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Case No: A3/2020/0776/0814/0815

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
Mr Justice Mann
[2020] EWHC 97 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th July 2021

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
SIR TIMOTHY LLOYD

- -

Between :

THE CLAIMANTS IN THE ROYAL MAIL GROUP LITIGATION	**Appellants**
- and -	
ROYAL MAIL GROUP LIMITED	**Respondent**

- -
- -

MR RODERICK CORDARA QC & MR GEORGE McDONALD (instructed by Mishcon de Reya LLP) for the **Appellants**
MR JAVAN HERBERG QC & MS EMILY NEILL (instructed by Macfarlanes LLP) for the **Respondent**

Hearing dates : 22nd-24th June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Wednesday 28th July 2021.

Lord Justice Lewison, Lady Justice Asplin and Sir Timothy Lloyd:

This is the judgment of the court.

Introduction

1. For over 30 years Royal Mail provided bespoke postal services to commercial and other organisations in the belief (shared by all parties and by HMRC) that the supply of those services was exempt from VAT on the basis of domestic legislation then in force. A decision of the CJEU in 2009 upset that shared belief. As a result of that decision, it turns out that the domestic legislation did not correctly transpose EU law; and that the supply of at least some of those services was standard rated for the purposes of VAT. In theory, therefore, the costs charged by Royal Mail ought to have contained, embedded within them, an element of VAT. Royal Mail ought to have accounted to HMRC for its output tax on those supplies; and the recipients of those services, as taxable persons, ought to have been able to deduct as input tax the VAT that they paid. We will refer to the latter as "the traders". Understandably, because of the shared (but mistaken) belief Royal Mail did not issue VAT invoices to the traders which showed that VAT had been charged on the supply. Instead, the invoices stated that the supplies were exempt. The main issue on this appeal is whether the traders have an actionable private law right to compel Royal Mail to issue invoices which show the amount of VAT which ought to have been charged. There are potentially two subsidiary issues: (a) if the traders have an actionable right to compel Royal Mail to issue such VAT invoices, when did that cause of action accrue, and is it a continuing cause of action; and (b) is a claim for an injunction to enforce that right one which is barred by limitation? The period of the claim stretches back to May 1977 and runs until at least April 2012.

2. These (and many other) issues came before Mann J as preliminary issues.

3. The judge's answers to the issues which remain live were:

    i) The traders did not have an actionable right of action to compel Royal Mail to issue VAT invoices.

    ii) If there was a cause of action it arose on the expiry of 30 days from the supply; and it was not a continuing cause of action.

    iii) The time limits for the bringing of a claim in tort do not apply to a claim for an injunction. This point was not in fact argued before the judge; but was conceded in the light of authority binding on the judge.

4. The judge's judgment is at [2020] EWHC 97 (Ch).

The Assumptions

5. The facts have not been found, and the case was argued on the basis of certain agreed assumptions. Anything that we say about the facts carries no suggestion that the assumptions are or are not correct. The assumptions which are relevant to this appeal were as follows:

i) The services provided by Royal Mail which are the subject of the claim ("the Services") were chargeable to VAT as a matter of EU law.

ii) The traders are entitled to rely on EU law by virtue of domestic law being interpreted in conformity with the EU law position.

iii) Save in respect of supplies in relation to which the contractual terms expressly provided that the price was exclusive of VAT, the consideration paid for the services included VAT.

iv) There is no factual matrix other than the contractual terms themselves and sensible inferences which can be drawn from the entering into of a contract between Royal Mail and a business, or between Royal Mail and a body within section 33(3) of the Value Added Tax Act 1994 (or its predecessor provision) ("VATA"), for the provision of postal services. Where necessary, the parties were to prepare an agreed statement to describe the Services. In fact no such statement was prepared.

v) At the time when the supplies of the Services were made, the traders and Royal Mail and HMRC mistakenly understood those supplies to be exempt from VAT and by reason of that mistake the traders did not demand a VAT invoice.

vi) Royal Mail did not account to HMRC for VAT included in the consideration price and retained the full sum for its own use.

6. The judge observed at [21] that:

> "… as it turned out (and as ought to have been anticipated) the original assumptions were not sufficient without some additional background matters to provide all the evidential material required to enable all the issues to be decided. Some of the gaps were filled in as we went along by the acceptance of the parties from time to time of some obvious and agreed background facts to provide necessary context. Sometimes it transpired that facts upon which one side or the other (usually the claimants) wished to rely were not evidenced and were not agreed as such, so they could not be deployed."

7. Further deficiencies in the material before the court emerged in the course of the hearing of this appeal.

8. All this brings to mind Lord Scarman's dictum in *Tilling v Whiteman* [1980] AC 1, 25:

> "Preliminary points of law are too often treacherous short cuts.
> Their price can be, as here, delay, anxiety, and expense."

VAT framework: The European dimension

9. VAT predates the United Kingdom's entry into what was then the Common Market. The First Council Directive was issued in 1967. The directives which are relevant to the current proceedings are the Sixth Directive (77/388/EC) which was in force until replaced by the 2006 VAT Directive (2006/112/EEC) ("the Principal VAT Directive").

It is not suggested that there is any material difference between them in so far as concerns the issues raised by this appeal. Some of the provisions of the Principal VAT Directive (including some provisions relating to invoicing) have been amended by Council Directive 2010/45, but it is not suggested that those changes affect the issues we have to decide.

10. The Sixth Directive is principally relevant to explain the background to the problem that has now arisen. The judge set it out accurately. Article 13A of the Sixth Directive stated:

> "1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:
>
> (a) the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto…"

11. In the UK this was given effect by section 31 and Schedule 9 of VATA. Section 31 provided for exempt supplies if they were as described in Schedule 9, and that Schedule described:

> "1. The conveyance of postal packets by the Post Office.
>
> 2. The supply by the Post Office of any services in connection with the conveyance of postal packets."

12. Royal Mail operated a number of services in addition to what the consumer would understand to be the regular mail delivery service. There were various parcel services, with differing provisions for delivery, collection and sorting. They were provided by Royal Mail under various contracts, and (in the case of franking services) statutory schemes.

13. Royal Mail did not distinguish between those services for VAT purposes. They were all treated by all concerned as being within the statutory VAT exemption as set out in Schedule 9. The result was that no VAT invoices showing VAT were rendered. All concerned (Royal Mail, customers and indeed HMRC) worked on the footing that that was the correct approach. Accordingly, Royal Mail did not account to HMRC for any output tax, and customers did not claim credit for any input tax. So far as invoices were concerned, when rendered they did not show, or purport to charge, VAT.

14. The width of this transposition of Article 13A was held by the CJEU to go beyond the permitted exemption under the Sixth Directive: *R (TNT Post UK Ltd) v HMRC* (Case C-357/07), [2009] 3 CMLR 752. It was only services provided by a universal service provider that fell within the exemption. In consequence, the United Kingdom had to change the legislation. This was done by section 22 of the Finance (No 3) Act 2010. The exemption now contained in an amended Schedule 9 is limited to:

> "1. The supply of public postal services by a universal service provider.
>
> 2. The supply of goods by a universal service provider which is incidental to the supply of public postal services by that provider."

15. The amendment applies only to supplies made on or after 31 January 2011: section 22 (4).

16. VAT is intended to be a turnover tax which operates in the same way across the EU. As recital (7) to the Principal VAT Directive explains:

> "The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain."

17. Thus Article 1 of the Principal VAT Directive provides:

> "The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.
>
> On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components."

18. Title IV of the Principal VAT Directive describes what are taxable transactions.

19. Title VI deals with the time at which tax is chargeable. Article 62 provides:

> "For the purposes of this Directive:
>
> (1) 'chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;
>
> (2) VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred."

20. Article 63 provides:

> "The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied."

21. But Article 66 says, by way of derogation, that:

> "Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:
>
> (a) no later than the time the invoice is issued;
>
> (b) no later than the time the payment is received;
>
> (c) where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event."

22. Title X deals with the right to deduct which is a fundamental feature of VAT. Article 167 provides:

> "A right of deduction shall arise at the time the deductible tax becomes chargeable."

23. Article 168 provides:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person…"

24. This is the system of setting off output tax against input tax.

25. Article 178 lays down the rules for exercising the right to deduct. It provides:

> "In order to exercise the right of deduction, a taxable person must meet the following conditions:
>
> (a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240…"

26. How to make the deduction is explained by Article 179:

> "The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178."

27. But Article 180 provides:

> "Member States may authorise a taxable person to make a deduction which he has not made in accordance with Articles 178 and 179."

28. Invoices are dealt with in Title XI, Chapter 3. There is some reference to invoicing in the recitals to the Principal VAT Directive:

> "(45) The obligations of taxable persons should be harmonised as far as possible so as to ensure the necessary safeguards for the collection of VAT in a uniform manner in all the Member States.
>
> (46) The use of electronic invoicing should allow tax authorities to carry out their monitoring activities. It is therefore appropriate, in order to ensure the internal market functions properly, to draw up a list, harmonised at Community level, of the particulars that must appear on invoices and to establish a number of common arrangements governing the use of electronic invoicing and the electronic storage of invoices, as well as for self-billing and the outsourcing of invoicing operations.
>
> (47) Subject to conditions which they lay down, Member States should allow certain statements and returns to be made by electronic means, and may require that electronic means be used.
>
> (48) The necessary pursuit of a reduction in the administrative and statistical formalities to be completed by businesses, particularly small and medium-sized enterprises, should be reconciled with the implementation of effective control measures and the need, on both economic and tax grounds, to maintain the quality of Community statistical instruments."

29. Article 220 provides:

> "Every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party:
>
> (1) supplies of goods or services which he has made to another taxable person or to a non-taxable legal person…"

30. Article 224 allows for invoices drawn up by the customer by prior agreement with the supplier. These are known as self-billing arrangements. They are not relevant to this appeal.

31. Article 226 sets out the minimum prescribed contents of an invoice.

VAT Framework: the domestic dimension

32. The basic system of VAT is that where a taxable person makes taxable supplies, he is liable to charge output tax on those supplies, and will be entitled to deduct any input tax that he pays on connected supplies to him. The process of accounting to HMRC for

the balance between input tax and output tax is accomplished by means of VAT returns. Each return is made up by reference to a prescribed accounting period. The balance (if positive) will be paid to HMRC; while if negative it entitles the taxable person to a VAT credit: Value Added Tax Act ("VATA") section 25.

