is good practice to inform a taxpayer of his right to appeal a decision, there is nothing in the 1994 Act which requires the Commissioners to do so, and we do not think any of the appellants, all of whom had experienced advisers, could have been under any illusion that the notifications they received were something other than decisions. It is apparent from the first appellant's representatives' request, of 14 September 2005, for a "formal independent reconsideration of the Commissioners decision not [to] pay compound interest to our client" that there was no misunderstanding on their part of the nature of the communication which had been received. We observe in passing that the letters the appellants received reiterating the refusal of the Commissioners to pay compound interest also did not identify themselves as decisions, or inform the appellants of their rights of appeal, but none of the appellants has suggested that those letters did not amount to appealable decisions.

36. What, then, was the nature of the decisions? Did they amount to decisions on claims for simple interest, the decisions being to accept those claims but going no further? Or did they constitute decisions on claims for statutory interest, whatever that might be, the decisions being that amounts of interest, as calculated by the Commissioners, were due, and nothing more? In our view, the answer is clearly the latter. The appellants requested interest pursuant to statute; they were, we consider, asking for all of the interest to which they were entitled. They, like the Commissioners, may have thought mistakenly (according to the appellants' construction of s 78) that their entitlement was only to simple interest. But that does not turn their request—that is to say for everything to which the statute entitled them—into something else—that is to say the amount which they thought they were entitled to and no more.

37. We accordingly determine that the relevant decisions, giving rise to a right of appeal under s 83, were those received when the payments of simple interest were made, that is between September 2003 and February 2005. The appeals were therefore out of time.

38. It is accordingly necessary to decide whether or not the appellants should be granted an extension of time to bring those appeals. Although there are, as we have said, differences of detail between them, some of which Mr Swift relied upon, and the periods of delay extend, at one extreme, to a little over two years and at the other to rather less than one year, the different periods of delay are not such as to lead us to make different decisions concerning the extension of the relevant time limits in the different appeals.

Discretionary extension of time

39. It was common ground that, the appeals having been made to the VAT and Duties Tribunal in early 2006, we should exercise the power conferred on us by para 7(3) of Sch 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 and r 26A(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, and apply the rules of that tribunal, the Value Added Tax Tribunals Rules 1986, when deciding the application for an extension of time. The power to extend time conferred by those rules was in rule 19(1):

> "A tribunal may of its own motion or on the application of any party to an appeal or application extend the time within which a party to the appeal or application or any other person is required or authorised by these rules or any decision or direction of a tribunal to do anything in relation to the appeal or application (including the time for service for a notice of appeal or notice of application) upon such terms as it may think fit."

40. The appellants all argue that the uncertainty about the extent of the remedy available to taxpayers who have been required to pay tax which was not due, or to pay tax early, explored by the courts in, particularly, the *Sempra Metals* and *Chalke* cases, is alone a sufficient reason to extend time in their favour.

41. The appellants could have deferred making any claim for interest until after the judgment in *Sempra Metals*. If they had taken care to observe the 3-year limit under s 78(11), their claims would have been valid. The Commissioners' responses would almost certainly be materially the same as the responses the appellants in fact received, and their appeals would also all have been in time.

42. The appellants contend that, beyond the possibility of being required to meet meritorious claims, the Commissioners will suffer no prejudice if time is extended whereas the prejudice to them of being shut out from pursuing claims which, as clear authority now shows, are sound in principle would be considerable. Even if (as we have found) the letters accompanying the payments of simple interest amounted to decisions, they were not, at least expressly, decisions about compound interest, since the letters did not address the issue at all, and a refusal of an extension would have the result that the appellants had been deprived of any opportunity of ventilating the matter in the proper forum.

43. Mr Swift's arguments for the Commissioners were that we should not extend time unless the appellants, who were seeking the tribunal's indulgence, demonstrated good reason for the grant of an extension. He relied on the observation of Auld LJ in *Robertson v Bexley Community Centre* [2003] IRLR 434 at [25] that "the exercise of discretion [to extend time] is the exception rather than the rule"; here, he said, none of the appellants had demonstrated any good reason why they should be treated exceptionally. Uncertainty in the law could not be regarded as an exceptional reason for not bringing an appeal; the appellants should instead have brought appeals and asked that they be case managed while the uncertainties were resolved as *Sempra Metals* proceeded through the courts.

44. The judgment of the Court of Appeal in *Sempra Metals*, the prompt, it would seem, for the claims for compound interest, was handed down in April 2005, yet none of the appellants acted with urgency; the first four appellants did not make claims until October or November 2005, some six or seven months later,

and the fifth appellant did not do so for a whole year. In the first appellant's case the position was even worse since it had made a claim for compound interest as early as September 2003 but had not pursued it. There was no evidence supporting the requested extensions, nor even any proper explanation of the delay. Further, the judgment of Park J at first instance on 16 June 2004 should have alerted the appellants to the point; it was soon after that date that they should have considered their positions and made protective appeals. They did not do so or even raise the question of compound interest with the Commissioners.

45. The 30-day time limit is long established and well-known, and is there for good reason. Contrary to the appellants' argument, there is prejudice to the government (or other taxpayers) in having to meet large, unexpected claims since they are disruptive of the government's planning of its income and expenditure. The time limit, short though it may be, is justified for that reason, and in the interests of legal certainty, and should not be lightly extended.

46. In this context, it is worth repeating what Henderson J said at paragraph 164 of his judgment in *Chalke*:

> "It is apposite in this connection to have in mind the 'very illuminating general discussion' (as Lord Walker termed it in *Fleming* at paragraph 58) by Advocate General Jacobs in *Fantask A/S v Industriministeriet* (Case C-188/95) [1997] ECR I-6783, ('*Fantask*') where he emphasised at paragraph 71 of his opinion 'the need for states and public bodies to plan their income and expenditure and to ensure that their budgets are not disrupted by huge unforeseen liabilities', and in paragraph 72 'the need, recognised by all legal systems, for a degree of legal certainty for the state, particularly where infringements are comparatively minor or inadvertent'."

47. We have found this a difficult issue, since we consider that the arguments, including those relating to prejudice, are finely balanced. There is force in Mr Swift's point that good reason should be shown if an extension is to be granted, although we agree with the appellants that the observation of Auld LJ on which he relied, made in the context of an expressly more onerous test, should be treated with some caution in other contexts. We agree with Mr Swift too that the appellants have not acted with a sense of urgency. Although it is true that the claims for compound interest were all made within the three-year time limit imposed by s 78(11) and, had they been the only claims, the second to fifth appellants would have been in time, we consider that it counts against the appellants that they did not commence their appeals once they knew or should have known that they were or might be entitled to compound interest within the same period applicable to an appeal from a decision, namely 30 days. It is one thing to say that an appeal was not made within 30 days of the decision because it was not appreciated that the claim for compound interest could be made; but once it was, or should have been, appreciated that such a claim could be made, the appellants ought to have taken steps to act promptly to appeal the earlier decision to pay simple interest.

48. Further, the possibility, to put it no higher, of an award of compound interest has been known since April 2001, and that possibility became a strongly arguable case following the High Court judgment of Park J in to which we have referred, factors which also count against the appellants, although it is

understandable that they were reluctant to incur the costs of what might have been speculative appeals until the position became even clearer.

