



[2011] UKUT 112 (TCC)
Appeal number: FTC/52/2010

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Appellants

- and -

GMAC UK PLC

Respondent

TRIBUNAL: The Hon Mr Justice Warren (President), Judge Charles Hellier

Sitting in public in London on 8 March 2011

**Paul Lasock QC and Fiona Banks of counsel, instructed by the General Counsel
and Solicitor to HM Revenue and Customs for the Appellants**

**Roderick Cordara QC and Jessica Wells of counsel, instructed by KPMG plc for
the Respondent**

DECISION and REASONS on Application of the Appellants
to refer questions to the Court of Justice of the European Union
for preliminary ruling

DECISION

The Application is adjourned to the hearing of the appeal

REASONS

1. This is essentially a case-management dispute. We do not propose to go into the facts which can be found in the decision of the Tax Chamber in this appeal. [see <http://www.financeandtaxtribunals.gov.uk/Aspx/view.aspx?id=4868>] Reference to that Decision will explain the references below to the insolvency condition, the passing of title condition, the Cars Order and Regulation 38.
2. There are essentially three issues in this appeal (although the first issue raises two distinct but similar points) and three parallel potential questions which we are asked to refer to the Court of Justice. HMRC ask us to make a reference now, before the appeal itself is opened. GMAC objects: it does not accept that a reference will ever be necessary. It says that all of the points of EU law which HMRC wish to raise are *acte clair* in its favour. But even if that is wrong, it contends that the reference should not be made at the present time but should be made only when the Tribunal has heard argument and at a time when it, and the parties, are able to see more precisely what it is that needs to be referred and are able to formulate the questions in a way which will provide the Tribunal with the answers which it needs in order to determine the appeal. Moreover, GMAC submits that it is entitled at least to present its appeal and to develop its arguments more fully than has been possible on the application to show that a reference is not needed.
3. The issues and parallel questions are these:
 - a. Were the insolvency condition and the passing of title condition in domestic bad debt relief provisions compatible with the derogation permitted by Article 11C1? (“the Compatibility Issue”). The two limbs of this issue raise distinct, albeit similar, points in relation to the two conditions.
 - b. To what extent were GMAC’s directly enforceable rights under that Article to be reduced by the benefit it received under the Cars Order in relation to a connected transaction? (“the Windfall Issue”).
 - c. Was GMAC out of time to make the bad debt relief claims? (“the Time Limit Issue”).
4. If, on any one of these issues, we could with confidence find for HMRC without the need for a reference to the Court of Justice on that issue, then the appeal would be determined in favour of HMRC. An answer to a question of EU law in relation to the other issues would not be necessary. Since we would not need to know the answer to such a question in order to resolve the appeal, a reference would not be necessary and we should not make one now.

5. In contrast, for GMAC to succeed in resisting HMRC's appeal, it has to succeed on all of the three issues. But if, on any one of these issues, we could with confidence find for GMAC without the need for a reference to the Court of Justice on that issue, there would be nothing on that issue which we could refer, either now or later.
6. The difference between the parties is this. GMAC says that the answer to each question of EU law raised in so clear that we will not need to make a reference at all. HMRC says that whatever the correct answers may be, one thing is clear: and that is that the answer, as a matter of EU law, in relation to each one of the Issues is not clear and can only be given by the Court of Justice. A reference is therefore needed on each Issue.
7. We presently consider that HMRC are correct to say that a reference will be necessary in relation to the Windfall Issue if an answer is ever needed in order to resolve this appeal. We will say a little more about this later. They may also be right to say that a reference will likewise be necessary in relation to the Compatibility Issue, but that is not, perhaps, so clear.
8. However, it seems to us likely that we would be able to determine the Time Limit Issue without the need for a reference on the basis of existing extensive case-law of both the Court of Justice and the English Court and the guidance which they provide. We do not consider that it is appropriate on this application to carry out the task of examining the authorities. But we highlight the main points below. That is a matter for the appeal. What we do say is that we are not satisfied at this stage that a reference would be necessary to resolve the Time Limit Issue (assuming that it ever needs resolving). We express no view about which party will succeed on the Time Limit Issue since that will depend on applying the guidance already given by the Court of Justice in existing case-law to the domestic legislation and its changes over the relevant period. We must therefore recognise the possibility that HMRC will be successful on the Time Limit Issue without the need for a reference to the Court of Justice. In that case, there would be need to refer the Compatibility Issue or the Windfall Issue since the appeal would be determined by reference to the Time Limit Issue alone.
9. It can, of course, be said that even in that scenario, the appeal ought to be decided by reference to the validity of the insolvency condition and the passing of title condition and by reference to the correct approach the interaction of EU law and domestic law, which would require answers to the Compatibility Issue and the Windfall Issue; the Time Limit Issue should be seen as arising only if there would otherwise be a good claim on the part of GMAC. But this, again, is really a case-management issue. In conventional litigation, limitation issues are sometimes dealt with as preliminary points and sometimes as part of the hearing of the main action. In the present case, we do not consider it appropriate for the Time Limit Issue to be dealt with separately from and prior to the hearing of the other aspects of the appeal.
10. It may, we accept, turn out during the course, or at the end, of the hearing of the appeal that we are being over-optimistic in thinking that the Tribunal can resolve