33. At the heart of this appeal is the mechanism for making the deduction of input tax.

34. Although there have been various iterations of the domestic legislation implementing the United Kingdom's obligations under EU law, the relevant provisions can be taken from the VAT Regulations 1995. Part III of the Regulations deals with invoicing. Regulation 13 provides:

> "(1) Save as otherwise provided in these Regulations, where a registered person (P)—
>
> (a) makes a taxable supply in the United Kingdom to a taxable person, or
>
> (b) makes a supply of goods to a person in a member State for the purpose of any business activity carried out by that person…; or
>
> (c) receives a payment on account in respect of a supply of goods that P has made or intends to make from a person in a member State… ,
>
> P must, unless paragraph (1ZA) applies, provide such persons as are mentioned above with a VAT invoice.
>
> …
>
> (5) With the exception of the supplies referred to in paragraph (6), the documents specified in paragraphs (1), (2), (3) and (4) above shall be provided within 30 days of the time when the supply is treated as taking place under section 6 of the Act, or within such longer period as the Commissioners may allow in general or special directions."

35. Regulation 14 prescribes the contents of an invoice.

36. Regulation 29 deals with the making of a claim to deduct input tax. It provides:

> "(1) Subject to paragraph (1A) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the return for the first prescribed accounting period in which he holds that document or invoice. …

> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—
>
> (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13…
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other … evidence of the charge to VAT as the Commissioners may direct."

37. Section 69 of VATA provides:

> "(1) If any person fails to comply with a regulatory requirement, that is to say, a requirement imposed under—
>
> …
>
> (d) any regulations or rules made under this Act, other than rules made under paragraph 9 of Schedule 12…
>
> he shall be liable, subject to subsections (8) and (9) below and section 76(6), to a penalty equal to the prescribed rate multiplied by the number of days on which the failure continues (up to a maximum of 100) or, if it is greater, to a penalty of £50."

38. Put shortly, the prescribed rate is a sliding scale which depends on the taxable person's previous level of default. Section 69 (8) provides:

> "(8) A failure by any person to comply with any regulatory requirement or the requirement referred to in subsection (2) above shall not give rise to liability to a penalty under this section if the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for the failure…"

The centrality of the invoice

39. Mr Cordara QC, for the traders, emphasises what he says is the centrality of the invoice. VAT is designed to be a tax whose burden is borne by the final consumer. The function of each intermediate supplier in a chain of supply is to collect and account for the tax due. Thus the right to deduct input tax is a fundamental feature of the VAT system. It is this feature which guarantees fiscal neutrality. This was explained by the CJEU in *Elida Gibbs Ltd v Customs and Excise Comrs* (Case C-317/94) [1997] QB 499, 560.

40. In *Zipvit Ltd v HMRC* [2018] EWCA Civ 1515, [2018] 1 WLR 5729 this court considered the role of the invoice. The facts of that case were not dissimilar to ours; as they also concerned the supply of services by Royal Mail at a time when everyone thought (wrongly) that they were exempt as opposed to standard rated. Zipvit attempted to recover from HMRC by way of input tax the VAT which, it said, must be taken to have been included in the consideration that Royal Mail charged for the services

supplied. In a judgment given by Henderson LJ, this court decided that without a valid VAT invoice the claim was bound to fail. Before looking at the reasoning in that case, let us say at once that on an appeal to the Supreme Court that court referred certain questions to the CJEU. Advocate General Kokott delivered her opinion in the case on 8 July 2021, after we had reserved judgment. We will return to that topic shortly.

41. Like this case, *Zipvit* was conducted on the basis that Zipvit was entitled to rely on EU law either (a) because the domestic legislation was to be construed as conforming with EU law or (b) because Zipvit was entitled to rely on EU law against HMRC as an emanation of the state.

42. At [47] Henderson LJ accepted the existence of:

> "[the] important principle… that the right to deduct does not depend on showing that the input tax in question has been paid or accounted for by the supplier as output tax to the revenue authorities."

43. He repeated the point at [88]. But he said at [49] that:

> "… this principle cannot be applied in isolation, and in particular does not in my judgment override the requirement for a person exercising the right of deduction to produce a VAT invoice evidencing payment of the relevant VAT by the supplier."

44. At [92] Henderson LJ pointed out that the requirement of an invoice in Article 178 is expressed to be mandatory. Having considered the case law of the CJEU, he said at [113]:

> "Exercise of the right to deduct is subject to a mandatory requirement to produce a VAT invoice, which must contain the specified particulars. Zipvit is unable to produce invoices which satisfy the requirements of article 226(9) and (10), and it is also unable to produce any supplementary evidence showing payment of the relevant tax by Royal Mail. A necessary precondition for exercise of the right to deduct therefore remains unsatisfied."

45. He added at [114]:

> "Provision of an invoice which complies with those requirements is essential to the proper performance by HMRC of their monitoring functions in relation to VAT, and is needed as evidence that the supplier has duly paid or accounted for the tax to HMRC."

46. Finally on this point, he said at [117]:

> "Whether the situation is described as one in which HMRC have no discretion, because the requirements of article 226(9) and (10) cannot be dispensed with, or as one where there is in law a discretion but on the facts of the present case it can only be

> exercised in one way, does not seem to me to matter. The important point is that the inability of Zipvit to produce a compliant VAT invoice in support of its claim to deduct input tax is in my judgment fatal."

47. Nevertheless, such is the importance of the right to deduct that a taxable person is entitled to deduct input tax if the substantive requirements are satisfied even if he fails to comply with some formal requirement. In *Barlis 06 - Investimentos Imobiliarios e Turisticos SA v Autoridade Tributaria e Aduaneira* (Case No C-516/14) [2016] BVC 43 the Portuguese tax authorities refused a deduction of VAT on the ground that the invoice in question did not satisfy the conditions laid down by national legislation. The CJEU held that the invoice in question did not satisfy the terms of Articles 178 (a) and 226. But it went on to say (omitting citation of authority):

> "42 The Court has held that the fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions. Consequently, where the tax authorities have the information necessary to establish that the substantive requirements have been satisfied, they cannot, in relation to the right of the taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes….
>
> 43 It follows that the tax authorities cannot refuse the right to deduct VAT on the sole ground that an invoice does not satisfy the conditions required by Article 226(6) and (7) of [the Principal VAT] Directive if they have available all the information to ascertain whether the substantive conditions for that right are satisfied."

48. Likewise in *Vădan v Agenția Națională de Administrare Fiscală* (Case C-664/16) the CJEU said (omitting references to authority):

> "41 The Court has held that the fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions. It follows that the tax authorities cannot refuse the right to deduct VAT on the sole ground that an invoice does not satisfy the conditions required by Article 226(6) and (7) of the VAT Directive if they have available all the information to ascertain whether the substantive conditions for that right are satisfied….
>
> 42 Thus, the strict application of the substantive requirement to produce invoices would conflict with the principles of neutrality and proportionality, inasmuch as it would disproportionately prevent the taxable person from benefiting from fiscal neutrality relating to his transactions.

> 43 Nevertheless, it is for the taxable person seeking deduction of VAT to establish that he meets the conditions for eligibility….
>
> 44 Accordingly, the taxable person is required to provide objective evidence that goods and services were actually provided as inputs by taxable persons for the purposes of his own transactions subject to VAT, in respect of which he has actually paid VAT.
>
> 45 That evidence may include, inter alia, documents held by the suppliers or service providers from whom the taxable person has acquired the goods or services in respect of which he has paid VAT. An assessment based on an expert report commissioned by a national court may, if necessary, supplement that evidence or reinforce its credibility, but may not replace it."

49. The problem for Zipvit was that it could not satisfy the alternative means of showing that the substantive conditions had been satisfied, as Henderson LJ explained at [112]:

> "One of the main purposes of the mandatory requirement for a VAT invoice is to enable the taxing authorities to monitor payment by the supplier of the tax for which a deduction is sought, or as the Advocate General put it at point 32 of her opinion [in *Barlis*] "to enable a check on whether the person issuing the invoice has paid the tax". Zipvit remains wholly unable to satisfy this condition, because the only invoices which it can supply show the complete opposite, namely that no tax was paid because the supplies were considered to be exempt. Nor can it be said that the position was remedied by the exiguous further information supplied with the letter of claim in September 2009. All this did was to show the VAT component of the original purchase prices, on the assumption that the supplies were taxable. It provided no evidence that a penny of that tax had been paid by Royal Mail to HMRC, and still less did it do so in the form of an invoice issued by Royal Mail."

50. In short, all the available evidence and documentation positively showed that Royal Mail had neither paid VAT nor accounted to HMRC for VAT on the relevant supplies; and had not in fact passed on any VAT to Zipvit. It was for that reason that Zipvit failed. That is how the judge analysed *Zipvit* at [91]; and in our opinion he was right.

51. The cases in the CJEU to which we have referred do not delineate precisely which requirements are substantive and which are formal. As mentioned, however, Advocate-General Kokott delivered her opinion in *Zipvit* (Case C-156/20) on 8 July 2021. We invited the parties to make written submissions on the impact of her opinion on this appeal; which we received on 19 July. The traders addressed the question of the requirement of an invoice, but not the Advocate-General's view of whether VAT was in fact passed on. That may be because her view was inconsistent with the assumptions on which the preliminary issues were argued below and before us. After our judgment was circulated in draft, they made further submissions on that aspect, which we have

taken into account. An opinion of the Advocate-General is persuasive rather than binding, but we will consider the effect that her opinion would have, if accepted by the CJEU, on the issues before us.

52. At [49] she drew a clear distinction between the right to deduct in principle and the right to deduct a given amount. Previous case law had only ruled on the right of deduction in principle. At [53] she said that the legislature assumed that the recipient of the supply is usually charged VAT before payment of the price, but after the supply itself. At that point the right of deduction has already arisen in principle. But so far as the right to deduct a given amount was concerned, she considered that article 178 (a) of the Principal VAT Directive was of decisive importance. At [55] she said:

> "That is because the mere supply of the goods or services says nothing about the amount of VAT charged to the recipient of the supply and included in the price. However, this is necessary for the exercise of the right of deduction. This becomes very clear in cases like the present one, where the parties are mutually mistaken about the exemption of the transaction. According to the contractual agreements, Royal Mail and the applicant assumed that the agreed price did not include VAT. If VAT were to be incurred, it was to be additionally borne by the applicant, in accordance with the contractual agreements. This never happened, although the supply was undoubtedly carried out. The supply of the goods or services in itself therefore does not contain any statement as to whether the applicant sustains a charge to VAT."

53. She went on to say at [56] that it was "only logical" that the Principal VAT Directive required the recipient of a supply to hold an invoice; and at [57] that holding an invoice served to implement the principle of neutrality. At [58] she said:

> "It follows from the concept of VAT relief that deduction of input tax is possible only if the recipient of the supply sustains a charge to VAT. However, the recipient does not sustain a charge immediately upon the supply of the goods or services, but ultimately only upon payment of the consideration (see points 52 and 55 above). The rule enacted in Article 178(a) of the VAT Directive is clearly predicated on the concept that payment is generally made promptly once an invoice has been issued. This means that it is possible even at that moment to presume that the recipient of the supply sustains a charge promptly."