49. In the exercise of our discretion, we refuse to extend the time for bringing these appeals. Taking the factors which we have mentioned into account, and whilst appreciating that different judges might come to a different conclusion, we consider that the balance falls in favour of the Commissioners.

50. We should add that we are conscious of the fact that these are only five of a very large number of claims for compound interest made by traders in the position of these appellants. The question whether compound interest may be awarded by this tribunal, or the Tax Chamber of the First-tier Tribunal, is a matter of considerable general importance. We heard full argument on both sides on the merits of the appeals and, as will appear from the next part of this decision, we have addressed the arguments and reached concluded views. We have done so notwithstanding that these views are, as a result of our refusal to extend time for bringing the appeals, not strictly reasons for dismissing the appeals. If the appellants were to obtain permission to appeal against our decision to refuse an extension of time, we think that the Court of Appeal might prefer to have our views on the underlying issue albeit that Court will be in as good a position as us to decide the matter since the appeals have been conducted on the basis of agreed facts.

51. We consider that it would be wrong in principle to take into account, in deciding whether to extend the time for making the appeals, the fact that many other claims for compound interest are awaiting the decision in these appeals. The rights and wrongs of the recovery from the Commissioners of substantial sums of money cannot, we consider, depend on whether other claimants need to know the answer to the underlying issues.

52. This is particularly so given the case management directions which have been given in these appeals. The application for an extension of time was made a considerable time ago. The VAT & Duties Tribunal, instead of deciding that application, directed that it should be heard at the same time as the substantive appeals. It would have been quite wrong for us, in those circumstances, to have decided the extension of time point and left the substantive hearing for which everyone had prepared to another day. Those case management directions should not, however, be allowed to influence the merits of the application itself.

The substantive issue

53. To put the central contentions very briefly, the appellants say that, as a matter of Community law, they are entitled to compound interest on the repayments of overpaid VAT over the entire period between payment and repayment. This right is directly enforceable and the tribunal must, in one way or another, give effect to it. The correct way to do so is as a matter of interpretation of the UK legislation so that "interest" in s 78 is to be read as "compound interest" or "interest including compound interest". It is for us to determine the appropriate interest rates and rests over the period for which interest is due when calculating the amount of interest.

54. The Commissioners accept for the purpose of the appeal before us that, as a matter of Community law, the appellants are entitled to full compensation; but this is not necessarily compound interest in all cases. The basis of this acceptance is the judgment of Henderson J in *Chalke*. Although that decision is under appeal, it is not suggested that we should differ from the conclusions of the judge on this issue. His conclusion, which is to be found at paragraph 124 of his judgment, is that under Community law the appellants are entitled to an award of compound interest on the tax which they have overpaid. In paragraph 2 of his judgment, the judge emphasised that he used the phrase "compound interest" as a shorthand description of the remedy sought by the claimants which should be understood as including, where appropriate, restitution-based claims for the time value of overpaid tax whilst it was retained. But clearly compound interest was regarded by the judge as the paradigm method of complying with Community requirements.

55. But whether or not the appellants are entitled to compound interest, the Commissioners submit that it is not possible to construe s 78 or the other statutory provisions used for calculating interest as providing for anything other than simple interest. The appellants' Community law right (if any) to compound interest is to be given effect in domestic law by way of the English law remedy of restitution. A claim in restitution is not a matter over which we have jurisdiction; it is for the courts to enforce such claims.

56. As will be seen in a moment, some of the appellants have already attempted to enforce their rights in the courts but have been defeated by limitation defences. That is why, for them, establishing a right to compound interest under s 78 is so important since different time limits apply.

57. The issue for us is one of statutory construction. In order to carry out that task, it is necessary to know what Community law requires since the only basis for giving s 78 the extended meaning for which the appellants contend is that it is the appropriate way of giving effect to Community rights. Although the conclusion of Henderson J was that Community law requires an award of compound interest, we do not think that that can be an end of the enquiry.

Community and domestic law

58. The relevant case-law of the ECJ and the domestic courts has been exhaustively considered by Henderson J in his two masterly judgments in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2009] STC 254 (which will refer to as the *FII Appeal* to distinguish it from the case before the ECJ of the same name *ie FII*) and *Chalke*. It would be a work of supererogation for us to carry out the same exercise. In any event, although his decision in *Chalke* is under appeal, the Commissioners do not, as we have said, for the purpose of the appeal before us, seek to go behind his conclusion that, as a matter of Community law, the appellants are entitled to full recompense for the time value of the overpaid tax while it was in their hands.

59. In *Chalke*, Henderson J identified and addressed two core questions: first whether the statutory scheme in the 1994 Act for repayment of VAT and simple

interest is exhaustive; secondly whether Community law overrides ss 78 and 80 of the 1994 Act and requires an award of compound interest.

60. We wish to say a little at this stage about the first core question. Henderson J's conclusion on that question was that the statutory scheme is an exhaustive one and that interest may only be recovered, as a matter of domestic law, on a repayment of overpaid VAT by the Commissioners if it is awarded by the tribunal or pursuant to s 78. The reference to an award by the tribunal (even had the power to make an award, formerly conferred by s 84(8), survived), as we have already observed, is not of relevance for present purposes. So far as concerns s 78, it seems to have been common ground before Henderson J that the statutory scheme provided only for simple interest. He made no reference in his judgment to any argument that, properly construed, s 78 provides for compound interest. And yet, in the appeals before us, that precise argument is being made and is being made by some of the taxpayer claimants before him.

61. This is, to say the least, curious in our view. If, as the appellants now contend, s 78 provides for the payment of compound interest, then the requirement of Community law to provide a full remedy is to be found in the English domestic legislation. Henderson J concluded that, just as s 80 provides an exhaustive regime for the recovery of overpaid VAT, so s 78 provides an exhaustive regime for the recovery of interest. The arguments leading to the conclusion he reached (a conclusion with which we respectfully agree) do not depend on whether s 78 on its true construction provides for simple or compound interest. There would then be no room at all for an alternative remedy in restitution (or something like restitution). Now, the Commissioners would clearly not have wanted to run that argument as a defence to the claimants' restitutionary and damages claims in *Chalke* since they would thereby be admitting the right of taxpayers in the position of the appellants to compound interest. The appellants themselves did not raise the argument because, if it was right, it would defeat their own claim before the court and, indeed, the correct forum for them to assert the statutory right was not the court but this tribunal. The result is that Henderson J has conducted a long hearing and produced a mammoth judgment in relation to causes of action which, if the appellants before us are correct, did not exist.

62. We turn then to the topic of compound interest. As Henderson J points out, the Sixth Directive (the Sixth Counsel Directive 77/388/EEC concerning harmonization of turnover taxes) says nothing about the restitution of VAT let alone about interest on any amounts which may be repaid: see paragraph 78 of his judgment. This is a point of some significance because a failure to provide, in domestic legislation, for such restitution or interest cannot be categorised as a failure properly to implement Community legislation.

