Trinity Term

[2018] UKSC 44

On appeal from: [2016] EWCA Civ 1310

JUDGMENT

Totel Ltd (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent)

before

Lady Hale, President

Lord Sumption

Lord Carnwath

Lord Hodge

Lord Briggs

JUDGMENT GIVEN ON

26 July 2018

Heard on 25 and 26 April 2018

Appellant	Respondent
Michael Firth	Jonathan Swift QC
	Katherine Eddy
(Instructed by Morrisons Solicitors LLP)	(Instructed by HMRC Solicitor's Office (Salford))

LORD BRIGGS: (with whom Lady Hale, Lord Sumption, Lord Carnwath and Lord Hodge agree)

Introduction

1.
Traders who wish to appeal against assessments to Value Added Tax ("VAT") in the United Kingdom are required, by section 84 of the Value Added Tax Act 1994, first to pay or deposit the tax notified by the assessment with HMRC, unless they can demonstrate that to do so would cause them to suffer hardship. Otherwise, their appeal will not be entertained. This "pay-first" requirement is a feature of the procedural regime for appealing assessments to a number of other types of tax, including Insurance Premium Tax, Landfill Tax, Climate Change Levy and Aggregates Levy. But it is not a

condition for appealing assessments to Income Tax, Capital Gains Tax (“CGT”), Corporation Tax or Stamp Duty Land Tax (“SDLT”).

2.
VAT is, in the UK and elsewhere in the European Union, regulated by the provisions of EU Directives, currently of VAT Directive 2006/112. An appeal against an assessment to VAT is therefore a claim based on EU law. All the other taxes and levies referred to above are regulated by domestic law, so that appeals against assessments to any of them are based on domestic law.

3.
The appellant Totel Ltd (“Totel”) seeks to appeal a number of assessments to VAT but has been unable to demonstrate that a requirement to pay or deposit the tax in dispute would cause it hardship. But Totel claims that the requirement to pay or deposit the disputed tax as a condition for its appeals being entertained offends against the EU law principle of equivalence. In outline, this principle requires that the procedural rules of member states applicable to claims based on EU law are not less favourable than those governing similar domestic claims. It is submitted that appeals against assessment to Income Tax, CGT and SDLT are claims which are similar to appeals against assessment to VAT and that, because a VAT appeal is subjected to the pay-first requirement whereas those other appeals are not, then the UK’s procedural rules for VAT appeals are less favourable than those governing similar domestic claims.

4.
In the course of a convoluted but irrelevant procedural history Totel first raised its challenge based upon the principle of equivalence when (successfully) seeking permission to appeal from the Upper Tribunal (Tax and Chancery Chamber) to the Court of Appeal. In December 2016 the Court of Appeal rejected that challenge on two grounds. Logically the first (although the second to be dealt with in the leading judgment of Arden LJ) was that none of the domestic taxes (Income Tax, CGT and SDLT) relied upon by Totel were true comparators with VAT for the purpose of the application of the principle of equivalence. The second ground was that, even if they were, there were other domestic taxes (namely those described in para 1 above) which subjected appeals against assessments to the same pay-first requirement, so that it could not be said that EU-derived VAT appeals had been picked out for the worst procedural treatment. Accordingly, what is commonly called the “no most favourable treatment proviso” (“the Proviso”) applied so as to prevent infringement of the principle of equivalence.

5.
In this court Totel challenges both those conclusions of the Court of Appeal. For their part, HMRC challenge (for the first time) the underlying assumption that, when viewed in the round, the procedure for appeals against tax assessments is rendered less favourable to the taxpayer by the imposition of the pay-first requirement in relation to only some of them.

6.
The principle of equivalence and its qualifying Proviso are creatures of the jurisprudence of the CJEU (and its predecessors), and take effect within the general context that it is for each member state to establish its own national procedures for the vindication of rights conferred by EU law: see EDIS v Ministero delle Finanze (Case C-231/96) at paras 19 and 34 of the judgment. Further, it has been repeatedly stated by the CJEU that it is for the courts of each member state to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in

relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis: see Palmisani v Istituto Nazionale della Previdenza Sociale (Case C-261/95) at para 38, and Levez v TH Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521, para 43.