54. At [60] she said:

> "After all, the extent to which the recipient of the supply sustains (or will sustain) a charge to VAT is apparent only if VAT in that amount was included in the calculation of the consideration payable by the recipient – as also rightly submitted by the Kingdom of Spain, the Czech Republic and the United Kingdom. The extent to which VAT was included in the consideration, however, is apparent only from the legal relationship underlying

> that consideration and the *billing for performance under that relationship*. The transaction performed is billed by issuing an invoice in which the supplier discloses his or her calculation." (Original emphasis)

55. Importantly, at [62] she said:

> "If, as in the present case, both parties as well as the tax authorities mistakenly assumed that a transaction was exempt, no VAT is *passed on* from the supplier to the recipient of the supply by way of the agreed consideration – as rightly emphasised by all parties concerned, with the exception of the applicant. This is why the supplier also did not include it in the invoice. Should both parties decide to adjust the contract after discovering the mistake and to include the missing VAT in the price, this would also be reflected in a corresponding invoice, by means of which the recipient of the supply could then also exercise the right of deduction. Correspondingly, Royal Mail would also be liable for the subsequently stated VAT at the latest when the invoice was issued, in accordance with Article 203 of the VAT Directive. This would restore the synchronisation of input tax and tax liability intended by Article 178(a) of the VAT Directive." (Original emphasis)

56. That paragraph suggests that if in fact no VAT was passed on then no right to deduct arises, unless there is a subsequent adjustment of the price. Thus she said at [63]:

> "In the final analysis, it is precisely the invoice which must be held in accordance with Article 178(a) of the VAT Directive that is the means provided for by that directive by which the charge to VAT is passed on from the supplier (which is liable for payment of the tax) to the recipient of the supply (as part of the price) in a manner that is verifiable for all parties concerned (including the tax authorities). Only then is the recipient of the supply able to see how much the supplier believes he or she should be charged in VAT. The recipient can claim relief in that amount by means of that invoice – which gives rise to his or her tax burden."

57. Again, the last sentence suggests that it is the invoice which gives rise to the tax burden imposed on the recipient of the supply. She repeated that thought at [67] where, having referred to two previous cases, she said:

> "In both cases, the Court rightly proceeded on the assumption that the recipient of the supply did not sustain a charge to VAT until it was in possession of a corresponding invoice stating its VAT liability. The applicant is not in possession of such a corrected invoice in the present case, however."

58. These passages seem to us to say that the recipients of a supply, such as the traders in this case, do not sustain a liability to pay VAT in the absence of an invoice stating that

liability. On that basis it seems to follow that Royal Mail did not in fact charge VAT, and therefore that no VAT was passed. If that applies to the facts of this case, then there is nothing to deduct; and the foundation of the traders' case would fall away.

59. The Advocate General then turned to consider whether it was possible to deduct without an invoice. Previous case law, she said, considered the question of evidence that a right of deduction had arisen. If an invoice had been issued, but lost, then the taxable person could show by other evidence that "at some point he or she held an invoice on which VAT was charged in a given amount." Although it was possible to exercise the right of deduction where some of the details of the invoice did not comply with the Principal VAT Directive, the court had never been concerned with "possession of an invoice as such (or the existence of an invoice)." Accordingly, she concluded at [79]:

> "Thus, that case-law only refers to the absence of *certain* formal requirements, not to the absence of *all* formal requirements. It cannot therefore be concluded from that case-law that a right of deduction can arise if no invoice is held." (Original emphasis)

60. She went on to consider what the essential requirements of an invoice were; which she listed at [81]. At [83] she said:

> "However, if the shortcoming in the invoice concerns – as in the present case – the circumstance of whether VAT is stated separately, which is one of the essential features of an invoice conferring a right of deduction, the possibility to deduct input tax is ruled out for that reason alone. The recipient of the supply cannot claim relief from a charge to VAT by means of an invoice showing an exempt supply. In that respect, the United Kingdom rightly refers to a precondition for a deduction of input tax. This is because such an invoice does not give rise to a charge to VAT. Without such an invoice as the means by which the tax burden is 'passed on', the requirements of Article 178(a) of the VAT Directive are not met."

61. In other words, the recipient incurs no charge to VAT without an invoice. In that case the supplies were stated to be exempt; so no VAT was charged or passed on. Her interim conclusion at [85], therefore, was:

> "Thus, it follows both from the wording of the VAT Directive and from the case-law of the Court that a right of deduction in a given amount requires the recipient of the supply to have held at some point an invoice separately stating the VAT passed on in that amount. Since this was never the case here, a right of deduction on the part of the applicant is ruled out for that reason alone."

62. The remaining questions were not necessary for her to answer, but she considered them nevertheless. Article 168 (a) of the Principal VAT Directive was concerned only with the VAT payable by the supplier (both in that case and this, Royal Mail). It was not possible to say whether the recipient of the supply would be liable to pay VAT. She explained at [92]:

> "This is because, with regard to his or her input transactions, the recipient of the supply – outside the cases of the reverse charge procedure under Article 194 et seq. of the VAT Directive – is not liable for VAT and also cannot pay VAT. The recipient of the supply is liable – under civil law – for only the price for the supply or service. It is also only that price that he or she can pay. That price may contain an element arithmetically reflecting the VAT liability of the supplier. However, this does nothing to change the fact that, with the payment of the price by the recipient of the supply, only the price and no VAT is due or paid. This is because the tax creditor in respect of VAT is not the supplier, but only the State."

63. What, then happens, when the recipient of the supply has paid the price which did not (but should have) included VAT? The Advocate-General answered that question at [99]:

> "The Court therefore rightly emphasises in its case-law that when a contract of sale has been concluded without reference to VAT, in a situation where the supplier has no means under national law of recovering from the purchaser the VAT claimed subsequently by the tax authorities, taking the total price, without deducting the VAT, as the taxable amount on which the VAT is to be levied, leads to a situation where it is the supplier which bears the VAT burden. This therefore conflicts, in turn, with the principle that VAT is a tax on consumption to be borne by the end consumer. Taking that amount as the taxable amount also conflicts with the rule that the tax authorities may not charge a VAT amount exceeding the amount paid by the taxable person. The corollary of this is that (all) the consideration actually received already includes the VAT provided for under EU law."

64. Her overall conclusion on this question at [101] and [102] seems to us to have been that if the supplier has no means of making a subsequent adjustment of the price, no VAT has been passed on to the recipient of the supply (here the claimants). Having repeated that the "VAT due or paid" refers to the VAT due from or paid by the supplier, she concluded at [109]:

> "However, this only becomes practically relevant for the recipient of the supply when he or she receives a corresponding invoice stating the VAT, which demonstrates the passing on of that tax to the recipient of the supply. However, in the case of a mutual error, the supplier will issue such an invoice only if he or she alone must bear the risk of the correct assessment under VAT law or if the recipient of the supply subsequently pays the VAT that has not yet been passed on due to the mutual error, that is to say, the price is adjusted accordingly."

65. This would show that there are two distinct reasons why the traders in this case would not be entitled to deduct. First, the price in our case has never been adjusted, so it would follow that no VAT has been passed on to the traders. Likewise, the traders have not in

fact paid any passed-on VAT to HMRC. They would not, therefore, have any right to deduct. Second, they do not have an invoice showing the amount of VAT (if any) that has been passed on.

66. If that analysis is correct, then there would be no occasion for any private law cause of action to compel Royal Mail to issue an invoice. Such an invoice would show the VAT payable *in addition* to the original contract price.

67. The implications of the Advocate-General's opinion and of the eventual decision of the CJEU will no doubt require further consideration as the present litigation proceeds. Given that the case has been argued on the basis of the assumptions set out above, however, we will decide the issues before us on those assumptions, unaffected by the Advocate-General's opinion.

The impact of EU Law on domestic law

68. Until the departure of the United Kingdom from the European Union, the conduit by which EU law became part of domestic law was section 2 of the European Communities Act 1972. Section 2 of the 1972 Act relevantly provides:

> "(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly…
>
> (4) … any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section…"

69. The effect of section 2 was comprehensively considered by the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61. The majority judgment in that case establishes the following:

i) Section 2 authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only became a source of UK law, but actually took precedence over all domestic sources of UK law, including statutes: [60].

ii) Where EU law applied in the United Kingdom, it was the EU institutions which were the relevant source of that law. The legislative institutions of the EU could create or abrogate rules of law which would then apply domestically, without the specific sanction of any UK institution: [61].

iii) EU law may have taken effect as part of the law of the United Kingdom in one of three ways:

a) First, the EU Treaties themselves were directly applicable by virtue of section 2(1). Some of the provisions of those Treaties create rights (and

duties) which were directly applicable in the sense that they were enforceable in UK courts.

b) Second, where the effect of the EU Treaties was that EU legislation was directly applicable in domestic law, section 2(1) provided that it was to have direct effect in the United Kingdom without the need for further domestic legislation. This applied to EU Regulations.

c) Third, section 2(2) authorised the implementation of EU law by delegated legislation. This applied mainly to EU Directives, which were not, in general, directly applicable but were required to be transposed into national law: [63].

iv) Failure of the United Kingdom to comply with its obligations under EU law was justiciable in domestic courts, and some Directives could be enforced by individuals directly against national governments in domestic courts. Further, any serious breach by the UK Parliament, government or judiciary of any rule of EU law intended to confer individual rights would have entitled any individual sustaining damage as a direct result to compensation from the UK Government: [63].

v) So long as the United Kingdom was party to the EU Treaties, UK courts were obliged (i) to interpret EU Treaties, Regulations and Directives in accordance with decisions of the Court of Justice, (ii) to refer unclear points of EU law to the Court of Justice, and (iii) to interpret all domestic legislation, if at all possible, so as to comply with EU law: see *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135. And, so long as the United Kingdom was party to the EU Treaties, UK citizens were able to recover damages from the UK Government in cases where a decision of one of the organs of the state based on a serious error of EU law had caused them loss: [64].

70. For the purposes of this appeal it is assumed that the traders are entitled to rely on EU law by virtue of domestic law being interpreted in conformity with the EU law position; in other words by the application of the *Marleasing* principle. It is not suggested that there is any other means by which, on ordinary principles of statutory interpretation, the domestic legislation could be interpreted so as to conform with EU law. The *Marleasing* principle applies because of section 2 of the 1972 Act.

Remedies in EU law

71. The root cause of the problem is that the United Kingdom wrongly transposed the exemption required by Article 13A of the Sixth Directive into domestic law. There are circumstances in which European law allows a claim for compensation arising out of a failure to implement EU law correctly. It is necessary to show that (1) the rule of Community law infringed is intended to confer rights on individuals; (2) the breach is sufficiently serious, and in particular that there was a manifest and grave disregard by the member state of its discretion; and (3) there is a direct causal link between the breach of the obligation resting on the member state and the damage sustained by the injured party: *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722; *Brasserie du Pêcheur SA v Federal Republic of Germany* (Joined Cases C-46 and

C-48/93) [1996] QB 404; *Phonographic Performance Ltd v Department of Trade and Industry* [2004] 1 WLR 2893. We refer to these as "the *Francovich* criteria".