63. The starting point, therefore, is the right under Community law to a refund of taxes and duties levied in breach of the rules of Community law. The principle is clearly articulated in case C-199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595 ("*San Giorgio*"); the relevant passage was cited by Henderson J at paragraph 79 of his judgment in *Chalke*.

64. It is for national law to provide for the appropriate redress both in terms of substantive law and procedure: see for instance the judgment of the ECJ in *Hoechst* at paragraph 81:

> "It must be stressed that it is not for the Court of Justice to assign a legal classification to the actions brought by the claimants before the national court. In the circumstances, it is for the claimants to specify the nature and basis of their actions (whether they are actions for restitution or actions for compensation for damage), subject to the supervision of the national court."

65. This, of course, is subject to the Community principles of equivalence and effectiveness. These require that the rules for reclaiming tax wrongly levied in breach of Community law must be no less favourable than those relating to similar domestic actions and they must be framed in such a way that the exercise of the right is not rendered virtually impossible or excessively difficult. It is worth repeating what Henderson J says in paragraph 92 of his judgment in relation to equivalence:

> " … the relevant comparison is with the rights conferred by national law for the recovery of overpaid VAT in a domestic context, as Moses J held in *Marks & Spencer plc v HMRC* [1999] STC 250 at 232f-j. Those rights are to be found in the self-same provisions in sections 80 and 78 of the 1994 Act. There is no question of purely domestic claims for the recovery of overpaid VAT being treated any more favourably than claims based on a breach of Community law. In either case, only simple interest is recoverable."

66. Chadwick LJ put matters succinctly in his judgment in *Sempra Metals* when it reached the Court of Appeal (see [2006] QB 37 at 46). After noting the ECJ in *Hoechst* had not found it necessary actually to decide whether a national court would classify the claim as restitutionary or compensatory (because the answer to the second question was the same whichever categorisation was adopted), he identified at paragraph 25 two factors:

> "First, the national court is required to give a remedy, whether by way of restitution or as compensation, in respect of the breach of Community law. It is not open to the national courts to deny restitution or compensation on the ground that no remedy would lie under domestic law. If necessary, Community law demands an autonomous remedy in respect of the breach of Community law which has occurred. Second, the remedy to be given by the national court must be a 'full' remedy; in the sense that it must be such as will restore the equality of treatment guaranteed by article 52 …. Nothing less will do. A full remedy for the loss of the use of money over a specified period may be measured by reference to the interest 'accrued' on the amount of the tax paid prematurely. But it is important to keep in mind that there is no true analogy with the award of interest on a domestic judgment. The task of the national court is to ascertain the amount which the member state must pay to the claimant in order to restore the claimant to the position it would have been in if it had not been required to pay an amount of corporation tax prematurely."

67. We find this passage of help in the present case as a statement of principle applicable in a much wider range of circumstances than on the narrow facts of *Sempra Metals*. The conclusion we draw is that the national court (and indeed the claimant) will look within its existing portfolio of remedies for one which reflects,

and where there is more than one the one which best reflects, the Community law rights which the claimant asserts. If there is no national remedy which, as it stands, is adequate to reflect those rights, either existing remedies must be tailored to provide one, or a new remedy must be invented.

68. We need to digress for a moment. The use of the words "restitution" and "restitutionary" by different AGs and by the ECJ in its judgments causes a little difficulty because it is not always clear that those words are being used in the special sense which they have in English law. Park J identified the point this way at paragraph 16 of his High Court judgment in *Sempra Metals* [2004] STC 1178 at 1186:

> "(ii) Although the term 'restitution' might imply that it was necessary to identify the benefit to the national exchequer and require the government to restore that benefit to the claimant, the discussion in paragraphs 82, 88 and 89 seems to me to proceed on the basis that the amount of a restitutionary remedy would be equal to the interest which the claimant could have obtained from the use of the money if it had not paid it to the Revenue by way of ACT. In paragraph 88 the court states: ' … *in an action for restitution the principal sum due is none other than the amount of interest which would have been generated by the sum, the use of which was lost as a result of the premature levy of the tax*'.
>
> (iii) To a similar effect paragraph 89 referred to 'interest accrued on the advance corporation tax paid by the subsidiary during the period between the payment of advance corporation tax and the date on which mainstream corporation tax became payable', and continued to say that 'that sum may be claimed by way of restitution'. Mr Glick [counsel for the Crown] commented in argument, and I agree, that, on the basis of the judgment, a restitutionary remedy and a compensatory remedy would both produce the same result, since both of them look to the same thing: what the taxpaying company has lost by reason of having to pay tax early, not what the Government has gained."

69. We note that these observations by Park J must now be read in the light of Lord Hope's comments in paragraph 20 of his speech in *Sempra Metals*.

70. As to paragraph (ii), it should also be noted that, in paragraph 87 of the ECJ's judgement in Hoechst, it is said that the award of interest "represents the 'reimbursement' of that which was improperly paid". Further, one might also add a reference to paragraph 52 of the opinion of the AG who found it "more correct and more logical to treat the plaintiff's claim as restitutionary rather than as compensatory [*ie* in the sense of a *Francovich* claim]". (The reference is to *Francovich v Italy* (Case C-479/93) [1995] ECR I-3843, [1996] IRLR 355 ("*Francovich*").) He expressed that view on the basis that, had it been possible to bring proceedings during the period between payment of the ACT and its being taken into account against mainstream corporation tax, the plaintiff would have been entitled to interest so that, "in a practical sense, the claim for interest is closer to a restitutionary claim than a compensatory claim".

71. Moreover, the answer to the second question referred to the ECJ reflects this approach. Under Community law, the claimants were entitled to an (at para 96):

> "effective legal remedy in order to obtain reimbursement or reparation of the financial loss which they have sustained and from which the authorities of the member state concerned have benefited …. The mere fact that the sole object of such an action is the payment of interest equivalent to the financial loss suffered as a result of the loss of use of the sums paid prematurely does not constituted a ground for dismissing such action."

72. Lord Scott was clearly troubled by this aspect when examining the confusion, as he saw it, between a compensatory claim and a restitutionary claim: see the trenchant observations in paragraphs 135 to 138 of his speech. Lord Mance, too, noted (see paragraph 198 of his speech) the focus of the ECJ on Sempra's loss of the money rather than on any benefit to the revenue. But the difference of emphasis (or perhaps even of substance) in the use of the words "restitution" and "restitutionary" and the possible differences in the concepts underlying them should not detain us for long. Provided that one recognises the overarching obligation of the national court to provide a full remedy as described by Chadwick LJ, those apparent difficulties should be seen to be paper tigers. The question in any particular case will be whether the English law remedy (*eg* restitution) does adequately effect Community rights.

73. Returning from that digression to the applicable case-law of the ECJ, Henderson J, in *Chalke*, followed it through two periods. First, up to and including the decision in *Hoechst* and, secondly, thereafter. He concluded, in paragraph 90 of his judgment, that if *Hoechst* had been the last word, there would be a strong argument for saying that the interest provisions of s 78 were compliant with Community law. And having previously held that the provisions of the VAT Act 1994 provided an exclusive code for the recovery of interest, the taxpayer would have had no right to bring any other claim whether in restitution or for *Francovich* damages. The decisions of Park J and the Court of Appeal in *Sempra Metals*, discussed by Henderson J in this context at paragraphs 110 to 112 of his judgment, provide a very strong counter-blast to that argument.