The search for a true comparator

7.
The principle of equivalence works hand in hand with the principle of effectiveness. That principle imposes a purely qualitative test, which invalidates a national procedure if it renders the enforcement of a right conferred by EU law either virtually impossible or excessively difficult. By contrast, the principle of equivalence is essentially comparative. The identification of one or more similar procedures for the enforcement of claims arising in domestic law is an essential pre-requisite for its operation. If there is no true comparator, then the principle of equivalence can have no operation at all: see the Palmisani case, at para 39. The identification of one or more true comparators is therefore the essential first step in any examination of an assertion that the principle of equivalence has been infringed.

8.
Plainly, the question whether any, and if so which, procedures for the pursuit of domestic law claims are to be regarded as true comparators with a procedure relating to an EU law claim will depend critically upon the level of generality at which the process of comparison is conducted. Is it sufficient that both claims are tax appeals, or (as Totel submits) appeals against the assessment of tax, or that they must both be made to the same tribunal? Or is it necessary to conduct some more granular analysis of the different claims, and the economic structures in which they arise? Or is there some simple yardstick which would prevent claims from being truly comparable, such as, in the present case, the difference between claims arising out of the assessment of liability to direct and indirect taxes, (as HMRC submits)? Decisions of the CJEU provide considerable assistance in identifying the correct approach to this task, although the guidance to be gained from some of them is not always that which springs from an over- simplistic analysis of particular phraseology.

9.
First, the question whether any proposed domestic claim is a true comparator with an EU law claim is context-specific. As Lord Neuberger put it in Revenue and Customs Comrs v Stringer [2009] UKHL 31; [2009] ICR 985 at para 88:

“It seems to me that the question of similarity, in the context of the principle of equivalence, has to be considered by reference to the context in which the principle is being invoked.”

This proposition was not in dispute between counsel, and it is therefore unnecessary to cite decisions of the CJEU in support of it, although most of those to which reference is made below illustrate or mandate the conduct of a context-specific enquiry.

10.
The domestic court must focus on the purpose and essential characteristics of allegedly similar claims: see the Levez case, at para 43 of the judgment:

“In order to determine whether the principle of equivalence has been complied with in the present case the national court - which alone has direct knowledge of the procedural rules governing actions

in the field of employment law - must consider both the purpose and essential characteristics of allegedly similar domestic actions."

To the same effect is para 35 of the judgment of the Grand Chamber in Transportes Urbanos y Servicios Generales SAL v Administración del Estado (Case C-118/08). In Littlewoods Retail Ltd v Revenue and Customs Comrs (Case C-591/10) [2012] STC 1714, the Court at para 31 used the phrase "similar purpose and cause of action", without in my view thereby intending to change the underlying meaning from that described in the earlier cases.

11.
Of particular importance within the relevant context is the specific procedural provision which is alleged to constitute less favourable treatment of the EU law claim. This is really a matter of common sense. Differences in the procedural rules applicable to different types of civil claim are legion, and are frequently attributable to, or at least connected with, differences in the underlying claim. A common example is to be found in different limitation periods. Thus, in England and Wales, the primary limitation period for personal injury claims is three years, whereas the primary limitation period for most other claims is six years. There is a 20 year prescription period for property claims in Scotland. To treat personal injury and, for example, property claims as true comparators for the purpose of deciding whether the shorter limitation period for personal injury claims constituted less favourable treatment would make no sense. This is because it is no part of the purpose of the principle of equivalence to prevent member states from applying different procedural requirements to different types of claim, where the differences in those procedural requirements are attributable to, or connected with, differences in the underlying claims.