72. Importantly, however, that claim for compensation is made against the member state in question, or an emanation of that state; not against another commercial entity that has been operating under the incorrectly transposed law. This was explained by the ECJ in *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] QB 401:

> "46. It is necessary to recall that, according to a long line of decisions of the court, in particular its judgment in *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53, wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual *against the state* where that state fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.
>
> …
>
> 48. With regard to the argument that a directive may not be relied upon against an individual, it must be emphasised that according to article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each member state to which it is addressed." It follows *that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.* It must therefore be examined whether, in this case, the health authority must be regarded as having acted as an individual." (Emphasis added)

73. The appeal was argued on the basis that Royal Mail is a "normal commercial business". Arguments relating to Royal Mail as an alleged emanation of the state are for another day.

74. In relation to postal services, it has now been held that the United Kingdom's misinterpretation of the exemption in the Sixth VAT Directive (which led to the non-compliant domestic legislation) did not satisfy the second of the *Francovich* criteria, with the consequence that no claim lies against the United Kingdom: *R (Whistl (UK) Ltd) v HMRC* [2014] EWHC 3480 (Admin), [2015] STC 1077. We were told that an appeal from that decision was abandoned in April 2016.

Extent of Marleasing

75. Although the *Marleasing* principle requires the court to interpret domestic legislation conformably with EU law, it does not go any further. In particular, it does not require the court to interpret domestic legislation in such a way as to give rise to a private law cause of action where no such right exists as a matter of EU law.

76. On the contrary, it will normally be assumed that in transposing EU Directives into domestic law, Parliament intended to go no further than its Treaty obligations.

77. *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2017] UKSC 34, [2017] 1 WLR 1373 concerned a claim by a disappointed tenderer under the Public Contracts Regulations 2006. The Regulations had been passed in order to comply with EU Directives on public procurement. Lord Mance considered the EU jurisprudence on the conditions for liability of public authorities to pay damages for breach of the Directive pursuant to which the Regulations were made. Referring in particular to *Combinatie Spijker Infrabouw-De Jonge Konstruktie v Provincie Drenthe* (Case C-568/08) [2010] ECR I-12655 Lord Mance said at [27]:

> "In these circumstances, there is in my view very clear authority of the Court of Justice confirming that the liability of a contracting authority under the Remedies Directive for breach of the PP Directive is assimilated to that of the state or of a public body for which the state is responsible. It is in particular only required to exist where the minimum *Francovich* conditions are met, although it is open to states in their domestic law to introduce wider liability free of those conditions."

78. Reversing this court, Lord Mance explained at [37]:

> "Where the Court of Appeal in the present case went in my opinion clearly wrong was in its assumption that any claim for damages under the 2006 Regulations was no more than a private law claim for breach of a domestically-based statutory duty, and for that reason subject to ordinary English law rules which include no requirement that a breach must be shown to be "sufficiently serious" before damages are awarded: para 67. The Court of Appeal appears to have assumed that the categorisation in domestic law of a claim based on EU law as being for breach of statutory duty freed it automatically from any conditions which would otherwise apply under EU law. That this is not so is clear if one takes the simple case of a domestic claim against the state for failure correctly to transpose EU law. Such a claim is subject to the *Francovich* and *Brasserie du Pêcheur* principles and conditions."

79. At [38] he approved the decision in *Phonographic Performance Ltd v Department of Trade and Industry*; and went on to say at [39]:

> "Although there is no *Marleasing* imperative to construe the scheme so far as possible consistently with the *Francovich* conditions, it is I think a natural assumption that the UK legislator will not go further than required by EU law when implementing such a scheme, without considering this and making it clear."

A private law claim in EU law?

80. Mr Cordara QC, for the traders, relies on the *Marleasing* principle that national courts have an obligation to interpret national law in conformity with EU law. That principle is not (and could not be) disputed. But in our opinion the application of the principle begs the question.

81. The first question, as it seems to us, is whether a private right of action of the kind that the traders allege exists as a matter of EU law. They claim declarations that they are entitled to VAT invoices, orders that they be provided, and damages for not providing invoices.

82. The Principal VAT Directive (and its predecessors) do not suggest the existence of any such right. The judge held at [96] (a) that the EU source legislation did not require the existence of an actionable private law right. We were not shown any decision of the CJEU (or its predecessor) which suggested that such a private right existed in EU law. Nor were we shown any decision of a court in another member state which recognises such a right.

83. Mr Cordara accepted that, at EU level, there was no private law claim by one taxable person against another for failure to issue an invoice. He submitted that it was very rare for EU Directives to require member states to provide particular remedies for contravention of EU law. But there is no doubt that Directives sometimes do. Two examples will suffice. Council Directive 89/665/EEC as amended required member states to provide for remedies (including compensation) to disappointed tenderers for public contracts. Directive 2004/48 required member states to ensure that a person who knowingly infringes an intellectual property right pays damages.

84. We do not, therefore, consider that the *Marleasing* principle requires a court to hold that there is a private law claim of the kind that the traders assert unless Parliament has independently made it clear that such a right exists.

The content of the alleged duty

85. The duty as pleaded asserts:

> "[Royal Mail], being a registered taxable person making taxable supplies for VAT purposes to another taxable person (i.e., the [traders]), was under a statutory duty to provide the [traders] with an invoice containing particulars specified by regulations in force at the relevant time."

86. It was a duty in that form that was the subject of the argument before the judge; and as we understood it, it was that duty which was advanced in the traders' skeleton argument. A duty in that form appears to be a duty to issue a VAT invoice within 30 days of each supply made during the claim period. The duty that Mr Cordara argued for in the course of his oral submissions, however, differed from that advanced in the skeleton argument. Mr Cordara recognised that under section 69(8) of VATA no civil penalty could be imposed on a supplier who failed to produce a VAT invoice if that supplier had a "reasonable excuse" for not doing so. He also recognised that, until some

indeterminate date after the judgment of the CJEU in *TNT*, Royal Mail would have had a reasonable excuse for not producing an invoice.

87. Thus the duty for which he contended orally was a two stage duty. Stage 1 of the duty was a duty to issue an invoice within 30 days of the supply, in conformity with regulation 13. That was a duty which was enforceable against the state or an emanation of the state but not against an ordinary taxable person. An ordinary taxable person might have a reasonable excuse for not issuing an invoice, judged in accordance with section 69 of VATA. But once the taxable person ceased to have a reasonable excuse, the duty to issue a VAT invoice was actionable against that person. That was stage 2, which gave rise to the cause of action.

88. Mr Cordara propounded this duty, at first, in oral submissions, recognising that the duty as pleaded was open to the criticism that it was asserted to exist in circumstances in which the statutory duty was not subject to the regulatory sanction of a penalty under section 69 because the supplier had a reasonable excuse for not issuing the invoice. At the court's request he then formulated the duty in writing, but has not sought to amend the traders' pleadings so as to rely on this alternative duty. In these circumstances we will address the issues by reference primarily to the pleaded duty, but will also consider how the position would or might be different in respect of the alternative duty.

Has Parliament created a private law cause of action?

89. Mr Cordara argues that the principles of effectiveness and legal certainty require the existence of a private right to compel production of an invoice, where such an invoice is a necessary condition of exercise of the right to deduct. EU law requires effective and legally certain protection of the right to deduct; and UK legislation, including regulation 13, must be interpreted accordingly.

90. The principal purpose of the requirement of an invoice is to enable the taxing authorities to monitor the proper operation of the VAT scheme rather than to give one trader rights against another. A fully compliant invoice is not always necessary, as the court held in *Vãdan*; but the objective evidence must show that:

> "goods and services were actually provided as inputs by taxable persons for the purposes of his own transactions subject to VAT, in respect of which *he has actually paid VAT*." (Emphasis added)

91. Moreover, at least on the basis of Advocate-General Kokott's opinion in *Zipvit*, the taxable person must show that at some point he held an invoice which stated his VAT liability; in addition to showing that he in fact paid VAT. The traders cannot do that in this case. On the assumption that the traders have paid VAT (an assumption that we have rejected) the possession of the invoice is a necessary precondition of the right to deduct. It follows, therefore, so the argument runs, that there must be a private law right to compel the issue of a compliant invoice. In our judgment, this argument has a number of difficulties.

92. The first of these difficulties is that if (as is common ground) there is no such private cause of action in EU law, it is a natural assumption that the UK legislator will not go further than required by EU law when implementing such a scheme, without considering this and making it clear. Many statutes do make it clear when a civil remedy

arises (e.g. Protection from Harassment Act 1997 section 3; Landlord and Tenant Act 1988 section 4). Conversely sections 2 to 8 of the Health and Safety at Work etc Act 1974 impose duties on employers, but section 47(1)(a) makes it clear that there is no civil liability for breach of those duties. Whatever else may be said about VATA and the VAT Regulations, it is by no means *clear* that they confer a private law cause of action; let alone a private law cause of action which operates in stages.

93. The second difficulty is that it seems unlikely that Parliament intended to create a private law cause of action by one taxable person against another which was not required to satisfy the *Francovich* criteria. EU law does not give an individual a private law cause of action where those criteria are not satisfied; and there is no reason why Parliament should be more generous. Although the reformulated duty accommodates the possibility of a reasonable excuse for not providing an invoice, the *Francovich* criteria require "a manifest and grave disregard" of EU law. As we have said, it has already been decided that the United Kingdom's misunderstanding of EU law did not meet that test.

94. The classic exposition of the circumstances in which breach of a purely domestic statutory obligation gives rise to a private law right is found in the speech of Lord Browne-Wilkinson in *X v Bedfordshire CC* [1995] 2 AC 633, 730 and following. He divided such claims into a number of different categories:

> "(A) actions for breach of statutory duty simpliciter (i.e. irrespective of carelessness); (B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; (C) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; (D) misfeasance in public office…"

95. We are concerned only with the first category. That category comprises cases in which:

> "the statement of claim alleges simply (a) the statutory duty, (b) a breach of that duty, causing (c) damage to the plaintiff. The cause of action depends neither on proof of any breach of the plaintiffs' common law rights nor on any allegation of carelessness by the defendant."

96. He went on to say:

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which

> it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v Wimborne (Lord)* [1898] 2 QB 402."

97. Having pointed out that many statutes in fact protect a limited class of people, but give rise to no private law cause of action he said:

> "The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions."

98. Indeed, in *X v Bedfordshire* itself the two statutes relied on as giving rise to a private law claim were passed for the protection of a limited class of the public (children at risk and children with special educational needs respectively) yet no private law claim existed.