74. Although neither Park J nor the Court of Appeal had the benefit of the decision of the ECJ in *FII*, their views were, as Henderson J remarked, prophetic. The prophecy came true with the shift in the Community landscape as a result of *FII*. Henderson J carried out, in *Chalke*, detailed analyses of the opinion of the Advocate General and of the judgment of the Court in *FII* (including their references to *Hoechst*). He concluded, in paragraph 107 of his judgment, that it was clear to him

> "that the *San Giorgio* principle must now be regarded as entitling a claimant who has paid tax levied in breach of Community law not only to repayment of the tax itself, but also to reimbursement of all directly related benefits retained by the member state as a consequence of the unlawful charge. It is only in this way that the claimant can obtain an effective remedy for its loss, and effect can be given to the underlying principle that the member state should not profit from the imposition of the unlawful charge."

75. One sees further reference to this "underlying principle" in paragraph 115 where Henderson J says this:

> " … if the guiding principle of Community law is that the member state should not profit from the imposition of the unlawful charge, compound

> interest would seem to be required as a matter of Community law, because it is only in that way that full effect can be given to the guiding principle. It was clearly the view of Park J and the Court of Appeal in *Sempra Metals* that compound interest was a requirement of Community law …".

76. In the context of the present appeals, we need to say something more about what Community law does require than we have so far expressed. This is because the competitors, if we may put it that way, for the best remedy are (a) a claim in restitution, perhaps modified to eliminate possible defences available under domestic law which defences, if allowed, would infringe either of the principles of equivalence and effectiveness and (b) an interpretation of s 78 which allows for the payment of compound interest. On any view, to construe s 78 in the way for which the appellants contend involves a construction which, in a purely domestic context and applying ordinary canons of construction, would be strained or artificial: see further at paragraphs 99*ff* below. However, it is a construction which the appellants say is well-justified by application of the *Marleasing* principle: see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135 ECJ. However, if the construction for which the appellants contend produces a result which does not properly reflect the Community law rights available generally to taxpayers, that is a powerful, if not conclusive argument, against any attempt to apply the *Marleasing* principle in the first place. This is because s 78 is a provision which applies to all taxpayers; if it provides for compound interest in the case of the appellants, it will do so in all cases where a taxpayer seeks interest under s 78, even in cases where a "full" remedy as required by Community law would give a lesser right.

77. In this context, something more needs to be said, in particular, about the "underlying principle that the member state should not profit from the imposition of the unlawful charge" or "the guiding principle" as Henderson J put it. At least up to and including *Hoechst*, we have not discovered a reference to any such "underlying principle". The underlying principle was the *San Giorgio* principle. The idea that a member state must not profit is articulated by the AG (Fennelly) at paragraph 45 of his Opinion in *Hoechst* where he says this:

> "The Court has consistently held that Member States must reimburse taxes levied in breach of Community law and that the right to such a reimbursement is a consequence of, and a complement to, the rights conferred on individuals by the directly effective provisions of Community law. In its more recent case law, the Court has added that Member States are 'required in principle to repay charges levied in breach of Community law'. **The notion underlying this principle is that a Member State must not profit—and an individual who has been required to pay the unlawful charge must not suffer loss—as a result of the imposition of the charge**." [our emphasis]

78. It is not possible, we consider, to derive from the passage we have highlighted, when read in its context, the proposition that the notion underlying the *San Giorgio* principle is a requirement that the member state should be made liable in the same way as it might be made liable in an English-law claim for restitution. Rather, profit to the state and financial loss to the taxpayer are seen as two sides of the same coin—they are expressly linked together in one sentence as two limbs of the underlying notion. The AG cannot be taken, we think, to be

saying that the state must account for some large benefit which it has somehow managed to acquire through the use of this money. We think that he would have been very surprised if it were said that he was suggesting that the underlying notion went wider than we have just explained.

79. Henderson J also referred to the opinion of the AG in *FII*. We do not repeat it all. However, after referring in paragraph 130 to *Hoechst*, the AG said this in paragraph 132:

> " … The underlying principle [in relation to claims for recovery of charges unlawfully levied] should be that the UK should not profit and companies (or groups of companies) which have been required to pay the unlawful charge must not suffer loss as a result of the imposition of the charge. As such, in order that the remedy provided to the test claimants should be effective in obtaining reimbursement for reparation of the financial loss which they had sustained and from which the authorities of the member state concerned had benefited, this relief should in my view extend to all direct consequences of the unlawful levying of tax. This includes to my mind: (1) repayment of unlawfully levied corporation tax …; (2) the restoration of any relief applied against such unlawfully levied corporation tax …; (3) the restoration of reliefs foregone in order to set off unlawfully levied corporation tax …; (4) loss of use of money in so far as corporation tax was, due to the breach of Community law, paid earlier than it would otherwise have been …. In each case, it would be for the national court to satisfy itself that the relief claimed was a direct consequence of the unlawful levy charged."

80. The words in which the AG (Geelhoed) describes the underlying principle are taken from paragraph 45 of the opinion of the AG (Fennelly) in *Hoechst*, as a footnote to the opinion discloses. We make the same observations in relation to this passage as we have done in relation to paragraph 45. Indeed, the focus of this passage is clearly on financial loss suffered by the claimant as the list of recoverable items shows. Each item on the AG's list of direct consequences reflects both loss to the claimant and benefit to the member state. Thus, to take but one example, the member state must restore reliefs foregone—it must not profit—which is matched by the act of restoration by elimination of the financial loss to the claimant. There is no suggestion that the member state must disgorge benefits which are not reflective of any loss to the claimant. Indeed, the use of the words "direct consequences" suggests quite the reverse. Full reimbursement and reparation is seen, we think, as carrying with it automatically the elimination of profit to the state.

81. Henderson J also quoted paragraphs 204 to 206 of the judgment of the ECJ in *FII*. We should repeat paragraphs 204 and 205:

> "204. In addition, the Court held in paragraph 96 of its judgment in [*Hoechst*], that, where a resident company or its parent have suffered a financial loss from which the authorities of a member state have benefited as the result of a payment of advance corporation tax, levied on the resident company in respect of dividends paid to its non-resident parent but which would not have been levied on a resident company which had paid dividends to a parent company which was also resident in that member state, the Treaty provisions on freedom of movement require that resident subsidiaries and

> their non-resident parent companies should have an effective legal remedy in order to obtain reimbursement or reparation of the loss which they have sustained.
>
> 205. It follows from that case law that, where a member state has levied charges in breach of the rules of Community law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that state or retained by it which relate directly to that tax. As the Court held in paragraphs 87 and 88 of [*Hoechst*], that also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely."

82. This reference in paragraph 204 to the benefit to a member state is, again, reflective of the financial loss suffered by the claimant—a financial loss "from which the authorities … have benefited". This passage does no more, it seems to us, than identify the situation in which the right of the claimant arises—that is to say where tax has been improperly levied and thus where the state must, almost *ex hypothesi*, have received a benefit. The remedy to which the claimant is then entitled under Community law and which the national law must provide is "reimbursement or reparation of the loss" sustained. That entitlement extends not only to the tax actually paid and wrongly levied but to other amounts paid to the state or retained by it which relate directly to that tax. This somewhat opaque wording is referring we think to the sort of matters identified by the AG in paragraph 132 of his opinion.

