Neutral Citation Number: [2022] EWCA Civ 103

Case No: CA-2021-000506
(formerly A3/2021/0518)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(TAX AN CHANCERY CHAMBER)
Mrs Justice Bacon
[2020] UKUT 0357 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 February 2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE LEWISON
and
LADY JUSTICE MACUR

- -

Between :

REGENCY FACTORS PLC	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondent**

- -
- -

MICHAEL RIPLEY (instructed by **R G Legal Ltd Solicitors**) for the **Appellant**

SUZANNE LAMBERT (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Respondent**

Hearing date : 27 January 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 2pm on Thursday 3 February 2022

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether Regency Factors Ltd is entitled to bad debt relief in relation to VAT. The FTT (Judge Thomas) held that it was not (a) because there was no bad debt; and (b) because Regency had failed to comply with the procedural requirements for the making of such a claim. The UT (Bacon J and Judge Cannon) disagreed with the FTT on the first of those reasons, but upheld the second. The UT held, contrary to Regency's argument (which does not appear to have been advanced in the FTT), that the procedural requirements were compatible with EU law. The decision of the FTT is at [2019] UKFTT 0144 (TC), [2019] STI 1015; and the decision of the UT is at [2020] UKUT 357 (TCC).

2. Regency appealed against the decision of the UT on the second question; but HMRC also sought to reinstate the decision of the FTT on the first. At the conclusion of the argument on the appeal we announced that we would dismiss the appeal on the second question, with written reasons to follow. In consequence we did not hear argument on the points raised in HMRC's Respondent's Notice dealing with the first question. These are my reasons for joining in that decision.

The European framework

3. As is well-known, VAT is a tax created by EU legislation. The legislation in force at the relevant time was Council Directive 2006/112/EC ("the Principal VAT Directive" or "PVD").

4. Article 73 of the PVD relevantly provides:

> "In respect of the supply of goods or services … the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply."

5. Article 90 provides for bad debt relief. It says:

> "1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.
>
> 2. In the case of total or partial non-payment, Member States may derogate from paragraph 1."

6. Article 90 is a central provision of the VAT regime, as the CJEU explained in *NLB Leasing doo v Slovenia* (C-209/14) [2016] STC 55 at [35]:

> "… it must be noted that Article 90(1) of the VAT Directive, which relates to cases of cancellation, refusal or total or partial

> non-payment, or where the price is reduced after the supply takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, that person has not received part or any of the consideration. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received."

7. The issue raised in the Respondent's Notice turned on the question whether Regency did not receive part or any of the consideration for its supply of services.

8. Recital (59) to the PVD states:

> "Member States should be able, within certain limits and subject to certain conditions, to introduce, or to continue to apply, special measures derogating from this Directive in order to simplify the levying of tax or to prevent certain forms of tax evasion or avoidance."

9. Since the relevant legislation is a Directive, it was addressed to member states, who had the duty to incorporate it into national law. But the Directive gave member states a certain latitude in its implementation. Thus article 273 provides:

> "Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.
>
> The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3."

10. Thus article 273 enables a member state to lay down conditions and procedures for making a claim to bad debt relief. Article 273 gives member states a margin of discretion about the formalities that a taxable person must comply with in order to claim bad debt relief: *Lombard Ingatian Lizing Zrt v Nemzeti Adó-és Vámhivatal Fellebbviteli Igazgatóság* (Case C-404/16) at [42]. But that margin of discretion has its limits. Many of the decisions of the CJEU dealing with the limits of that freedom repeat what was said in earlier cases. So I do not think that I need to refer to them all. There is a convenient summary of principle in *Tratave Tratamento de Águas Residuais do Ave SA v Autoridade Tributária e Aduaneira* (C-672/17) ("*Tratave*"). In that case the CJEU said:

> "[33] It is, however, apparent from the case-law that measures to prevent tax evasion or avoidance may not, in principle, derogate

> from the rules relating to the taxable amount except within the limits strictly necessary for achieving that specific aim. They must have as little effect as possible on the objectives and principles of the VAT Directive and may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT (judgments of 26 January 2012, *Kraft Foods Polska*, C-588/10, EU:C:2012:40, paragraph 28; of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 38; and of 12 October 2017, *Lombard Ingatlan Lízing*, C-404/16, EU:C:2017:759, paragraph 43).
>
> [34] Consequently, the formalities to be complied with by taxable persons in order to exercise, vis-à-vis the tax authorities, the right to reduce the taxable amount for VAT, must be limited to those which make it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received. In that regard, it is for the national courts to ascertain whether that is true of the formalities required by the Member State concerned (judgments of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 39, and of 12 October 2017, *Lombard Ingatlan Lízing*, C-404/16, EU:C:2017:759, paragraph 44)."