99. Can it be said that the requirement placed on a supplier to provide a VAT invoice was imposed "for the protection of a limited class of the public"? We do not consider that the EU jurisprudence leads to an affirmative answer to that question.

100. The principal purpose of the requirement of an invoice, as Advocate-General Leger observed in *Finanzamt Osnabrück-Land v Langhorst* (Case C-141/96) [1997] STC 1357 at [29] is "to ensure that the tax is correctly levied and to avoid fraud." In *Société Générale des Grandes Sources d'Eaux Minérales Françaises v Bundesamt für Finanzen* (Case C-361/96) [1998] STC 981 Advocate-General Cosmas returned to the question. In paragraph [11] of his opinion he referred to and approved the quoted statement by Advocate-General Leger. But he went on to say at [13]:

> "I consider, therefore, that limits exist both for the adoption of new formal requirements and for the interpretation of the minimum requirements which the Community legislature has enacted. Those limits are intended *to prevent the right of taxable*

> *persons to deduct input tax from being totally undermined*." (Original emphasis)

101. He concluded at [14]:

> "It follows from the above that, in the view of the Community judicature, the Community tax regime in issue is based on two fundamental principles/objectives: first, the levying of tax and the combating of tax evasion and, secondly, safeguarding the right of taxable persons to deduct input tax (the principle of fiscal neutrality). In accordance with the principle of proportionality, the balance must not in any event be tipped excessively in favour of one of the objectives, thereby putting achievement of the other at risk."

102. The court did not, however, adopt this description of the purpose of the invoice in their judgment. They decided the case on much narrower grounds.

103. Advocate-General Kokott also discussed the functions of the invoice in *Barlis*. In her opinion she said:

> "30. The purpose of requiring a specific detail in an invoice depends in turn on the function an invoice has to fulfil in the scheme of VAT. As follows from recital 46 of the VAT Directive, issuing invoices allows the tax authorities of the Member States to carry out their monitoring activities. In order to enable monitoring to take place, Article 244 of the VAT Directive requires taxable persons to keep all the invoices they have received and copies of all the invoices they have issued.
>
> 31. In the light of this aim, the purpose of each individual detail in an invoice is directly connected with the question as to what the tax authorities ought to be able to monitor on the basis of an invoice….
>
> 34. So the invoice is a type of insurance for the fiscal authority, in that in a certain sense it links the input tax deduction to payment of the tax. The invoice, without which no input tax deduction may be made, gives the fiscal authority at least the possibility of recovering from the person who issued the invoice the amount of money that goes out by way of input tax deduction, in that the tax authority is able to monitor payment of the corresponding tax by him."

104. Turning to the question of deduction, she said:

> "46. In addition, the invoice and its contents do not merely enable payment of the correct tax by the person who issued it to be monitored. As likewise appears from the legislative history of Article 226 of the VAT Directive, the invoice is intended to fulfil the function of 'proving' its recipient's right of deduction.

> 47. So the recipient of an invoice can also be the subject of monitoring by the tax authority by reference to the particulars in the invoice, as regards his right to deduct input tax. The question thus arises as to whether this monitoring function gives rise to more extensive requirements as regards the precision of the description of a service in an invoice.
>
> 48. The check of entitlement to an input tax deduction begins with an examination of whether the recipient of the invoice holds an invoice at all. This provides some guarantee that the invoiced service actually took place, which is a condition for the existence of the right of deduction. As already explained, under Article 203 of the VAT Directive all VAT in an invoice is payable by the person who issued it. As a result, there is a certain disincentive for a person to issue an invoice in respect of a service which has not been supplied at all. However, for this monitoring function of an invoice the details of the nature of the service are just as unnecessary as they are as regards the check on whether the tax has actually been paid. The disincentive to issuing an invoice for a non-existent supply is based on the tax liability under Article 203 of the VAT Directive, which, as we have seen, does not depend on the description of the service.
>
> 49. In addition, the check on whether the person who issued the invoice stated the tax accurately in it, which, as I have already explained, is one of the purposes of an invoice, serves by way of mirror-image the check on the correct amount of the corresponding input tax deduction. But this is no more a reason for more extensive requirements as regards the description of the nature of a service than those set out above."

105. The court approved this discussion at [27]. At [30] it said:

> "That requirement must also be interpreted in the light of the objective pursued by the imposition of required details in the invoice, such as those provided for in Article 226 of [the Principal VAT] Directive, which, as noted in paragraph 27 above, is to enable the tax authorities to monitor payment of the tax due and, if appropriate, the existence of the right to deduct VAT."

106. The primary purpose, then, of requiring an invoice was not to protect the recipient of the supply, but to enable the tax authorities to monitor the operation of VAT. That is, in essence, an administrative function entrusted to HMRC. The effective ability of the recipient of the supply to exercise its right of deduction is given by its ability to provide the tax authorities with the necessary objective information otherwise than by means of an invoice if it has in fact paid VAT. That ability is relevant not only to the question whether the obligation to supply a compliant invoice was imposed for the protection of a limited class of members of the public, but also to the question whether there is another remedy for the breach of obligation. Thus a third difficulty is to characterise

the obligation to provide an invoice as being for the protection of a limited class of persons, as opposed to enabling the taxing authorities to exercise their functions.

107. A fourth difficulty is to locate the source of the private law cause of action *created by Parliament*. What Mr Cordara relies on is regulation 13 of the VAT Regulations. Section 24 of VATA deals with input tax. Section 24 (6) provides:

> "Regulations may provide—
>
> (a) for VAT on the supply of goods or services to a taxable person. . . and VAT paid or payable by a taxable person on the importation of goods . . . to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases…"

108. Schedule 11 to the Act supplements that provision. Paragraph 2 of that Schedule (as originally enacted) provided:

> "(1) Regulations under this paragraph … may require taxable persons supplying goods or services in such cases, or to persons of such descriptions, as may be so specified to provide the persons supplied with invoices (to be known as "VAT invoices") containing statements of such particulars as may be so specified of the supply, and of the persons by and to whom the goods or services are supplied and containing such an indication as may be required by the regulations of whether VAT is chargeable on the supply under this Act or the law of another member State and such particulars of any VAT which is so chargeable as may be so specified.
>
> (2) The regulations may, where they require a VAT invoice to be provided in connection with any description of supply, require it to be provided within a prescribed time after the supply is treated as taking place, or at such time before the supply is treated as taking place as may be required by the regulations, and may allow for an invoice to be issued later than required by the regulations where it is issued in accordance with general or special directions given by the Commissioners."

109. These, as we understand it, are the enabling powers which gave HMRC the right to make regulations requiring the production of a VAT invoice. We do not consider that it can be suggested that section 24 itself creates a private law cause of action in one taxable person to require another taxable person to supply him with a VAT invoice, since no such invoice is mentioned in section 24. Nor does Schedule 11 on its face lay down any particular duty. It seems highly unlikely that Parliament intended to give HMRC the power to create a private law cause of action where none existed before, particularly where the only possible kind of loss that might be suffered is economic loss as opposed, for example, to personal injury.

110. In *R v Deputy Governor of Parkhurst Prison and Others, Ex p Hague* [1992] 1 AC 58, 171 Lord Jauncey considered the rule making power under section 47 of the Prisons Act 1952 which empowered the Secretary of State to make Prison Rules. Having said that the substantive provisions of the Act itself gave rise to no private law cause of action, he went on to say:

> "To give the Secretary of State power in section 47 to confer private law rights on prisoners would therefore be to allow him to extend the general scope of the Act by rules. This could, of course, be done by some such provision as is found in section 76(2) of the Factories Act 1961 whereby the minister is specifically empowered to make regulations which "impose duties on owners, employed persons and other persons ..." However, in the absence of such a specific provision I conclude that it was not intended that the Secretary of State should be able to extend the scope of the Act by creating private rights by way of rules, from which it follows that had he done so he would have been acting ultra vires."

111. Although Lord Bridge did not agree with the proposition stated in such stark terms, it seems to us that Lords Goff and Lowry (and possibly Lord Ackner) did.

112. *Todd v Adams* [2002] EWCA Civ 509, [2002] 2 All ER (Comm) 97 concerned a failure to comply with the Fishing Vessels (Safety Provisions) Rules 1975 made under powers contained in section 121 of the Merchant Shipping Act 1975. The statutory power enabled the Minister to make rules about the hull, equipment and machinery of fishing vessels; but it also gave him power to exempt any vessel from any requirements. At [4] Neuberger J (with whom Thorpe and Mance LJJ agreed) said:

> "The question of whether a failure on the part of the defendants, as owners of a vessel covered by the 1975 rules, to comply with any of those rules could give rise to a civil liability on their part is an issue which primarily falls to be determined by reference to the 1995 Act. *If the true effect of s 121 of the 1995 Act is that non-compliance with its provisions cannot give rise to a civil liability, then it would be impossible for any rules made thereunder to have the effect of creating such a liability; in so far as they purported to do so, any such rules would simply be ultra vires.* On the other hand, if the true effect of s 121 of the 1995 Act was that the legislature intended there to be civil liability for non-compliance with the rules made thereunder, then, while it would, I believe, be possible for some or all of the rules made thereunder to exclude civil liability for their breach, one would expect, if that was the intention of the legislature, to see very clear words expressing that intention in the 1975 rules themselves. There are no such clear words." (Emphasis added)

113. If, therefore, VATA itself did not create the private law cause of action, it is very unlikely that the Regulations did.

114. A fifth difficulty is the existence of the civil penalty which HMRC can impose under VATA section 69. As Lord Normand explained in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 413:

> "If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action. Otherwise the duty might never be performed. But if there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole. The inference that there is a concurrent right of civil action is easily drawn when the predominant purpose is manifestly the protection of a class of workmen by imposing on their employers the duty of taking special measures to secure their safety."

115. The imposition of the civil penalty is the means of enforcement that Parliament has provided. But even if there is no sanction at all for failing to comply with a statutory duty, it does not necessarily follow that there is a private right of action: *St John Poulton's Trustee in Bankruptcy v Ministry of Justice* [2010] EWCA Civ 392, [2011] Ch 1.

116. Mr Cordara submitted that the imposition of a punitive sanction for failure to comply with a statutory duty was not enough. What the court should be looking for was a means of enforcement that would ensure *compliance* with the statutory duty. In our judgment, however, that submission is contradicted by the speech of Viscount Simonds in *Cutler*. Viscount Simonds quoted the observation of Lord Tenterden in *Doe d. Murray v Bridges*:

> "where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

117. He went on to say:

> "It was argued that the rule had no application where the statutory remedy was by way of criminal proceedings for a penalty. But I see no ground for this distinction. The implication is, if anything, in the opposite direction. For the sanction of criminal proceedings emphasizes that this statutory obligation, like many others which the Act contains, is imposed for the public benefit and that the breach of it is a public not a private wrong."