83. From all of this, Henderson J, at paragraph 105 of his judgment in *Chalke*, identified the general principle of Community law in this way:

> "The general principle … is that individuals are entitled to reimbursement 'not only of the tax unduly levied but also of the amounts paid to that state or retained by it which relate directly to that tax'. This may be compared with the Advocate General's view (in paragraph 132 of his opinion) that an effective remedy should 'extend to all direct consequences of the unlawful levying of tax'. The final sentence of paragraph 205 indicates that the Court, like the Advocate General, viewed the remedy fashioned by the Court in *Hoechst* as coming within the scope of the general principle thus identified."

84. In the light of this rather long discussion, we return to the observation of Henderson J at the end of paragraph 107 of his judgement concerning the reimbursement by the state of all directly related benefits retained by the member state. He was, we are sure, saying nothing different from what the AG and the ECJ were saying in *FII*. He was, probably deliberately, using the same language as they had used and in referring to "all directly related benefits retained by the member state" must have been referring to the same benefits as those identified by the AG in paragraph 132 of his opinion and by the ECJ in paragraph 205 of the judgment in order to ensure that he was not saying anything different from them. For reasons already given, we see the AGs and the court approaching profit to the member state and financial loss to the taxpayer as matching each other.

85. In particular, so far as concerns loss of the use of money (the fourth item on the list of the AG in *FII*), interest is seen as the appropriate means of recompensing the claimant and eliminating benefit to the member state. That seems to be the view which Henderson J took, as is shown by the opening of

paragraph 108 of his judgment. He said that, if an effective remedy requires that the member state should not profit from the unlawful charge, the claimant should be entitled to interest. The assumption in this line of reasoning is that the member state does in fact obtain a benefit by having money in hand and that the elimination of that benefit can be achieved by the payment of interest. And, as his third conclusion in paragraph 108 shows, interest should be compound interest in the context of an English-law restitutionary claim. It is only by an award of compound interest that the commercial value of the use of the money over the time when it was retained can be properly reflected.

86. In paragraphs 109*ff* of his judgment, Henderson J went on to consider *Sempra Metals* at all three levels. He expressed the view (although not strictly necessary for his decision) in paragraph 116 that payment of compound interest in respect of charges wrongfully levied is a requirement of Community law. He summarised his conclusions at paragraph 124 which includes the following:

> " … In my judgment Community law does override the otherwise exhaustive and exclusive statutory scheme for the payment of interest on overpaid VAT, where the overpayment arose from breach of directly effective provisions of Community law. Subject to the Commissioners' secondary defences, therefore, the claimants are entitled to an award of compound interest on the tax which they have overpaid, at any rate from 1 January 1978 when the Sixth Directive came into effect in the UK. It is only in this way that effect can be given to the underlying principle that the UK should not be permitted to profit from the overpaid tax. The requirement that compound interest should be paid is in my judgment a requirement of Community law, but the manner in which it should be worked out is a matter for national law …."

87. After stating these conclusions, Henderson J went on to consider the claimants' restitutionary claims and their claims in damages under the *Francovich* principle. Both of these claims were in principle capable of providing a domestic remedy to give effect to the claimants' Community rights. As to the restitutionary claim, he considered a number of defences and held, in the end, that the claims were time-barred. He decided that a change of position defence was not in principle available to the Commissioners as it would contravene Community law. The damages claims were rejected in their entirety.

88. His decision in relation to the change of position defence does illustrate one significant point. It is that the English court can tailor its domestic remedies to protect the rights which Community law provides. This particular illustration shows this result being achieved by disallowing a defence which would otherwise apply. We see no reason to think that English law would not, if the need arose, extend a well-established remedy to give effect to a Community law right if the nature of the English law remedy was not thereby substantially altered.

89. The remedy to give effect to Community law rights is a matter for national law. If national law provides two remedies each of which would be effective to comply with Community law requirements, it will be a matter for national law which of those remedies the claimant is entitled to invoke; national law may even allow the claimant to invoke either remedy. In *Chalke*, there were two potential remedies: restitution and *Francovich* damages. The damages claim was not, as a matter of principle, available because the breaches of Community law which

caused the claimants' loss were not, in Henderson J's judgment, sufficiently serious to found liability. That left the restitutionary claim as the only English-law remedy. It was not in fact available because of limitation problems; but had the claim not been time-barred, there was no suggestion before Henderson J that the remedy afforded in accordance with the *Sempra Metals* approach would not comply with Community law. We propose to proceed on the basis that the restitutionary remedy to which the claimants in the present case would, apart from limitation defences, be entitled would be sufficient to provide, in accordance with the principles of equivalence and effectiveness, the claimants with their entitlements according to Community law.

Sempra Metals

90. We come now to *Sempra Metals*: this is a case of difficulty. We can only agree with Henderson J when he said (see paragraph 109 of his judgment in *Chalke*) that the speeches of the House of Lords pose considerable challenges to a lower court searching for a *ratio decidendi*. Uncertainties remain. These are not, happily, of a great deal of concern to us in the context of Community law since, by the time it reached the House of Lords, *Sempra Metals* had become concerned principally with domestic law. It is easy to overlook the fact that no point of Community law was in contention. Instead, the claimant relied on, and only on, the rights which it was able to assert as a matter of domestic law given that it was entitled to a remedy in respect of the money which it had paid as the result of mistake, that is to say a mistake as to its rights under Community law.

91. Even though we do not propose to embark on a detailed analysis of the speeches in the House of Lords, we ought to state briefly the conclusions of the House.

92. The House unanimously rejected the anomalous and unprincipled exception to the common law rule in relation to recovery of interest losses as damages; it would always be open to a claimant to plead and prove his actual interest losses caused by late payment of a debt which might include an element of compound interest.

93. The House also held unanimously that a court had jurisdiction to award compound interest where a claimant was seeking restitution of money paid under a mistake. Lords Hope, Nicholls and Scott considered that this could be done in the exercise of the court's common law restitutionary jurisdiction. Lords Walker and Mance considered that this would be in exercise of the court's equitable jurisdiction.

94. Lords Hope, Nicholls and Walker considered that the money award reversing unjust enrichment had to take account of the value of the use of the money over the time during which it had been retained by the defendant. Lords Hope and Nicholls considered that this was *prima facie* the reasonable cost to the defendant of borrowing the same sum over the same period unless the defendant could show that he had had in fact gained no such benefit. Lord Hope did not consider that Sempra Metals' rights depended on proving what the revenue had actually done with the money; it was the opportunity to turn the money to account

which is the benefit which the defendant is presumed to have derived from money in its hands.

95. Lords Scott and Mance were of the opinion that the claimant should recover interest only if the money had been proved to have earned interest in the hands of the defendant.

96. The majority (Lords Nicholls, Hope and Walker) were of the opinion that the assumption that the Government had derived some benefit from the premature payment of tax had not been displaced; but because the Government was in a different position from an ordinary borrower and could borrow at more favourable rates, those lower rates should be applied.