12.
Mr Michael Firth for Totel drew the court's attention to some passages in European authorities which, he submitted, justified addressing the similarity question at a very high level of generality, in support of his broad submission that all UK appeals against tax assessments are true comparators with an appeal against a VAT assessment. He relied, for example, on the following passage in the court's judgment in the Transportes Urbanos case, at para 36:

"As regards the purpose of the two actions for damages referred to in the previous paragraph, the Court notes that they have exactly the same purpose, namely compensation for the loss suffered by a person harmed as a result of an act or omission of the State."

Accordingly, he submitted, all claims against the state for compensation for loss were, at least in principle, capably of being truly comparable for the purposes of the principle of equivalence. Taken out of context, that citation might appear at first sight to support Mr Firth's submission, but a closer analysis of that case shows that it does nothing of the kind. The claimant complained that it had been over-charged to VAT, and its consequential loss could be remedied if either the charge in question was contrary to European law, or if it was contrary to the Spanish Constitution. In the former case Spanish procedural law imposed a condition requiring prior exhaustion of remedies, whereas it did not for the latter. The alternative claims were held to be true comparables for the purposes of the principle of equivalence not because they were both, viewed in the abstract, claims against the state for compensation for loss, but because they were alternative legal bases for claiming compensation for precisely the same loss. This is, in particular, apparent from para 43 of the Court's judgment. Alternative types of claim for compensation for exactly the same loss are a common example of true comparators: see eg Preston v Wolverhampton Healthcare NHS Trust (No 2) [2001] 2 AC 455.

13.

For his part, Mr Jonathan Swift QC for HMRC submitted that dicta in European and domestic authority justified a conclusion that there could never be a true comparator with an appeal against a VAT assessment, apart from some other assessment to VAT. In short, he submitted that VAT, and all claims relating to it, were sui generis, with no true comparator arising from any other type of tax. He began with the following dictum of Moses J in Marks & Spencer plc v Comrs of Customs and Excise [1999] 1 CMLR 1152, a case in which a limitation period for the recovery of overpaid VAT was alleged to offend the principle of equivalence. At paras 61-62 he said:

“In my judgment no comparison can be made with other types of tax such as income tax payable in respect of an individual’s profits or the tax on a document imposed by stamp duty. Other forms of indirect taxation, such as excise duty, are wholly different types of tax.

It seems to me that the jurisprudence of the European Court of Justice, exemplified in EDILIZIA, requires a comparison between the approach of a member state to the recovery of tax charged in breach of Community rules and the recovery of the same tax in breach of domestic rules. Any wider enquiry would invite unnecessary argument as to whether there is a true comparison.” (My emphasis)

Referring to the principle of equivalence, he concluded:

“The principle is designed to protect Community law rights: adequate protection is afforded by focusing upon the way a member state deals with the same tax in a domestic as opposed to Community context.”

14.
The difficulty with this analysis, as Mr Firth pointed out, is that (as Mr Swift agreed) all claims to recover overpaid VAT are necessarily based on EU law, because VAT is a tax regulated by EU law. Moses J’s analysis was approved by the Court of Appeal in Littlewoods Ltd v Revenue & Customs Comrs (CA) [2015] EWCA Civ 515; [2016] Ch 373, paras 133-134 in the judgment of Arden LJ. But it appears that her analysis was based on the same concession, namely that there could be purely domestic claims for recovery of overpaid VAT.

15.
Mr Swift obtained more persuasive assistance from Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze (Case C-35/05) [2007] ECR I-2452. It was alleged in that case that a provision limiting the identity of those who could claim a VAT repayment offended against the principle of equivalence because there was no comparable restriction in relation to the recovery of overpaid direct tax. At paras 94 and 95 of her opinion, Advocate General Sharpston agreed with the following submission of the Commission:

“In general … a situation in that (direct tax) field is unlikely to be comparable to that in the field of VAT. In the latter it is in principle only the supplier who is in a direct legal relationship with the tax authority. Indeed, the whole system of direct taxation is unrelated to that of VAT. Since the principle of non-discrimination concerns only comparable situations, it is thus not relevant here.”

16.
In its judgment, the Court adopted the more general part of the Commission’s argument at para 45:

“In the present case, the system of direct taxation, as a whole, is not related to the VAT system.”