11. In that case the court upheld a requirement of Portuguese legislation which precluded a claim for bad debt relief unless the taxable person had given notice to the purchaser of the goods or services of its intention to cancel the whole or part of the VAT.

12. In *Minister Finansów v Kraft Foods Polska* SA (C-588/10) (to which the CJEU referred in *Tratave*) the court upheld in principle a requirement of Polish legislation that in order to make a claim for bad debt relief the taxable person had to be in possession of a receipt from the purchaser of the goods or services acknowledging receipt of a corrected invoice. At [28] the CJEU said that measures to prevent tax evasion or avoidance may not derogate from the basis of charging VAT except "within the limits strictly necessary for achieving that specific aim." They went on to say at [29]:

> "Consequently, if reimbursement of the VAT becomes impossible or excessively difficult as a result of the conditions under which applications for reimbursement of tax may be made, those principles may require that the Member States provide for the instruments and the detailed procedural rules necessary to enable the taxable person to recover the unduly invoiced tax."

13. There was some debate about the CJEU's use of the word "consequently". As Mr Ripley submitted on behalf of Regency, the court did not say that provided that a condition was not impossible or excessively difficult to fulfil it was for that reason permissible. I therefore agree with Mr Ripley that impossibility or excessive difficulty (i.e. the principle of effectiveness) is not the only criterion by which a national provision must be judged. But it is important to note that all that the CJEU said was that if a national provision did fall foul of that criterion all that the member state was required to do was to allow the taxable person to make his claim by other means. It did not strike down the provision itself. That is, I think, borne out by what the court said at [40]:

> "If it is impossible or excessively difficult for the supplier of goods or services to recover, within a reasonable period, the excess VAT paid to the tax authorities on the basis of the initial invoice because of the condition at issue in the main proceedings, the principles of VAT neutrality and proportionality *require the Member State concerned to permit the taxable person to establish by other means before the national tax authorities*, first, that he has taken all the steps necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and that he is aware of it and, *second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice*." (Emphasis added)

14. In the light of that discussion, the answer that the court gave to the referred question was:

> "the principles of VAT neutrality and proportionality do not, in principle, preclude such a requirement. However, where it is impossible or excessively difficult for the taxable person who is a supplier of goods or services to obtain such acknowledgment of receipt within a reasonable period of time, he cannot be denied the opportunity of establishing, by other means, before the national tax authorities, first, that he has taken all the steps necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and is aware of it and, second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice."

15. In *Es sp z o.o. sp. k. v Minister Finansów* (C-335/19) the CJEU considered a different provision of Polish legislation. That legislation required the person to whom the supply was made to have been a taxable person and not subject to any insolvency process both at the date of the supply and also at the date when the claim for an adjustment of VAT was made. It further required that the creditor also continue to be registered as a taxable person when the claim for an adjustment was made. The CJEU held that those conditions were incompatible with EU law. Since taxable supplies could be made to a person who was not himself a taxable person (i.e. the ultimate consumer), there was no connection between the taxable status of the person to whom the supply was made and the risk of non-payment of the debt. Equally, whether or not the creditor remained registered when the claim for adjustment was made did not bear on the question whether there was a risk of non-recovery. The CJEU reached the same conclusion in *A-PACK CZ sro v Odvolaci finančni ředitelsivi* (Case C-127/18) where Czech legislation precluded an adjustment where the recipient of the supply had ceased to be a taxable person.

16. In *Elvospol sro v odvolaci finančni ředitelsivi* (Case C-398/20) the CJEU held that Polish legislation which prevented a taxable person from claiming bad debt relief where the claim arose during the period of six months preceding the debtor's insolvency was incompatible with EU law. The reason was that it systematically purported to exclude

altogether reduction of the taxable amount for VAT purposes in the event of non-payment of such claims. The national provision could not be justified as "intended to ensure the correct collection of VAT".