118. We do not consider that the imposition of a civil penalty is any different. Whether the civil penalty is or is not effective is a matter for Parliament, not the courts.

119. A sixth difficulty lies in the content of the alleged private law cause of action. On the basis of the pleaded duty, the cause of action, premised on a failure to issue a VAT invoice within 30 days of the supply, can be asserted even if the supplier would have a reasonable excuse defence to the imposition of a penalty under section 69. That seems

inherently improbable. On Mr Cordara's alternative formulation of the duty, it does not mature into a justiciable cause of action for as long as the supplier has a reasonable excuse for not providing the invoice. Under section 69 (8), whether the supplier has such an excuse depends on whether it can satisfy HMRC or a tribunal that it does.

120. *Todd v Adam* is relevant to this issue too. One of the reasons that led the court to its conclusion that no private law cause of action had been created was the wide and flexible powers given to the Minister; and in particular his ability to exempt vessels from some or all of the requirements. Under VATA the question whether a taxable person does nor does not have a reasonable excuse is to be decided either by HMRC or by the tax tribunal. As Mr Herberg QC cogently submitted, this raises real conceptual problems in deciding how a claimant needs to plead its claim. If (as in the present case) HMRC has in fact imposed no penalty under section 69, is the claimant to allege:

i) That HMRC (or the tribunal) are not satisfied that the defendant has a reasonable excuse?

ii) That no reasonable HMRC (or tribunal) could be satisfied that the defendant has a reasonable excuse?

iii) That the defendant has no reasonable excuse, leaving it to the court to decide whether or not that is the case, despite the fact that VATA entrusts that decision to HMRC or the tribunal?

121. These are not minor matters. They go to the core of the alleged duty, and also serve to underline what a wide measure of administrative discretion is involved. In addition, where it is alleged that a breach of statutory duty gives rise to a private law cause of action, the cause of action arises when the breach of duty causes loss; not at some later time depending on the defendant's state of mind. Moreover, the purpose of requiring the production of an invoice is not an end in itself. It is only the means to an end; namely a claim for reimbursement or credit against HMRC. It would be very odd if the existence of the cause of action depended on a decision made by the ultimate target of the cause of action. The reformulated duty for which Mr Cordara contends is, in our experience, unique. No doubt by careful drafting Parliament could have created such a cause of action but in our judgment it did not do so.

122. A seventh difficulty is that the nature of the loss covered by the alleged private law cause of action is purely economic. The fact that the only kind of loss that is likely to be suffered is not, of course, a bar to a private law cause of action for breach of statutory duty. But while there may be powerful policy reasons for interpreting a statute designed to protect a person against personal or other physical injury, those reasons are less compelling where the loss is economic. As Stuart-Smith LJ put it in *Richardson v Pitt-Stanley* [1995] QB 123, 132:

> "In my opinion, the court will more readily construe a statutory provision so as to provide a civil cause of action where the provision relates to the safety and health of a class of persons rather than where they have merely suffered economic loss."

123. An eighth difficulty is that the invoices supplied by Royal Mail did in fact comply with all relevant statutory requirements then in force as they would have been understood

according to domestic principles of interpretation. It cannot have been Parliament's intention to create a private law action against a person who in fact complied with domestic legislation as ordinarily understood. The law was not changed until the Finance (No 3) Act 2010 changed it; and then only in relation to supplies made on or after 31 January 2011. Moreover, as a matter of domestic law as ordinarily understood, the supplies made by the Royal Mail before 31 January 2011 were exempt supplies, even though they ought not to have been. Their VAT status was not retrospectively changed by the amendment. To say that Royal Mail had an obligation to supply VAT invoices for supplies that had been made before the amendment came into effect would be to give retrospective effect to the amendment; in direct contradiction to the evident intention of Parliament.

124. For all these reasons, as well as those given by the judge, we reject the argument that the traders have a private law cause of action against Royal Mail for the failure to provide a VAT compliant invoice. We would therefore dismiss the appeal as regards the first of the issues.

If there was a private law claim, when did the cause of action accrue?

125. We assume for the purposes of this issue that the VATA and the VAT Regulations did create a private law right which is capable of forming the subject matter of a justiciable claim. A right of action derived from a breach of statutory duty is classified in English law as a claim in tort. The general rule in cases of tort is that the cause of action is not complete until the breach of duty has caused damage. That appears to have been common ground below; but the judge decided at [216] that damage was not necessary to support the action. The reason that he gave for his conclusion was that as soon as there was a breach of duty the aggrieved trader could apply to court for an injunction requiring the invoice to be supplied.

126. We do not regard that as a reason weighty enough to detract from the general rule. It is true that the court can grant an injunction before there has been an invasion of the claimant's rights in a case where there is a strong probability that the defendant will act in breach of the claimant's rights and the breach would cause serious harm. That is the species of injunction known as a *quia timet* injunction. But the fact that the court may grant an injunction before a breach actually takes place demonstrates that the court may grant an injunction before a cause of action at law has crystallised. The fact that the court has that power does not, in our judgment, shed any light on when the cause of action does indeed crystallise.

127. In *Pickering v Liverpool Daily Post* [1991] 2 AC 370, 420 Lord Bridge said:

> "… it must, in my opinion, appear upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach."

128. Similarly, in *Cullen v Chief Constable of the RUC* [2003] UKHL 39, [2003] 1 WLR 1763 Lord Millett said at [66]:

> "It is not enough that Parliament shall have imposed the duty for the protection of a limited class of the public. It must also be

> shown that breach of the duty is calculated to occasion loss of a kind for which the law normally awards damages."

129. In our judgment, therefore, the cause of action as pleaded arises when there has been a breach of duty that causes loss to the trader.

130. The assumption is that the VAT invoice is needed in order for the trader to enforce its right to deduct input tax. Although the right arises under article 167 "at the time the deductible tax becomes chargeable" (i.e. at the date of the supply), in practice a claim to deduct input tax will not be made until the trader submits its periodic VAT return.

131. If (as pleaded) the duty is a duty to supply a VAT invoice within 30 days after the date of the supply, then the first time at which the invoiceless trader will be unable to exercise its right of deduction will be in the VAT return submitted at the end of the prescribed accounting period in which that 30 day period elapses. Does that inability amount to damage?

132. In our judgment it does. Mr Cordara argued that because the trader could claim to deduct the input tax at the end of a later accounting period, the capital value of the right to deduct remained "pristine". Accordingly, so the argument went, there was no loss suffered at the end of the first accounting period that expires more than 30 days after the supply. We do not accept this argument. The trader who cannot exercise his right to deduct input tax is financially disadvantaged at the time when he would otherwise have exercised that right. Even if the disadvantage is only a cash flow disadvantage it is still a quantifiable financial loss sufficient, in our view, to count as "damage" for the purpose of completing the cause of action.

133. The fact that a trader may deduct the input tax in a later accounting period does not, in our view, affect the analysis. The question is not when the effects of the breach *cease* to be felt, but when they are *first* felt.

134. Mr Cordara had a subsidiary argument for saying that no loss was suffered at that time. Because everyone (including HMRC) thought that the supplies made by Royal Mail were exempt, they would have disallowed the claim to deduct even if the traders had been armed with invoices in the correct form. Thus no loss would have been suffered. We consider that this argument is without foundation. In the first place, in order for the traders to be able to claim the right to deduct they must (so it is assumed) have been issued with invoices purporting to show that VAT had been charged on the supply. In that situation, there would have been a clear difference of opinion between the traders (and for that matter Royal Mail) on the one hand and HMRC on the other over whether the supplies were indeed exempt or standard rated. But that is exactly the sort of dispute that the tax tribunal is well equipped to resolve, if need be with the aid of a reference to the CJEU. In other words, by invoking the dispute resolution procedures for which the law provides the traders could, on this hypothesis, have compelled HMRC to give effect to the right to deduct. As Mr Herberg correctly pointed out, HMRC would also have been obliged to compensate the traders for the loss of use of the money.

135. On that basis, therefore we consider that the judge was right in his alternative conclusion at [222] that, if damage were necessary, it was suffered at the date of the next VAT return due after the date when the invoice should have been rendered.

136. There is, however, a wrinkle. The modified duty that Mr Cordara advanced orally entailed the proposition that the breach of duty consisting of a failure to issue an invoice within the 30 days following a supply did not have any horizontal effect for as long as the supplier had a reasonable excuse for not providing the invoice. It would seem to follow that, if that is the duty, no cause of action accrues until HMRC (or a tribunal) determine that the taxable person no longer has a reasonable excuse for not issuing an invoice.

137. The order made by the judge declared that the cause of action arose at the expiry of 30 days after the supply. Because we consider that damage is a necessary ingredient of the cause of action, we do not agree. We will discharge that part of the judge's order.

138. On the basis of the pleaded duty we hold that the cause of action arose in relation to any given supply at the date when the trader submitted its next VAT return after the date on which a VAT invoice should have been provided in respect of that supply.

139. If the duty relied on were to be amended along the lines of the alternative duty proposed by Mr Cordara during his submissions to the court, then the accrual date would be different; but the present uncertainty as to the exact content of the duty, absent a pleaded version or even a draft of such a version, is such that it would not be useful or meaningful to provide a contingent alternative answer to the second question in issue 2.

If there was a breach, was it a continuing breach?

140. As a general rule where a person has an obligation to do something by a specified time, the breach is complete when the time passes without that thing having been done. The fact that the harm caused by the failure may be cured by late performance does not convert the breach into a continuing one.

141. The point has arisen more than once in cases concerning obligations in leases to reinstate after damage by insured risks. In *Re King* [1963] 1 Ch 459, 478 Lord Denning MR said:

> "Let me take the covenant to reinstate. Suppose the premises are damaged by fire. The lessee does not reinstate within a reasonable time. The breach is over once and for all, but its effect continues."

142. That observation was approved in the similar case of *Farimani v Gates* [1984] 2 EGLR 66 in which Slade LJ said:

> "… if in any given case the relevant obligation is to perform an act by a given date or (as the case may be) within a reasonable time, that is an obligation which can only be broken once; if the act has not been performed by that date or (as the case may be) within a reasonable time, there is a single breach of that covenant, but no continuing breach."

143. Equally, the fact that a breach is remediable does not mean that it is a continuing breach: *Bell v Peter Browne & Co* [1990] 2 QB 495. As Dixon J neatly put it in the High Court

of Australia in *Larking v Great Western (Nepean) Gravel Ltd* [1940] HCA 37, (1940) 64 CLR 221:

> "If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant."