Accordingly, the Court concluded that none of the EU anti-discriminatory principles, including the principle of equivalence, were engaged by the comparison between VAT and direct taxation.

17.
Compass Contract Services Ltd v Comrs for Her Majesty's Revenue and Customs (Case C-38/16) EU:C:2017:454 involved a comparison between different limitation periods applicable to claims to recover overpaid VAT, and claims to deduct input tax from VAT otherwise due, for the purposes of the equal treatment principle. The Fourth Chamber of the CJEU concluded that, even within the confines of the VAT regime, the two claims were not truly comparable: see paras 36-39 of the judgment.

18.
Taken together, these authorities certainly justify the exercise of very considerable caution by a national court when faced with the assertion that a VAT claim should be treated as truly comparable, for the purposes of the principle of equivalence, with a claim relating to some domestic tax, and in particular with any direct tax. But I do not consider it necessary or appropriate to go so far as to conclude that, for all purposes connected with the principle of equivalence, VAT claims must be treated as sui generis, with no possibility of there being a true comparator in a claim arising out of some other tax. My reasons follow.

19.
First, the identification of any such general rule would run counter to the context-specific basis upon which it is clear that the examination of comparators for the purposes of the principle of equivalence must be conducted. It would, in particular, rule out any analysis of the question whether the particular procedural provision alleged to amount to less favourable treatment had any connection with underlying differences between VAT and some different domestic tax.

20.
Secondly, although the court's ruling in the Reemtsma case appears to come quite close to such a general conclusion, the principle of equivalence lay only at the fringe of the issues there being considered by the CJEU, with the result that, unsurprisingly, the point was addressed with what may fairly be described as extreme brevity. The case was mainly about the related principles of neutrality, effectiveness and non-discrimination.

21.
Thirdly, if the Reemtsma case had established such a general rule in 2007, namely that VAT is for this purpose sui generis, with no true comparators, it is difficult to understand why this did not constitute a simple solution to the question referred to the CJEU in the Littlewoods case (Case C-591/10) [2012] STC 1714, which included the question whether the restriction of a successful claimant to a VAT repayment to simple interest offended the principle of equivalence, when compared with interest payable on other types of claim for repayment of tax under domestic law. It is evident from paras 42 to 48 of the opinion of Advocate General Trstenjak that there was a wide range of submissions as to potential comparators, including a concession from the UK government that, in principle, repayment claims under domestic indirect taxation were comparable for the purposes of the principle of equivalence, in the context of different entitlement to interest. In accordance with the Advocate General's advice, the Court of Justice referred the comparability question to the UK courts. This must have been on the basis either that there was no rule of general application for all purposes that VAT claims could in no circumstances be treated as truly comparable with claims for repayment of domestic tax, or that the CJEU regarded claims for restitution against the state as falling within a separate category.

22.

Nevertheless, applying the context-specific analysis called for by the European jurisprudence which I have described, the Court of Appeal was in my judgment correct to conclude that none of the domestic taxes (namely Income Tax, CGT and SDLT) proposed by Totel constituted true comparators with VAT for the purpose of deciding whether the imposition in the VAT context of a pay-first requirement constituted less favourable treatment contrary to the principle of equivalence. This is because a trader seeking to appeal a VAT assessment is typically in a significantly different position from a taxpayer seeking to appeal an assessment to any of those other taxes, and in a manner which is properly to be regarded as sufficiently connected with the imposition of a pay-first requirement. In that respect my reasoning is closely aligned with that of the Court of Appeal, as explained in para 54 of Arden LJ's judgment.

23.
Subject to certain exceptions to which I refer below, VAT is a tax of which the economic burden falls upon the ultimate consumer, but which is collected by the trader from the consumer, and accounted for by the trader to HMRC. By contrast, taxpayers seeking to appeal an assessment to Income Tax, CGT and SDLT are being required to pay, from their own resources, something of which the economic burden falls on them, and which they have not collected, for the benefit of the Revenue, from anyone else. It is therefore no less than appropriate that traders assessed to VAT should be required (in the absence of proof of hardship) to pay or deposit the tax in dispute, which they have, or should have, collected, while no similar requirement is imposed upon the taxpayers in those other, and different, contexts.