17. In *FGSZ Földgázszállitó Zrt v Nemzeti Adó-és Vámhivatal Fellebbviteli Igazgatósága* (Case C-507/20) the CJEU held that although it was, in principle, permissible for national legislation to prescribe a time limit for the making of a claim for bad debt relief, a period which ran from the date of performance of the original payment obligation, rather than from the date upon which the debt became definitively irrecoverable was incompatible with article 90. The CJEU considered the converse case in *Enzo di Maura v Agenzia delle Entrate* (Case C-246/16). In that case Italian law prevented a taxable person from claiming bad debt relief until the conclusion of the debtor's insolvency proceedings which, it was said, might take up to ten years. The CJEU held that that provision went beyond what was necessary to resolve any uncertainty about whether the debt was irrecoverable. It would have been possible to allow a reduction in VAT where there was a reasonable probability that the debt was irrecoverable, subject to a subsequent adjustment in the event that payment occurred.

18. The legislation in issue in *SCT d.d. v Republic of Slovenia* (C-146/19) ("*SCT*") prevented a taxable person from claiming an adjustment to VAT in respect of an irrecoverable claim where he had failed to lodge that claim in insolvency proceedings commenced against the debtor, even though the taxable person had shown that, had he lodged the claim, he would not have been able to recover it. The CJEU held that the freedom given to member states by article 273 was intended only to allow member states to counteract the uncertainty associated with recovery of the sums owed and did not resolve the question whether the taxable amount for VAT purposes might not be reduced in the case of definitive non-payment. A member state was thus required to allow the taxable amount for VAT purposes to be reduced where the taxable person was able to demonstrate that his claim against the debtor was definitively irrecoverable. The court accepted at [38] that the requirement of lodging a claim in insolvency proceedings was "in principle, likely to contribute not only to ensuring the correct collection of VAT and the avoidance of tax evasion but also to eliminating the risk of loss of tax revenue, and thus pursues the legitimate objectives set out in Article 90(1) and Article 273 of the VAT Directive." It also accepted at [42] that the requirement was not excessively onerous in terms of financial or administrative burdens. But the court went on to say at [43]:

> "However, where the taxable person shows that, even if he had lodged his claim, he would not have recovered it, excluding a reduction of the taxable amount and forcing the taxable person to pay an amount of VAT which he did not receive in the course of his economic activities goes beyond what is strictly necessary to achieve the objective of eliminating the risk of loss of tax revenue (see, to that effect, judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 27). In that situation, the lodging of the claim concerned would not have avoided any additional detriment to the State."

19. The formal ruling stated:

> "Article 90(1) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding legislation of a Member State under which a taxable person is refused the right to a reduction of the value added tax paid in respect of an irrecoverable claim where he has failed to lodge that claim in insolvency proceedings commenced against the debtor, even though the taxable person has shown that, had he lodged the claim, he would not have been able to recover it."

20. In my judgment, as Advocate-General Kokott pointed out in her opinion in *E sp z o.o. sp. k. v Minister Finansów* (C-335/19) at [38] to [40], it is possible to infer from the case law of the CJEU a distinction between substantive restrictions on adjustments to the taxable amount (which fall within the limited power to derogate under article 90 (2)) and formal aspects or conditions that must be fulfilled (which fall within article 273). A substantive derogation in the case of non-payment must relate to the uncertainty caused by the fact that the payment of consideration may be difficult to establish or may be only temporary. From a formal perspective, however, conditions of a more general nature may be laid down to ensure the correct amount of tax is collected and fraud is prevented. I consider that that distinction is amply borne out by the cases to which we have been referred.

21. The limits of the member state's discretion are, in my judgment, shown by *SCT*. Although national legislation may pursue a legitimate objective and may not be excessively onerous, the member state concerned must still permit the taxable person to show that he is in fact entitled to bad debt relief; and that compliance with the requirement would have made no difference. Likewise in *Kraft Foods*, if a legitimate requirement is impossible or excessively difficult to comply with, a member state must allow the taxable person to prove their entitlement to bad debt relief by other means. In neither case was the condition itself held to be unlawful.