97. Lord Nicholls expressly stated that he considered that English law as thus interpreted gave an effective remedy to reflect the claimant's Community law entitlement. Lord Mance expressed a similar view as a result of Sempra Metals' damages claim as he had analysed it.

98. The House of Lords accordingly dismissed the appeal from the Court of Appeal which had itself upheld the decision of Park J that the claimant was entitled to compound interest. It varied the order of the Court of Appeal by substituting, for the rates of interest ordered below, conventional rates calculated by reference to the rates of interest and other terms applicable to borrowing by the Government in the market during the relevant period.

Statutory construction

99. We have no doubt that s 78, construed solely in accordance with the ordinary principles of domestic law, provides only for simple interest. The statutory scheme contained in s 78, s 197 FA 1996 and the 1998 Regulations not only does not use the word "compound", but also does not contain any mention of one essential of compound interest, that is the frequency of rests. This appears to have been the basis on which *Chalke* proceeded before Henderson J. It could hardly be contended otherwise.

100. It is a general principle of statutory construction that domestic legislation intended to implement Community legislation, in particular directives, will be construed in the light of, and so far as possible in a way to give effect to, the relevant Community instrument. This is a principle of Community law which finds statutory force in s 2 of the European Communities Act 1972. It is a strong principle and can lead to some perhaps surprising results. As we have already pointed out, however, there is nowhere in the Sixth Directive or in any other relevant Community legislation any requirement concerning repayment of overpaid VAT, let alone interest on VAT. The obligation to make repayment of the tax and to make payment of interest rests on the principles which we have considered earlier in this decision, in particular the *San Giorgio* principle and its application, as explained by Henderson J, to interest.

101. The *Marleasing* principle was stated in this way by Arden LJ in *HMRC v IDT Card Services Ireland Ltd* [2006] STC 1252 ("*IDT Card Services*") at paragraph 79:

"The Court of Justice has held that the national court's obligation is to interpret domestic legislation, so far as possible, in the light of the wording and the purpose of a directive in order to achieve the result pursued by the directive and thereby comply with Community obligations …. It is sometimes also referred to as the principle of conforming interpretation."

102. She went on to refer to the development of these principles in *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397/01 to C-403/01) [2005] ICR 1307 ("*Pfeiffer* "). She cited a lengthy passage from paragraphs 111 to 119 of the judgment. It is worth repeating:

"111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

112. That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see *Wagner Miret v Fondo de Garanatia Salarial* (Case C-334/92) [1993] ECR I-6911 , para 20).

113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in *Von Colson and Kamann*, paragraph 26; *Marleasing*, paragraph 8, and *Faccini Dori*, paragraph 26; see also Case C-63/97 *BMW* [1999] ECR I-905, paragraph 22; Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 30; and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-0000 , paragraph 21).

114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 34).

115. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, *Carbonari*, paragraphs 49 and 50).

116. In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by

applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

117. In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 *Centrosteel* [2000] ECR 1-6007, paragraphs 16 and 17).

118. In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, *Marleasing* , paragraphs 7 and 13).

119. Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104 , is not exceeded."

103. There are two points which we wish to draw from this.

104. The first is that the *Marleasing* principle is concerned to ensure that Community legislation is given full effect in member states. National legislation which is enacted specifically for the purpose of implementing a directive is to be assumed to be intended fully to implement the directive and is to be construed conformably in so far as possible. It has nothing to say about the interpretation of a national legislative provision outside the context of the implementation of Community legislation. It may be that a piece of domestic legislation which is enacted to give effect to some other Community law right—for instance, a *San Giorgio* right to repayment of charges wrongfully levied—would fall to be construed against the background of that purpose; but that is not part of the *Marleasing* principle.

105. The second point (see paragraph 115 of Arden LJ's judgment) is that there is no narrow focus on domestic implementing legislation (although it may be the primary focus) rather than on national law as a whole. Accordingly, if domestic law makes provision somewhere for that which is required by directive, it does not matter that it cannot be found in the particular piece of domestic legislation which is enacted to implement that directive. It remains an open question, as Arden LJ remarks at paragraph 91 of her judgment, whether the domestic court can interpret other rules of domestic law in accordance with the *Marleasing* principle. It is not a question we need to answer because, in the present case, the

alternative to the extended construction of s 78 for which the appellants contend is a restitutionary claim under which they would be entitled to recover compound interest were it not for the limitation defence. If it is necessary slightly to modify the remedy (*eg* by eliminating a change of position defence) that is something which the courts would have to do in order to afford the appellants the full remedy to which they are entitled.

106. It follows from these two points taken together that there is nothing in *Marleasing* or *Pfeiffer* which would require the right to compound interest in the present cases to be found within the 1994 Act *even if* the Sixth Directive had made provision for repayment of charges wrongfully levied. Still less is there any such requirement where the right to compound interest is not found in the Sixth Directive but is a right which arises under general principles of Community law. It is enough that an appropriate remedy is available under English law which gives full effect to the claimants' Community entitlement.

107. Those are the cases before the ECJ to which we need to refer. We now turn to some of the English authorities to which we have been referred.

108. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 ("*Ghaidan*") did not concern a directive. Rather, it concerned the interpretation of legislation, in this case the Rent Act 1977, in the light of the requirements of s 3 of the Human Rights Act 1998 ("HRA 1998"). The issue was whether the defendant, who had lived for many years in a stable and permanent homosexual relationship with the protected tenant of a flat, was a person living with the tenant "as his or her wife or husband". Section 3 HRA 1998 provides, so far as material for present purposes, as follows:

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention Rights."

109. It was held that the defendant's Convention Rights were infringed since application of the ordinary meaning of the words "as his or her wife" resulted in the defendant being treated less favourably than survivors of heterosexual relationships without any rational or reasonable ground for such discrimination. It was further held that s 3 HRA 1998 required that the legislation be given a Convention-compliant meaning wherever possible, subject only to the modified meaning remaining consistent with the fundamental features of the legislative scheme. The majority, (Lord Millett dissenting) held that it was possible to read the relevant provision of the Rent Act 1977 as extending to same-sex partners without contradicting any cardinal principle of that Act. Lord Steyn referred to *Marleasing*, referring to the "undoubted strength" of the interpretative obligation under Community law, describing it as a significant signpost to the meaning of s 3(1).

110. The general principles are, we think not in dispute. Reference can usefully be made to the speeches of Lord Millett (at paragraphs 59 to 68) and Lord Rodger (at paragraphs 106 to 116) The flavour can perhaps best captured in the speech of Lord Nicholls from paragraph 25 to the end of his judgment. Included are the following passages:

"30 … the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31 On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32 From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33 Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

111. The next case is *IDT Card Services*, to which we have already referred. This case is of importance because it incorporates into the interpretative function, when

construing English legislation in the context of the Sixth Directive, the same principles as the House of Lords articulated in *Ghaidan*. Arden LJ dealt with this at paragraphs 86 to 92 of her judgment. Of particular relevance are paragraphs 90 and 92:

> "90 … In determining whether the solution is one of interpretation or impermissible law-making, the relevant test remains whether the interpretation that would be required to make the statute in question Convention-compliant or in this case, EU law-compliant, would involve a departure from a fundamental feature of the legislation. As I see it, the latter cannot be the case where the effect of the interpretation would be to bring the statute into conformity with the objectives of the Sixth Directive in the absence of clear statutory language to the effect that Parliament intended that there should not be such conformity ….
>
> 92 … I consider that the differences in concept between section 3 interpretation and interpretation under the *Marleasing* principle are more apparent than real. As already stated I consider that the *Ghaidan* case is a helpful guide when determining the interpretation under the *Marleasing* principle. I see no reason why the same robust techniques used to make legislation compatible with the ECHR should not equally apply to make domestic legislation comply with the laws of the European Union."