144. That was the way that the judge approached the question at [226]. He said:

> "The question of whether the breach is once and for all or continuing is a question of the construction of the obligation and the nature of the act in question. In my view it is plain that if the failure to provide an invoice was a breach of a statutory obligation it was a breach on the day when it ought to have been provided and not a further breach on the day after that and thereafter day by day. The obligation under Regulation 13 is clear - it provides for the provision of an invoice where a taxable supply is made and paragraph (5) provides for when it is to be done by - within 30 days of the supply. When that is not done in time, there is a breach, and the nature of the breach is a failure to supply an invoice within the 30 days. That remains the breach on the first day after the 30 days, the second day, and thereafter. There is no separate breach on the second and subsequent days. The breach is the same as it always was. If one asks the question on (say) day 5 after the 30 days, "Did the supplier commit a breach today?", the answer would be: No - it committed a breach by the end of 30 days from the supply. In my view the conclusion contended for by Mr Cordara cannot be maintained in the light of that."

145. We agree. The imposition of a penalty under section 69 measured by reference to how long the "failure" has lasted does not change the position. On the contrary it underlines the distinction drawn by Dixon J between the commission of the breach and the failure to remedy it.

146. The judge's answer to the first part of issue 2 was correct. We therefore dismiss the appeal on that part of the issue.

Does the limitation period apply to a claim for an injunction?

147. Royal Mail's appeal is against those parts of paragraph 1 of the judge's order by which he determined Issues 5, 8 and 14 in favour of the claimants. He did so by concession of Royal Mail, who accepted that on these points he was bound to follow the Court of Appeal's decision in *P & O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288. Issue 8 no longer matters, as the Claimants' claim in contract has been dismissed by the judge and permission to appeal was refused on that point. Issue 5 does not arise (subject to any further appeal) on the basis of our holding on Issue 1. However, Issue 14 is still live, pending the determination on a further preliminary issue hearing of Issue 9, the claim that Royal Mail was under a duty

actionable by the claimants under EU law as an emanation of the State. It is therefore right that we should determine Royal Mail's appeal in any event.

148. As stated at paragraph [80] above, the claim is for a declaration that Royal Mail is obliged to issue VAT invoices in accordance with its statutory duty or the alleged European duty (or both), injunctive relief to enforce performance of the duty, and damages or restitution.

149. If we were wrong on Issue 1 but right on Issue 2, the claim for damages for breach of statutory duty would be limited to breaches of duty causing loss occurring within the 6 years before issue of the proceedings. In principle it seems that the same would be true of a claim under a European duty, if established under Issue 9. However, by their injunction claim, the Claimants seek relief in respect of the failure of Royal Mail to issue VAT invoices without limit of time before the issue of the proceedings. The question to which Issues 5 and 14 are addressed is the impact (if any) of the Limitation Act 1980, section 36(1), on these claims.

150. Section 36(1) is as follows (ignoring material irrelevant for present purposes):

> "The following time limits under this Act, that is to say (a) the time limit under section 2 for actions founded on tort (b) the time limit under section 5 for actions founded on simple contract ... shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1 July 1940."

151. The claims for breach of the statutory duty and of the European duty are actions founded on tort. The claim for an order that Royal Mail deliver VAT invoices to the claimants is a claim for an injunction. Thus, the claim for damages would be barred after six years by section 2, but it is said that the claim for an injunction is not so barred, because of the terms of section 36. That is so unless the tort time limit under the pre-1939 legislation would have been applied by the court by analogy before the Limitation Act 1939 came into force.

152. Cases within the jurisdiction of courts of equity before 1873 were classified into three groups: exclusive jurisdiction, where the right invoked was one recognised only in equity, such as a claim for breach of trust or for breach of fiduciary duty, concurrent jurisdiction where the claim might be asserted either at law or in equity, and auxiliary jurisdiction where the right asserted was one recognised at law and the court of equity was invoked to assist the enforcement of the legal right for some reason such as the advantage to be gained by recourse to equitable procedures or remedies. This classification is set out, for example, in section 22 (headed The Effect of Concealed Fraud), at page 30 in the Fifth Interim Report of the Law Revision Committee, on Statutes of Limitation (Cmd 5334, 1936), which preceded and led to the Limitation Act 1939 and was cited to us by Mr Cordara for the sake of a different passage (section 13 on Limitation of Claims for Equitable Remedies). The distinction is there illustrated by contrasting a suit for breach of trust which could only be brought in a court of equity

and an action for unliquidated damages in contract or tort which could only be brought at law, whereas some other claims could be brought in either jurisdiction.

153. We were shown the House of Lords case of *Knox v Gye* (1872) LR 5 App Cas 656, decided on appeal from the Lord Chancellor in an equity proceeding. The case arose from the affairs of a partnership, where one partner had died and his executor sought relief against the surviving partner. The proceedings had been started more than six years after the dissolution of the partnership, so that a right of action at law was barred under the then applicable statute (the 1623 Act). The headnote in the report, recording the decision of the House of Lords, Lord Hatherley dissenting, is as follows:

> "Where there is a remedy at Law, and a corresponding remedy in Equity, supplementing that of the Common Law, and the legal remedy is subject by statute to a limit in point of time, a Court of Equity in affording the correspondent remedy will act by analogy to the statute, and impose on the remedy it affords the same limit in time. Where, therefore, in the matter of enforcement of a legal right, the Court of Common Law would, under the provisions of the Statute of Limitations, refuse the enforcement after the lapse of six years from the accruing of the right of action, a Court of Equity will, where its power to grant relief is asked for under similar circumstances, adopt the principle of the statute, and decline to grant such relief."

154. Lord Westbury said this at 674-5:

> "The general principle was laid down as early as the case of *Lockey v Lockey* (1719) Prec Ch 518, where it was held that where a Court of Equity assumes a concurrent jurisdiction with Courts of Law no account will be given after the legal limit of six years, if the statute be pleaded. If it could be doubted whether the executor of a deceased partner can, at Common Law, have an action of account against the surviving partner, the result will still be the same, because a Court of Equity in affording such a remedy and giving such an account, would act by analogy to the Statute of Limitations. For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in Equity corresponds with an action at Law which is included within the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure. … Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords."

155. In that case, it seems, the proceedings were brought in the Court of Chancery because of perceived or possible doubts as to whether the executor of the deceased partner would be recognised as having standing to bring proceedings at law. In other cases recourse might be had to equity for other reasons, such as for assistance in discovery (as in *Lockey v Lockey*) or for the sake of the specific remedies available in equity including specific performance and injunction, as being more valuable in certain cases than an award of damages. The present case is an example of the latter, in that an injunction is sought to require Royal Mail to perform what is said to be its duty, as was *The UB Tiger*, where specific performance was sought in order to require consignees to take delivery of a particular cargo whose custody was problematic.

156. The remedies of specific performance and injunction are, of course, quite different in their nature from the remedies available at law. Their very difference is why the assistance of equity was invoked in some cases. By contrast, some other equitable remedies, such as for an account or for equitable compensation, are quite similar in substance to the relief that can be obtained at law, whether for an account or for damages.

157. Some of the more recent cases in which section 36(1) has had to be considered have been concerned with equitable remedies more, rather than less, similar in nature to remedies available at law. The principal case of this kind is *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112, a decision of the Court of Appeal (Clarke LJ, Waller LJ and Sir Christopher Staughton) on appeal from Langley J.

158. In that case, the claimant claimed damages for breach of contract, for negligence and for breach of fiduciary duty, in respect of agreements made between 1977 and 1979, the writ having been issued in 1995. Preliminary issues were directed on which the judge held that the claims in contract and tort were statute barred and that the same period of limitation should be applied by analogy under section 36(1) to bar the claims in equity for breach of fiduciary duty. The Court of Appeal upheld the judge's decision. It held that the enquiry under section 36(1) is as to whether the court of equity would have applied the statute by analogy, not whether in fact it did so (per Waller LJ at 120 and Clarke LJ at 125).

159. The claimants' argument on appeal was that the court of equity applied the statute by analogy in cases of concurrent jurisdiction and not in cases of equity's exclusive jurisdiction, which included the claim for breach of fiduciary duty. Waller LJ rejected that submission (at 122) and approved a passage in a judgment of Mr Jules Sher QC in *Coulthard v Disco Mix Club Ltd* [2000] 1 WLR 707, 730, as follows:

> "First, where the court of equity was simply exercising a concurrent jurisdiction giving the same relief as was available in a court of law the statute of limitation would be applied. Secondly, even if the relief afforded by the court of equity was wider than that available at law the court of equity would apply the statute by analogy where there was "correspondence" between the remedies available at law or in equity. …
>
> Mr Bate argues that the court of equity will apply the statute by analogy only where the equitable remedy is being sought in support of a legal right … I have no doubt that the principles of

> application by analogy to the statute (or in obedience to the statute, as Lord Redesdale LC preferred to describe it in its application to the facts of [*Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607]) are quite apposite in the situations envisaged by Mr Bate. But, in my judgment, they have a much wider scope than that."

160. Thus, as a matter of principle, the court held that equity would have applied the statute by analogy not only in cases of concurrent or auxiliary jurisdiction, where the remedy was sought in relation to a right of action enforceable at law, but also where the exclusive jurisdiction was invoked, in relation to rights recognised by equity and not by the law, if there was a sufficient correspondence between the remedies at law and in equity. On the facts of the case itself, it held that the statute would be applied by analogy to the claim for breach of fiduciary duty.

161. We then come to the litigation known as *The UB Tiger*, which went through several stages. The claim arose under a contract of carriage, the claimant carrier's objective being to oblige the defendant consignees to take delivery of the goods, which is why the proceedings included a claim for specific performance.

162. At first the claimants issued proceedings, shortly before the expiry of the six year limitation period, relying on a contract in given terms. Later, outside the six years, the claimants applied to amend their claim to allege in the alternative a different contract (made by variation of the first) in response to a plea in the defence. Colman J held first that the new claim would be barred by limitation if it were brought in new proceedings, for which he had to consider the effect of section 36(1), and then that it did not fall within the category of cases where amendment to plead a statute-barred claim was permitted. On the claimants' appeal from that order, the Court of Appeal did not decide the limitation point either way, but overturned the judge's decision on the amendment. The claim therefore proceeded with alternative claims, both brought within the relevant six year period, because the amendment related back to the issue of the claim form.

163. When considering the potential new proceedings, Colman J observed that the claim for damages was time-barred, and then said this:

> **"**[23] As to the claim for specific performance of the alternative contract, the question arises whether it is of such a kind as falls within section 36(1)(b) of the Limitation Act 1980. The substance of the new claim is that the defendants are under a continuing duty under the alternative contract to take delivery of the containers. That claim necessarily involves that the duty arose when delivery was tendered to the defendants in 1998. The alternative claims for declarations and an indemnity and for damages are all based on the defendants' same refusal to take delivery and all those claims are time-barred because all of them are founded on the same breach of contract which took place more than six years before the application to amend. Against this background, the submission by the claimants that before 1 July 1940 a court of equity would not have applied by analogy the six-year limitation period needs examining with great care because, if it were correct, it would give rise to an extremely

> anomalous remedial regime which could have no intelligent justification in the context of a modern system of commercial law. The remedial dislocation involved could be justified neither in terms of logic nor public policy. Accordingly, unless there were compelling juridical support for this submission, it ought to be rejected."