24.
I do not by reference to this connection between the pay-first requirement and the trader's paradigm status as a tax collector rather than a taxpayer mean to suggest that it is a condition of the recognition of this important difference separating VAT from other taxes that the pay-first requirement was devised for that specific reason. The evidence before the court did not show what, in fact, the reason was. The existence of a logical rather than causal connection is sufficient to justify the conclusion that VAT is different from those other taxes in this context, rather than a true comparator, regardless of the reason for the imposition of the pay-first requirement.

25.
Mr Firth sought to challenge this distinction between VAT and those other taxes. First, he submitted that the portrayal of the VAT registered trader as a collector rather than a payer of tax was true only for one of the three types of liability for VAT, the other two being acquisition from other member states and imports from outside the EU. That is, I agree, true of those heads of liability, but they arise only in a cross-border context, and for the purpose of making the VAT scheme work as a whole. The paradigm remains that of the trader who collects VAT from his customers and accounts for it to the Revenue.

26.
Secondly, Mr Firth submitted that by no means in every case would a trader seeking to appeal a VAT assessment already have collected the relevant tax from his customer. The appeal might be about whether his supply was subject to VAT, in circumstances where he had not charged VAT at all. That is, again, true as far as it goes, but it does not significantly impact on the paradigm. More typical are those appeals where the underlying dispute is whether the trader is entitled to deduct from tax collected on his supplies the VAT paid by him on his inputs.

27.

Thirdly, Mr Firth submitted that even if the VAT trader could generally be regarded as a collector rather than payer of tax, the same was equally true of an employer deducting and accounting for employees' Income Tax under the PAYE scheme so that Income Tax was, nonetheless, a true comparator with VAT. I would, again, acknowledge that there is an element of similarity between the two, but there are important differences. First, in circumstances of wilful failure to deduct by the employer the employee remains liable to the Revenue for Income Tax whereas, in the VAT context, the only recourse of HMRC is to the trader rather than the consumer. This distinction is closely connected with the existence of a pay-first condition for a VAT appeal but not in a PAYE context. Secondly, the employer has not charged and received a payment from employees creating a fund for which the employer is accountable. Thirdly, the PAYE scheme is only a sub-set of the Income Tax scheme viewed as a whole, and lies nowhere near so close to the essential nature of the relevant tax structure as does the quasi-collector status of the VAT trader.

28.
Finally, it was no part of Totel's case that, for the purposes of the principle of equivalence, the PAYE part of the Income Tax scheme was the sole true comparator with VAT for the purpose of testing whether the pay-first requirement represented less favourable treatment. Rather, Totel's case was that, simply because all appeals against assessments to tax are made for the same general purpose, and to the same tribunal, they could all properly be regarded as true comparators with appeals of assessments to VAT. That requires the similarity question to be addressed at a level of generality which is so high as to place it outside the entirety of the relevant jurisprudence about the principle of equivalence. It must therefore be rejected.

29.
My conclusion on this issue is sufficient to dispose of this appeal. The issue as to the meaning and application of the Proviso has content only against the hypothetical assumption that appeals against assessment to all kinds of direct and indirect domestic tax are true comparators with VAT appeals, and the unreality of that hypothesis makes it difficult to conduct a reliable analysis of the second issue. But it has been fully argued, and it was the first plank upon which the Court of Appeal dealt with the case. I shall therefore make some limited observations about it although, had it been necessary to decide this issue for the resolution of this appeal, I might have regarded it as deserving of a reference to the CJEU. But first it is convenient to deal with the new submission of HMRC that the imposition of the pay-first requirement does not in any event amount to less favourable treatment.

Does the pay-first requirement amount to less favourable treatment?

30.
This issue would arise if, contrary to my conclusion, there had been a truly comparable domestic tax in relation to which an appeal against an assessment was not subjected to the pay-first requirement which affects VAT appeals. It is an issue which would therefore arise if any of Income Tax, CGT or SDLT had been a true comparator for the purposes of the principle of equivalence.