The domestic legislation

22. National legislation is contained in the Value Added Tax Act 1994 ("VATA") and regulations made under it. Both VATA and the regulations are "EU-derived domestic legislation" as defined by section 1B of the European Union (Withdrawal) Act 2018. Accordingly, it continues to have the same effect in domestic law on and after exit day as it had before that day: section 2 (1). Decisions of the CJEU on the PVD fall within the definition of "retained EU case law" as defined by section 6(7) of that Act. Accordingly, in principle this court remains bound by decisions of the CJEU given before Brexit: section 6 (3). But under regulation 3(b) of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, this court has power under section 6 (4) (ba) of the 2018 Act to depart from retained EU case law applying the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court. Neither party has invited us to exercise that power. Accordingly, our task is to apply the retained EU case law (as I have analysed it above) to the domestic legislation.

23. Whether domestic legislation is compatible with EU law is not to be decided simply by homing in on one particular provision of that legislation. It must be considered as a whole.

24. The primary domestic legislation about bad debt relief is in section 36 of VATA. Section 36 (1) provides:

> "Subsection (2) below applies where—
>
> (a) a person has supplied goods or services and has accounted for and paid VAT on the supply,
>
> (b) the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and
>
> (c) a period of 6 months (beginning with the date of the supply) has elapsed."

25. Section 36 (2) goes on to provide:

> "Subject to the following provisions of this section and to regulations under it the person shall be entitled, on making a claim to the Commissioners, to a refund of the amount of VAT chargeable by reference to the outstanding amount."

26. Thus the right to a refund is subject to regulations. The power to make regulations is contained in section 36 (5) and (6). Section 36 (5) in particular provides that regulations may:

> "(b) require a claim to be evidenced and quantified by reference to such records and other documents as may be so specified;
>
> (c) require the claimant to keep, for such period and in such form and manner as may be so specified, those records and documents and a record of such information relating to the claim and to anything subsequently received by way of consideration as may be so specified…"

27. The relevant regulations are contained in the Value Added Tax Regulations 1995. Regulation 171 (3) provides that "[save] as the Commissioners my otherwise allow" where the claimant fails to comply with the requirements of various regulations (including regulation 168) he must repay the amount of any refund he has obtained by way of bad debt relief. Regulation 168 provides:

> "(1) Any person who makes a claim to the Commissioners shall keep a record of that claim.
>
> (2) Save as the Commissioners may otherwise allow, the record referred to in paragraph (1) above shall consist of the following information in respect of each claim made—
>
> (a) in respect of each relevant supply for that claim—
>
> (i) the amount of VAT chargeable,

> (ii) the prescribed accounting period in which the VAT chargeable was accounted for and paid to the Commissioners,
>
> (iii) the date and number of any invoice issued in relation thereto or, where there is no such invoice, such information as is necessary to identify the time, nature and purchaser thereof, and
>
> (iv) any payment received therefor,
>
> (b) the outstanding amount to which the claim relates,
>
> (c) the amount of the claim, . . .
>
> (d) the prescribed accounting period in which the claim was made, and
>
> (e) a copy of the notice required to be given in accordance with regulation 166A.
>
> (3) Any records created in pursuance of this regulation shall be kept in a single account to be known as the "refunds for bad debts account"."

28. Regulation 172 relevantly provides:

> "(1) This regulation shall apply for the purpose of ascertaining whether, and to what extent, the consideration is to be taken to have been written off as a bad debt.
>
> (1A) Neither the whole nor any part of the consideration for a supply shall be taken to have been written off in accounts as a bad debt until a period of not less than six months has elapsed from the time when such whole or part first became due and payable to or to the order of the person who made the relevant supply.
>
> (2) Subject to paragraph (1A) the whole or any part of the consideration for a relevant supply shall be taken to have been written off as a bad debt when an entry is made in relation to that supply in the refunds for bad debt account in accordance with regulation 168."

29. It is clear from section 36 (1) that bad debt relief has effect in relation to a particular supply. That reflects the text of article 90 (1) of the PVD. It is therefore necessary to identify the particular supply in respect of which the claim for bad debt relief is made.

30. The UT said at [90]:

> "Whilst there are limitations on the conditions and requirements that Member States can impose, such restrictions are engaged where the conditions for relief go beyond the margin of discretion and make the claiming of relief impossible or

> excessively difficult. The requirement for a single account is to provide an easily verifiable audit trail for HMRC, including identifying the date when consideration is written off. Such a condition plainly falls within the margin of discretion afforded to Member States. The requirements of regulation 168 contribute to ensuring the correct collection of VAT, preventing evasion and eliminating the risk of loss of tax revenue. They are not unduly onerous. Regency did not make out any case that the requirements made it impossible or excessively difficult to claim relief. In any event, the requirements are subject to the discretion of HMRC to allow less information to be contained in the single account."