164. Having reviewed relevant authorities he then said this:

> **"**[31] Having considered the authorities referred to both in *Spry's Equitable Remedies* and in *Cia de Seguros Imperio v Heath (REBX) Ltd*, I have reached the conclusion that a claim alleging breach of contract and claiming specific performance and/or damages and/or an indemnity should be treated as entirely time-barred if brought more than six years after the breach relied upon occurred or commenced. Whereas there is an intrinsic dissimilarity in the remedy in equity from that at law, the underlying facts are identical and there is no question of any equitable right to property or anything in the nature of a trust being involved. The essence of the matter is that a continuing breach of contract is alleged for which damages are claimed and in relation to which the granting of the equitable remedy will simply put an end to the continuing accumulation of loss. In such a case the function of that remedy is to diminish the loss which would otherwise sound in damages. To conclude that the availability of this remedy went on existing (laches apart) beyond the time when the claim for damages or an indemnity or a declaration of right ceased to be available would be to contemplate such an implausible remedial facility as to suggest most strongly that no court of equity would have so proceeded before July 1940."

165. The claimants having amended to plead their new case in the existing proceedings, so that the common law claims under the alternative contract were not time-barred, the defendants then sought to rely on the equitable defence of laches to resist the claim for specific performance. On a summary judgment application Tomlinson J held that they were entitled to do so and also held that the claimants should be restricted to their claim in damages, and he dismissed the claim for specific performance. The claimants appealed successfully against that order.

166. The principal judgment of the court on that appeal was given by Moore-Bick LJ and agreed to by Buxton and Jonathan Parker LJJ. The court held that the claim for specific performance was not one to which the courts of equity would have applied the statutes of limitation by analogy before 1940. It also held that the defence of laches was available to the defendant. On the limitation issue, Moore-Bick LJ adopted as tests two phrases taken from Lord Westbury's speech quoted above: whether "the remedy in equity is correspondent to the remedy at law", and whether "the suit in equity corresponds with the action at law" (para. 44), and he said that the question must be answered by reference both to the nature of the remedy and to the circumstances in which it is available (para. 52). He observed that a claim for specific performance is available in circumstances in which no remedy exists at law, in that it can be sought

before there has been an actual breach of the contract, and that the nature of the remedy of specific performance is quite different from any remedy available at law. He interpreted the test of correspondence of remedy as requiring substantial similarity. On that basis he held that the Limitation Act did not apply to a claim for specific performance. In the course of his judgment he considered the previous decision in *Cia de Seguros* as well as *Knox v Gye* and the judgment of Colman J at the earlier stage of the case in question.

167. The ratio of that decision is (relevantly) that no limitation period can be applied to a claim for specific performance because that remedy is so different from that which can be granted at law, namely damages, and it is therefore not "correspondent to the remedy at law". It seems to us to be open to question whether that is what Lord Westbury meant by that phrase, but this is clearly the basis on which the court proceeded in *The UB Tiger*.

168. The present case is one in which equitable relief by way of an injunction is sought in aid of a common law right, so it is within equity's auxiliary jurisdiction, not its exclusive jurisdiction. As a general principle, equity will grant relief in aid of a common law right only where the common law remedy of damages would not be an adequate remedy. Hence specific performance of a contract will be awarded in equity where the contract relates to the sale or lease of land, and only very rarely if the sale is of any other kind of asset. Likewise an injunction will only be granted to prevent irreparable damage to the claimant's position which could not be properly compensated in damages.

169. A mandatory injunction, such as the claimants seek, is normally only granted to oblige the defendant to undo the consequences of a wrongful act, for example to remove a building wrongfully erected. In the present case the injunction sought would require the defendant to perform its statutory duty. In that respect it has something in common with an order for specific performance despite not being based on contract.

170. It is difficult to imagine another case based on tort in which the question could arise of asking the court to order a party to perform acts under a positive duty which should have been performed in the past, perhaps (as here) the long distant past. Ordinarily, the remedy in tort would be damages to compensate for the loss caused by the tort. Here there is such a claim, but Mr Cordara explained that his clients' principal claim and objective is to receive the VAT invoices, on the basis of which they would mount a claim against HMRC for credit for the relevant input tax. He described the claim in damages against Royal Mail as a secondary and alternative remedy.

171. In relation to the auxiliary jurisdiction of equity, one might expect that, in a case where the common law remedy is barred, so would any equitable remedy be. As we have seen, that has been said to be the law from time to time, including by Colman J. It also seems to underlie some of the observations of Lord Westbury in *Knox v Gye*.

172. However, Moore-Bick LJ's dual test, of correspondence between law and equity in terms of both the claim and the remedy, and his interpretation of the word "correspondence" in terms of the different remedies, has the result that the limitation period does not apply where the equitable remedy sought is altogether different from that which was available at law, even if it is sought in order to enforce a right existing only at law. As a matter of decision, that is true of specific performance. Mr Cordara

submitted that there is no difference in principle which could lead to a different conclusion where it is an injunction that is sought. This would mean that no limitation period is to be applied to claims either for specific performance or for an injunction, leaving open only equitable defences such as laches and acquiescence, even though the Limitation Act would apply to a claim for the primary legal remedy of damages.

173. Mr Herberg submitted, with some force, that while the remedy of an injunction or, as the case may be, of specific performance in relation to rights at law (in tort or in contract) which are not statute-barred is in principle open to the court, there is no good reason why it should be supposed that a court of equity before 1940 would have granted such relief in support of a right at law which was statute-barred. He submitted that the decision in *Cia de Seguros* was authority for that, and that to the extent that *The UB Tiger* is inconsistent with that position, it was based on a mistaken understanding of what had been decided by the earlier case. Correctly understood, he said, the earlier cases should have led Moore-Bick LJ to conclude that, where equitable remedies are sought in aid of a common law right, but the common law remedy is barred under the statutes of limitation, then the court of equity will not provide its own remedies to assist a claimant who cannot obtain his common law remedy because of the lapse of time since the accrual of the cause of action. It will apply the statute by analogy.

174. The argument that in *The UB Tiger* the Court of Appeal went wrong in its understanding of the previous state of the law poses an issue of judicial precedent. We are bound by the ratio of the decision, which is the latest decision at this level on the point, unless one of the few exceptions applies under the principles set out in *Young v Bristol Aeroplane Ltd* [1944] KB 718.

175. For Royal Mail, Mr Herberg invoked two exceptions. He submitted that *The UB Tiger* was inconsistent with the earlier decision in *Cia de Seguros*, and also that it was *per incuriam*. In addition he submitted that *The UB Tiger* could be distinguished, relying on the difference between a claim for an injunction and a claim for specific performance.

176. To take that last point first, this had not been presented in the skeleton arguments, and it was not developed at any length during oral submissions. The parties put in written submissions on the point after the hearing which we have read. We can deal with this aspect briefly.

177. Quite apart from the fact that the particular injunction sought is very much in the nature of specific performance, though of a statutory duty not a contract, in our judgment this is not a distinction that can legitimately be drawn. We see no proper basis on which it could be said that the court of equity before 1940 would have approached the question of applying the statute by analogy differently, in a case in its auxiliary jurisdiction, according to whether the remedy sought was specific performance or an injunction.

178. The cases on judicial precedent, from *Young v Bristol Aeroplane Ltd* onwards, allow only limited exceptions to the binding effect of a decision of the Court of Appeal. One is that the court is entitled to decide which of two inconsistent decisions of its own it should follow. The other relevant instance is where it is satisfied that the previous decision was given *per incuriam*. This requires that the decision was reached without a consideration of a relevant statutory provision or of a previous binding authority. If two previous judgments are said to be inconsistent with each other, but in the second

decision the court considered the first and came to its own conclusion as to its ratio and effect, then it is not a *per incuriam* case, and it cannot be brought within the exception for inconsistent decisions: see for example Gage LJ at paragraph 57 in *Iqbal v Whipps Cross University Hospital NHS Trust* [2008] PIQR P9, at P174.

179. We were shown a decision of this court in *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] Ch 306 in which the court found itself able to ignore one previous decision as being inconsistent with a yet earlier decision and with the principles derived from House of Lords authority, and having been wrongly decided. Peter Gibson LJ, Kay LJ, and Arden LJ each delivered separate judgments, but only Peter Gibson LJ referred distinctly to the issue of judicial precedent, saying this at paragraph 97:

> "Where the ratio of an earlier decision of this court is directly applicable to the circumstances of a case before this court but that decision has been wrongly distinguished in a later decision of this court, in principle it must be open to this court to apply the ratio of the earlier decision and to decline to follow the later decision."

180. It appears from the report at [2002] Ch 306 that *Young v Bristol Aeroplane Ltd* was mentioned in skeleton arguments but not in oral argument, and neither it nor any other decided case on the rules of precedent was referred to in any of the judgments. In those circumstances we do not consider that the example of *Starmark* allows us to ignore *The UB Tiger* and to follow *Cia de Seguros* instead.

181. The Court of Appeal's decision in *The UB Tiger* cannot be distinguished from the present case, nor said to be *per incuriam*, nor can it be disregarded, under the rules of judicial precedent, as being inconsistent with *Cia de Seguros*.

182. In our judgment, it is not open to us to depart from the ratio of *The UB Tiger*, namely (so far as relevant) that section 36(1) does not apply a limitation period to a claim for an equitable remedy different in kind from the remedy available at law, even if the remedy is sought to enforce a right which arises only at law and not in equity. That being so, we must hold that no limitation period applies to the claimants' claim for an injunction. Despite our reservations about that ratio, it would serve no purpose for us to come to a conclusion as to whether *The UB Tiger* was right or not. Learned authors have expressed different views about it. In Spry on Equitable Remedies, 9th ed. (2014), it is said to be wrongly decided (at page 253) but Chitty on Contracts, 33rd ed. (2018) describes Moore-Bick LJ's judgment at paragraph 28-136 as excellent. In terms of judicial determination, the function of deciding that question is reserved exclusively to the Supreme Court.

Conclusion

183. The result of the appeals before us is therefore as follows:

i) The Claimants' first appeal, on Issue 1, is dismissed.

ii) Their second appeal, on Issue 2, is also dismissed save that we would vary the second sentence in the judge's order on this point so as to read: "In relation to each given supply the cause of action arose at the date when the trader submitted

its next VAT return after the date on which a VAT invoice should have been provided in respect of that supply".

iii) Royal Mail's appeal is dismissed.