31.
Less favourable treatment is not, of course, established merely because the procedure for one type of claim contains a restriction or condition which is absent from the procedure for another type of claim. It is common to find that different claims are subjected to a package of procedural requirements, such that some of those affecting claim A are less favourable, but others more favourable, than those affecting claim B. A good example is to be found in Preston v Wolverhampton NHS Trust (No 2) [2001] 2 AC 455, illustrated in paras 29 to 31 in the speech of Lord Slynn.

32.
In the present case, for the first time in this court, HMRC point out that appeals against assessment to Income Tax, CGT and SDLT are subject to a procedural regime such that the tax in dispute may still be collected pending the outcome of the appeal, by processes of enforcement which may include the presentation of a winding-up petition against the taxpaying company, unless the taxpayer can obtain postponement of payment, by demonstrating that there are reasonable grounds for believing that the tax in dispute has been overcharged: see, in relation to Income Tax, section 55 of the Taxes Management Act 1970 and, in relation to SDLT: paragraph 39 of Schedule 10 to the Finance Act 2003. If the taxpayer faces a winding-up petition on the basis of the tax in dispute, then it may defend that petition by showing that the amount in dispute is bona fide disputed on substantial grounds.

33.
HMRC concedes that the same principles about postponement, and the defence of a winding-up petition, apply also to the collection of VAT pending an appeal: see Revenue and Customs Comrs v Changtel Solutions UK Ltd [2015] EWCA Civ 29; [2015] 1 WLR 3911. Nonetheless Mr Swift submits that, in practice, a trader who has obtained disapplication of the pay-first requirement by demonstrating hardship would not thereafter be subjected to any process of enforced collection of the disputed tax, pending the outcome of the appeal.

34.
Mr Swift's point is not so much that the pay-first requirement in relation to VAT is balanced out by the provisions about collection and postponement pending appeal in relation to Income Tax, CGT and SDLT. Rather, he submits that, looked at in the round, the two regimes have broadly the same effect, so that the VAT regime cannot be described as less favourable.

35.
Viewed from the perspective of a trader with a good case for proving hardship, together with a reasonable prospect of success on appeal, that might in practice be so, although I would not accept that in no circumstances could a tax demand be enforced against a VAT trader who had established hardship. The two statutory tests are not the same. Nonetheless, from the perspective of a trader who cannot demonstrate hardship, the position seems to me to be rather different. Such a trader would have to raise and lodge the tax in dispute up front, before commencing an appeal. By contrast a taxpayer under Income Tax, CGT or SDLT is at liberty to initiate an appeal against an assessment, and may or may not be faced with an application for collection by HMRC. More generally, there is in my view no escape from the fact that the pay-first requirement is additional to, rather than a substitute for, the regime for collection and postponement so that, in principle, it constitutes less favourable treatment for VAT appellants even if, in certain types of supposedly comparable cases, it may make no difference to the outcome, in terms of the ability to prosecute an appeal without paying the tax in dispute.

The no most favourable treatment Proviso

36.
This issue arises if the search for true comparators with the EU claim discloses more than one comparable domestic claim with, viewed in the round, different levels of favourableness in procedural treatment. On almost every occasion when it has referred to the principle of equivalence the CJEU has added the proviso that the principle does not require the EU claim to be treated as favourably as the most favourably treated comparable domestic claim. In the earliest of the cases cited to this court, the EDIS case, the proviso is explained thus, at para 36:

“That principle (the principle of equivalence) cannot, however, be interpreted as obliging a member state to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law.”

Similar statements appear in the Levez case at para 45, in Pontin v T-Comalux SA (Case C-63/08) [2009] ECR I-10467, at para 45, in the Transportes Urbanos case, at para 34 and in the Littlewoods case, at para 31. But none of these cases provide any more comprehensive explanation of how the Proviso is to be applied in practice. This may be because its detailed operation is a matter for national courts, and the CJEU considers that the Proviso as described above is sufficiently self-explanatory for that purpose.