31. I agree. The cases in which the CJEU have ruled against national legislation are either cases in which the condition precedent for making a claim has no relationship to the question whether the debt in question is or is not recoverable; or where the condition serves no useful purpose. This is not such a case. Nor is it a substantive restriction on the right to claim bad debt relief, in relation to which a member state has a relatively narrow margin of discretion. The regulations with which we are concerned are formal conditions designed to ensure that the correct amount of tax is collected. The conditions applicable to the making of a claim for bad debt relief are there (as the court put it in *Tratave* at [34]) "to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received".

32. As the UT also pointed out, a failure to comply with regulation 168 is not invariably fatal to a claim for bad debt relief, because HMRC have discretion under regulation 171 (3) to permit other forms of proof. This is, in effect, the safety valve that *SCT* and *Kraft Food* require. In the light of that, Mr Ripley submitted that the appeal should be allowed because HMRC had not considered exercising their discretion. As the UT correctly observed, however, this was neither a ground of challenge in the FTT, nor a ground upon which Regency was permitted to appeal to the UT. It is not a ground which can be advanced in this court; and Mr Ripley did not press it.

33. It is common ground that Regency did not maintain a single account as required by regulation 168 (3). It says, however, that it did retain the records required by regulation 168 (2), even though they were not contained in a single account. In order to comply with EU law, Mr Ripley argues that regulation 168 (3) must be read as limited to records "created" in pursuance of regulation 168; rather than extending to the records that a taxable person must "keep" in order to comply with regulations 168 (1) and (2). In other words, it is submitted that the purpose of regulation 168 (3) is to establish an audit trail where otherwise one would not exist. If regulation 168 (3) goes further than that it is incompatible with EU law and must be disapplied.

34. It is common ground that ensuring the correct collection of VAT and preventing evasion of tax are legitimate objectives for a member state to pursue. In view of recital (59) to the PVD I consider that the simplification of the levying of tax is also a legitimate objective. I do not agree with Mr Ripley's attempt to brush this aside as "administrative convenience". Regency does not suggest that the requirements of regulation 168 (3) are impossible or excessively difficult to fulfil.

35. Although Mr Ripley submits that the purpose of regulation 168 (3) is to establish an audit trail where otherwise one would not exist, that overlooks at least three things. First, the audit trail would exist if the taxable person kept the records required by regulation 168 (1) and (2), thereby making regulation 168 (3) redundant. As Mr Ripley accepted, that audit trail would exist even if it consisted of unsorted boxes of invoices and scraps of paper dotted about the taxable person's premises. Thus, second, it overlooks the finding of both the FTT and the UT (with which I agree) that the requirement of a single account is not merely to establish an audit trail of some description but to establish an audit trail that "HMRC investigators can easily check". The UT recorded that Mr Ripley agreed that that was the purpose of the requirement. Since recital (59) expressly refers to the simplification of the levying of tax as one of the purposes behind article 273, I regard that as part of the legitimate objective too. It is also the case that if an audit trail is difficult to understand or to verify, that would tend to lead either to tax evasion or at least the incorrect levying of tax. Third, it is also the case that the account required to be kept under regulation 168 (3) also serves the purpose, in accordance with regulation 172, of establishing when and to what extent a debt is written off. I consider that that is another legitimate purpose.

36. The distinction that Mr Ripley sought to draw between records "created" in pursuance of regulation 168 and records "kept" for that purpose is, in my judgment, an artificial one. Although in some cases a national court must give an unnatural interpretation to national legislation in order to make it conform to EU law in accordance with the *Marleasing* principle, this is not, in my judgment, such a case.

37. HMRC have discretion under regulation 168 (2) to permit the taxable person to keep records otherwise than as required by that regulation. If HMRC exercises that discretion in the taxable person's favour it is, I think, a necessary corollary that regulation 168 (3) has modified effect. In addition, even if the taxable person has made a claim for bad debt relief without complying with regulation 168, HMRC have a discretion to allow the claim under regulation 171 (3). There may, in addition to these specific discretions, be a more general discretion (as Ms Lambert, for HMRC, suggested) not least in order to bring the UK VAT regime into line with what the CJEU held in *Kraft Foods* and *SCT*. In other words, if the taxable person can show that the substantive conditions for bad debt relief are met, then HMRC may be asked to exercise that discretion in favour of the taxable person. A refusal to do so is open to legal challenge. Taken as a whole, therefore, in agreement with the UT, I consider that the UK's domestic VAT regime complies with EU law.