112. So the interpretative signpost which Lord Steyn saw in the *Marleasing* principle pointing the way to the interpretation of s 3 HRA 1998 has swung round, and now points back to a method of interpretation of domestic legislation in a way which is compliant with Community law.

113. The actual decision in *IDT Card Services* does, indeed, show a very robust approach to this interpretative function. The case was nonetheless, it must be remembered, one about the interpretation of UK legislation which had failed properly to conform to the principles of the Sixth Directive to the detriment of the UK. This was an "all or nothing" case where, if the Commissioners were wrong, they would not be able to levy VAT in circumstances where the Sixth Directive required it to be levied in one member state or another.

114. Next we come to *HMRC v EB Central Services Ltd* [2008] STC 2209 ("*EB Central*"). This was a case where the taxpayer claimed repayment of an alleged overpayment of VAT on the basis that the services supplied by it should have been zero-rated under items 6(b) and 11(a) of Group 8 of Sch 8 to of the 1994 Act. The Commissioners refused to make a refund; on appeal, the High Court held that 95% of the supplies were zero-rated. HMRC appealed contending that it would be contrary to Community law for these services to be zero-rated, and that a construction of the UK legislation consistent with the requirements of the Sixth Directive was demanded. This again was an "all or nothing" case: there was no alternative remedy to which the Commissioners could have been entitled if they lost the point of construction concerning the statute. In the event, the court, allowing the appeal, was prepared to read into item 6(b) words which restricted its scope in order to make it compatible with the core concept in art 15(9) of the Sixth Directive. Mummery LJ put his conclusion at paragraph 49 of his judgment in this way:

"In my judgment, however, the provisions in Article 15(9) govern the construction of the implementing provision in Item 6(b). If possible, Item 6(b) must be construed compatibly with the Directive requirement of the 'direct needs of aircraft or of their cargoes'. It can be construed compatibly in accordance with the principles in *Litster* [1990] 1 AC 456 and *Marleasing* [1990] ECR 1 4135 by reading into the Item the core concept in Article 15(9) of storage to meet 'the direct needs' of aircraft or of their cargoes. In my judgment, HMRC's appeal on this point succeeds. There is nothing in Item 6(b) that is incompatible with that concept of 'direct needs'. Although the concept has not found verbal expression in the Item, it is possible to read into it that link or connection between the storage and the aircraft."

115. Dyson LJ put the matter this way:

"81 … But it is necessary to bear in mind the strength of the interpretative obligation on a national court to seek to construe its domestic legislation in a way which is consistent with a relevant EU Directive. Mummery LJ has referred to *Marleasing* and *Litster*. It is well established that, where necessary, the court will supply by implication words in order to satisfy the United Kingdom's treaty obligations, provided that to do so is consistent with the general scheme of the domestic legislation. *Litster* was concerned with the construction of a regulation which provided that a transfer of an undertaking would not operate to terminate the contract of employment of a person employed by the transferor and that any reference to a person employed in an undertaking was a reference to a person so employed 'immediately before the transfer'. The House of Lords held that the regulation should be read as if there were inserted after the words 'immediately before the transfer' the words 'or would have been so employed if he had not been unfairly dismissed in the circumstances described in regulation 8(1)'. Such an implication was consistent with the general scheme of the Regulations and was necessary if they were effectively to fulfil the purpose for which they were made of giving effect to the provisions of the Directive: see per Lord Oliver of Aylmerton at [1990] 1 AC 546, 577B–D."

116. He then went on to cite the passage from paragraph 90 of Arden LJ's judgment in *IDT Card Services* which we have already set out.

117. The last case is *Vodafone 2 v HMRC (No 2)* [2009] STC 1480 ("*Vodafone 2*"), a decision of the Court of Appeal in May 2009. The judgment of the Chancellor contains a useful résumé of the principles to be derived from the cases: see paragraphs 37 and 38. The decision does not say anything new about the law or the correct approach, but is another example of a strong reading of domestic legislation in a way which did not unlawfully restrict Vodafone 2's freedom of establishment conferred by Art 43 EC. This was another "all-or-nothing" case where, absent a conforming construction, Vodafone 2 would have been left without an adequate remedy.

Discussion

118. In the present case, both Mr Conlon and Mr Rabinowitz for their respective appellant clients submit two things. The first is that it is *possible* to construe s 78 so as to allow for the payment of compound interest without passing that elusive boundary between interpretation and legislation. The second is that we are

compelled to adopt that interpretation as a result of the *Marleasing* principle as developed in *Pfeiffer* and seen in action in *Ghaidan*, *IDT Card Services* and *EB Central*.

119. In particular, Mr Rabinowitz submits that the appellants' construction goes more "with the grain", to use Lord Rodger's phrase, than does the Commissioners' construction. To put that proposition another way: the appellants' construction is consistent with the thrust of the legislation whereas the Commissioners' construction is not. The basis of that submission is as follows:

a. Parliament has provided for the repayment of overpaid VAT in s 80 of the 1994 Act.

b. It has also provided, in s 78, for the payment of interest in cases of error on the part of the Commissioners. It has thereby recognised that, in cases of such error, the claimant taxpayer is entitled to *some* recompense for being kept out of his money.

c. It does not go against the grain of that scheme to recognise that the recompense needs to go further as the result of a requirement of Community law which had not previously been appreciated.

d. In contrast, the Commissioners' approach requires a fundamental change to the statutory scheme which goes against the grain. This is the need to disapply altogether the provisions of s 80(7) which states categorically that the Commissioners are not obliged to make any repayment of VAT except as provided by that section.

e. It is part of this last point that s 81(1) deems interest to be "an amount due by way of credit" which then falls within s 80. We are not convinced that that is correct, but we assume, for the purposes of the argument, that it is.

120. We reject those submissions. In our view—and ignoring altogether the alternative remedy in restitution which is in principle available—the payment of compound interest goes against the grain of this legislation. The statutory scheme is one of simplicity and is straightforward administratively. There can be no argument about the rate or rates of interest payable; they are laid down in the relevant subordinate legislation. And there is no question of identifying the relevant rests. To hold that s 78 allows for compound interest would be to give to this tribunal a further function and jurisdiction which it was not envisaged that it would have, namely to determine, in case of dispute, the amount of interest payable. This would require the tribunal to embark upon an enquiry which goes beyond that which was contemplated. Although s 83(1)(*s*) gives the Tribunal jurisdiction in respect of the Commissioners' liability to pay interest "or the amount of interest so payable", there are no tools provided for the assessment of interest, the determination of rests or any other matters which would be relevant to the ascertainment of what amount of compound interest would represent the full remedy which Community law requires. Rather, it seems to us that the draftsman had in mind simply the period over which interest should be paid and the arithmetic to be carried out in reaching the amount of (simple) interest due.