the Time Limit Issue without the need for further guidance from the Court of Justice. If and when that turns out to be the case, further consideration can be given to referring a carefully articulated question relating to this Issue. At present, as we have said, we think that there is a real prospect of being able to resolve the issue without there even being a need for a reference in relation to it, whether by the Tribunal or by the highest appellate court which the appeal reaches. Even if we are wrong, or turn out to be wrong, we do not consider that it is possible at the present time to formulate a question which sufficiently identifies the guidance which we need to answer the Time Limit Issue.

11. It would, we consider, be highly undesirable to have more than one reference to the Court of Justice. Since we consider it to be likely that a reference in relation to the Time Limit Issue will not be needed, there is nothing which we would see it as proper to refer to the Court of Justice at the present time. We could refer other questions, in particular the Windfall Issue, but it would not be right to refer that question (whether with or without a question relating to the Compatibility Issue) only to find, when the matter comes back for the substantive appeal, that a reference in relation to the Time Limit Issue is necessary after all. But, for the reasons already given, we do not think it appropriate to refer a question relating to the Time Limit Issue at this stage. It follows that we should not refer any other questions at this stage either.
12. So far as concerns the Compatibility Issue, we accept that it raises questions of EU law which it might be right to put to the Court of Justice. If resolution of the appeal turns on this issue, a reference will, we think, in due course have to be made. We are not, however, wholly persuaded by Dr Lasock that Mr Cordara has no chance at all of persuading us that the matter is *acte clair* although we think that to be unlikely. But if guidance from the Court of Justice were necessary to resolve this Issue it would be right to seek such guidance only at a later stage when it is known what other issues needed to be referred.

The Windfall Issue

13. HMRC's case is that it cannot be right that GMAC can obtain both (i) the benefit of Article 11C1 by asserting its direct effect and (ii) the benefit of the Cars Order when to do so would produce a result which neither EU law nor national law (taken separately) produces or is intended to produce. Thus, taking EU law by itself, there would have been no de-supply of the onward sale following repossession of the car and under UK law, there would have been no bad-debt relief at all. As we understand it, the argument is that, if GMAC is to rely on the direct effect of Article 11C1, it must effectively take the VAT treatment not only of the original sale but also of any related transaction, and in particular the resale, as governed by EU law alone.
14. The direct effect of Article 11C1 would be given effect to in the UK by disapplication of the offending parts of the legislation, that is to say the deletion of the insolvency condition and the passing of title condition. This has in fact now been done, but in conjunction with an amendment to the Cars Order which means that there is no de-supply on the subsequent sale of the car.

15. We have stated HMRC's argument at a very high level. We are not clear, however, precisely how HMRC would present its argument at a more specific level. Thus we are not clear whether it is said (i) that the Directive is to be applied in such a way that the benefit of the Cars Order is effectively to be disapplied in a cases such as the present, (ii) that the Directive is to be applied in such a way that the benefit of regulation 38 is effectively to be applied as if it meant what HMRC argued it meant in GMAC No1, (iii) that it remains permissible to apply the insolvency condition and/or the passing of property condition but only to the extent that it produces the same economic result as Article 11C1 by itself or (iv) something else. We would need to know which before being able to frame a suitable question for reference. This is something which would be clarified if the actual appeal were opened.

The Time Limit Issue

16. The first main issue here is whether the prior announcement of the end to the old scheme was sufficient to give effect to the requirements of legal certainty and legitimate expectations. The second main question is whether, once the old scheme had been repealed and assuming that it was done in a way which was not compliant with those requirements, GMAC was barred by lapse of time from relying on its directly enforceable rights following repeal, without an adequate express transitional period, of the mechanism for claiming bad debt relief. We think that the principles of EU law to be applied in answering those questions may well be sufficiently clear as to lead one to expect that a reference is unlikely to be necessary, although the application of those principles in the light of the UK case-law (in particular *Fleming*) may not be entirely straightforward.

Disposition

17. We do not consider it appropriate to make a reference at the present time. However, a reference may turn out to be necessary but the extent of such a reference is, as we see it, at present uncertain. We do not, therefore, dismiss the application, requiring HMRC to make a new one at a later stage. Instead, we adjourn the application to the hearing of the appeal when the Tribunal can keep our decision under review. We cannot prevent GMAC from making an application for costs. However, we hope that it will not do so at the present time. As we see it, costs would be better dealt with in the light of the way in which the appeal proceeds.

Mr Justice Warren
President

Judge Charles Hellier

Release Date: 16 March 2011