38. In addition, although we were not taken to the details of the relevant legislation, Mr Ripley told us that on an appeal to the FTT, the FTT has the power to reduce an assessment by HMRC. It will do so if it is satisfied that HMRC's assessment is wrong; and in considering that question it will consider both the law and the facts. The right of appeal to the FTT is thus a further means by which the taxable person may establish its right to bad debt relief. In my view, although I do not base my decision on this, that may also be considered as part of the UK's implementation of the PVD.

Regency's bad debt relief claim

39. Regency's accounting system maintains a running account for each client containing "an admixture of funds" which makes it "impossible to apportion credits to particular invoices submitted by a client and receipts from their customer." Instead, the claim for

bad debt relief was made on what Regency described as a "*pari passu*" basis. There is, in my judgment, no foundation for such a claim in the legislation. So on the facts of this particular case the keeping of a single bad debt relief account would undoubtedly have served a legitimate and useful purpose, namely that of ensuring that the particular supply which qualified for bad debt relief was properly identified; and in consequence that the correct amount of VAT was collected.

40. There was some debate about whether Regency either had established, or was now entitled to establish, that the substantive conditions for bad debt relief were satisfied, despite its failure to comply with regulation 168 (3). This boiled down to the correct reading of three paragraphs of the decision of the FTT. What the FTT said in those paragraphs was this:

> "[117] Regulation 169 requires a company which claims BDR to keep certain records as set out in regulation 168(2). The appellant says it does so, and *I have no reason to doubt that it keeps the records as listed.* But s 168(3) requires them to be kept "in a single account", to be known as "the refunds for bad debts account". It is in this single account that the writing off must be recorded. But the appellant says it does not have a single account. It has a "Bad Debts Write Off Account" which Mr Farrell refers to in his second witness statement. In my view the record keeping by the appellant is insufficient to comply with regulation 168 and particularly paragraph (3). The purpose of having a single refunds for bad debts account in which write offs are shown is to establish an audit trail that HMRC investigators can easily check.
>
> [118] This failure to keep a single account for bad debt refunds is possibly a consequence of the way the appellant accounts for its business. A passage at [39] of Mr Farrell's first witness statement is particularly telling:
>
> "As set out above the Current Account is a running account balance accordingly there is an admixture of funds and it is impossible to apportion credits to particular invoices submitted by a client and receipts from their Customer…"
>
> [119] And in that same witness statement where Mr Farrell gives information about particular clients in relation to whom the appellant has claimed BDR he says that the claims made to BDR are not the amounts shown on his analyses (as in §15): they may be higher or lower. HMRC had already pointed these discrepancies out. *Thus in the absence of a refunds for bad debt account as required by regulation 168 it is impossible to say whether the necessary conditions for BDR have been met*." (Emphasis added)

41. Mr Ripley naturally fastened on the first of the italicised passages; and Ms Lambert on the second. The UT said of paragraph [117] of the FTT's decision that it was not a finding of fact by the FTT: merely an assumption in Regency's favour. I did not

understand Mr Ripley to dissent from that. But reading those paragraphs as a whole, what they mean in my view is that even on the assumption that Regency maintained the records required by regulation 168 (2), it was impossible to say whether the substantive conditions for bad debt relief had been met. That is a finding of fact by the FTT. That finding of fact does not appear to have been challenged in the UT, although Mr Ripley told the UT on instructions (but without any evidence to that effect) that it was possible to match payments from customers to specific invoices. Whether Regency had in fact carried out that exercise remains a mystery.

42. In short, Regency had the opportunity to prove its claim for bad debt relief in the FTT (just as *SCT* allows) but it failed to do so. It is not entitled to a second opportunity.

Result

43. It was for these reasons that I joined in the decision to dismiss the appeal. The points raised by HMRC by way of Respondent's Notice did not therefore arise. Since they were one-off points arising out of the particular documentation that Regency uses, which would not on its own have justified a second appeal, we did not need to consider them.

Lady Justice Macur:

44. I agree.

Lord Justice Underhill (Vice-President of the Court of Appeal (Civil Division))

45. I also agree.