121. Further, the final step in the argument is not quite correct. It is not s 80(7) which needs to be disapplied. Henderson J did, indeed, hold that the statutory scheme for payment of simple interest was exhaustive and exclusive. It is true that s 80(7) featured in his reasoning; it was because s 80(7) provided an exclusive regime for the recovery of VAT that he considered the right to recover interest must "likewise be found within the confines of the statutory scheme". However, the appellants are right (assuming Henderson J was correct in his conclusion) to say that the payment of compound interest will, on the Commissioners' approach, allow recovery outside the statutory scheme and, to that extent, to say that the statutory provisions will need to be disapplied.

122. Therein lies one important difference between the two approaches. The appellants' approach requires us to read s 78 in a way which certainly departs from its natural meaning. It requires us to do so in a way which, in our view, does cut across the statutory scheme in a way which is not compatible with it. It does not go with the grain. In contrast, the Commissioners' approach does not require a strained *interpretation* at all. Rather the case is one of disapplying the statutory scheme to the extent that it is necessary to do so to allow full effect to given to the appellants' Community entitlements. That would be achieved by allowing the appellants to pursue their restitutionary remedies. There is no comparison between the two cases; the principles established in relation to the compliant reading of UK legislation have no scope for application in a case where the statute is disapplied, leaving a claimant to his remedy either outside the statute altogether or within it where what is disapplied is a provision precluding a right or remedy which the claimant would otherwise have. Ordinarily, it may be that construction comes before disapplication and it is only if a compliant construction is impossible that the question of disapplication arises: see for instance, paragraph 26 of the Chancellor's judgment in *Vodafone 2*. In our view, however, we are entitled to take into account the remedy which is available to the claimants in the absence of a conforming construction and to recognise the very limited nature of the disapplication which is necessary in the present case to release them from the fetter which prevents them otherwise asserting that alternative remedy.

123. That leads to another difficulty facing the appellants. The Commissioners' approach has the advantage that the claims of a taxpayer seeking redress in respect of the wrongful levying of VAT can be dealt with on a case by case basis. In many, if not most, cases, the restitutionary remedy along *Sempra Metals* lines will adequately reflect the taxpayer's Community entitlement, as it would in the present case. But there may be cases where a particular taxpayer would be entitled to a different measure of recompense to obtain "full" recovery. If the search is for a remedy outside the statute, it may be found. But if the search is confined to the statute, the proportionate remedy—whether it is more or less than compound interest—may not be available. This difficulty arises whether one formulates s 78 as giving a right to compound interest or, as with Mr Rabinowitz's alternative formulation, "at the rate applicable under section 197 of the Finance Act 1996 or in such other amount as is required by Community law".

124. In contrast to the Commissioners' approach, the claimants' formulation represents a "one-size-fits-all" approach. It may in some circumstances be insufficient to reflect the taxpayer's Community law rights; in which case he will

have a remedy outside the Act and it will be necessary to disapply the statute in just the way that the claimants submit goes against the grain. Or it may in some circumstance give a taxpayer more than he is entitled to. We can see that the express adoption of a provision for compound interest might be seen (in most cases at least) as compliant with Community law and if that overcompensates some taxpayers that will be because Parliament has passed legislation to that effect. But if one is to "read-up" the existing statutory provision, it behoves one to do so in a way which reflects Community law rights but does not go further. We are not confident that the construction for which the claimants contend would do so.

125. But even if we were confident that in all cases the construction for which the claimants contend would precisely effect their Community law rights, we would still reject it for the reason already given, namely that it would go beyond interpretation and pass into the realm of legislation.

126. That is enough to dispose of the case. But there are other reasons why we would reject the appellants' construction which we will deal with in case we are wrong so far. They are all connected but we deal with them separately.

127. The first reason is that the present case is not, as we have explained, dealing with the implementation of a directive. The Sixth Directive says nothing about repayment of overpaid tax or interest. It cannot, we consider, be said that in passing the 1994 Act or amendments to it, Parliament is to be taken as intending to give effect to all Community law requirements concerning the repayment of VAT and interest. There is no reason to construe this particular piece of legislation as if it were the only place where one might find the remedy.

128. The second reason is that English law does provide a remedy which is sufficient (or will in most cases be sufficient and is certainly sufficient in the present case apart from the limitation defence) to comply with Community law, namely a claim in restitution in accordance with *Sempra Metals*. If the natural reading of s 78 is adopted, so that only simple interest is available, English law provides a remedy. We acknowledge that that remedy may in some cases have to be moulded slightly, for instance by disallowing a change of position defence which would otherwise be available. But that is not we think a matter of great moment provided that the substance of the remedy remains undisturbed. This approach is consistent with what was said in paragraph 115 of *Pfeiffer* and is not, we think, invalidated by what Arden LJ said in paragraph 91 of her judgment in *IDT Card Services*.

129. The third reason, although it may really be part of the second reason, is that none of the cases concerned with Community law, whether in the ECJ or the domestic courts, was one where there was an alternative remedy (and the same goes for *Ghaidan*). Unless a compliant construction was given to the statute, the taxpayer or the Crown (as the case may be) would not be put in the position that Community law (or the Convention in *Ghaidan*) entitled them to be put in. In contrast, in the present case, the claimants have, or rather had, a perfectly good remedy outside the statute.

130. There is one other argument which Mr Conlon made which we should mention, if only to reject it. He argues that matters such as the right to VAT

refunds and questions of interest ought properly to be dealt with by the tribunal rather than by the court. In that context, he relies on *Autologic Holdings plc v Inland Revenue Commissioners* [2006] 1 AC 118 ("*Autologic*"), and submits that it is appropriate that the tribunal should rule on claims which were not fully established until the House of Lords determined *Sempra Metals*. *Autologic* was concerned with a rather different point, which was whether the jurisdiction which both the special commissioners and the court were capable of exercising should in fact be exercised by one rather than the other. The real point to draw from the decision is that a taxpayer must use the tax appeal system to resolve what are essentially issues going to his liability for tax and should not use colourable proceedings in the High Court to obtain declaratory relief. In the present case, however, the very question in issue is whether s 78 can be read in a manner which allows for an award of compound interest. If it can, then the tribunal has exclusive jurisdiction; if it cannot, then the tribunal has no jurisdiction and the right to compound interest must be enforced in the court in a claim for restitution. There is nothing, in our view, in an argument that seeks to find a substantive right to compound interest in s 78 simply in order to bring the claim within the jurisdiction of the tribunal.

Conclusion on construction

131. We conclude that s 78 is to be given its natural construction, namely that it provides only for simple interest. The appellants' arguments based on the *Marleasing* principle are rejected.

Disposal of appeal

132. We refuse permission to bring this appeal out of time. If we had not refused permission, we would have dismissed the appeal in the light of our conclusions on construction.

Mr Justice Warren
President

Colin Bishopp
Upper Tribunal Judge