37.
The issue of interpretation of the Proviso arises in the present case on the assumption that truly comparable domestic tax claims may include appeals against assessment not only to domestic taxes like Income Tax, where the procedure does not include a pay-first requirement, but also to other taxes like Insurance Premium Tax and Landfill Tax, which do. Thus VAT claims are treated less favourably than one or more true comparators, but equally favourably with others. There are only two levels of differently favourable treatment on this particular domestic spectrum of supposedly comparable claims, but it is easy to imagine a spectrum with several levels, with treatment of the comparable EU claim lying at the top, in the middle, or at (or below) the bottom of that spectrum.

38.
In Revenue and Customs Comrs v Stringer [2009] ICR 985, probably thinking of a spectrum of the latter kind, Lord Neuberger said this (obiter) about the Proviso:

“This is therefore not a case where it could be said that the appellants are seeking to benefit from the ‘most favourable rules’ of limitation, which I understand to mean exceptional or unusually beneficial rules (as mentioned by the Court of Justice in Levez v TH Jennings (Harlow Pools) Ltd, at para 42).”

In para 42 of the Levez case the CJEU merely repeated the Proviso as enunciated in the EDIS case and set out above, slightly adjusting the language to suit the facts, but without any underlying change in meaning.

39.
In the present case Mr Swift submitted that the Proviso should be treated as a reflection of the underlying purpose of the principle of equivalence, namely that national procedural rules should not single out EU claims for worse treatment, and specifically not discriminate against them by reason of their EU, rather than national, origin. If therefore the procedure for any true domestic comparator gave treatment to its claimant no more favourable than given to the EU claim, then the principle of equivalence was satisfied. If in the present case Insurance Premium Tax and Landfill Tax are true comparators, then the treatment of VAT appeals does not infringe the principle of equivalence.

40.
By contrast Mr Firth submitted that once any true comparator was identified the procedure for which treated its claimants better than did the procedure for the EU claim, then the principle of equivalence was infringed, unless the better domestic treatment fell into that exceptional category identified by Lord Neuberger in the Stringer case as excluded by the Proviso. Income Tax, CGT and SDLT could not be excluded as conferring exceptionally favourable treatment, and the fact that there were other domestic tax appeals treated equally favourably with VAT was neither here or there. The fact that domestic appellants in Insurance Premium Tax cases also received less favourable treatment than

Income Tax appellants did not mean that the EU based claims by VAT registered traders were not less favourably treated. One example of discrimination does not, so it is said, justify another.

41.
Both sides sought to squeeze out of the language of the CJEU decisions some titbits favourable to their sharply opposing cases on this point. For example, in the paragraph of the judgment in the EDIS case following the statement of the Proviso (para 37) is it stated:

“Thus, Community law does not preclude the legislation of a member state from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.”

That last sentence, said Mr Swift, clearly allowed a member state to resist an allegation of breach of the principle of equivalence if any similar domestic procedure included a pay-first requirement.

42.
In the present case the Court of Appeal applied that dictum, at para 47, as follows:

“The jurisprudence of the CJEU shows that it is open to a member state to apply any available set of rules, which are already applied to similar claims, to an EU-derived claim, provided that an EU-derived claim is not selected for the worst treatment. No one suggests that that is the position here.”

43.
Mr Firth relied by contrast first upon dicta from the Levez case, at paras 39 to 45 of the judgment. In my view, taken in context, they are neutral on the point. The high-water mark of his citations was this passage from the Pontin case, at para 56 of the judgment:

“If it emerges that one or more of the actions referred to in the order for reference, or even other national remedies that have not been put before the Court, are similar to an action for nullity and reinstatement, it would also be for the referring court to consider whether such actions involve more favourable procedural rules.”

The implication was, he said, that the discovery of any comparable domestic claim with more favourable treatment that the EU claim would offend the principle of equivalence.

44.
I do not consider that any reliable answer to this question can be found by the minute textual analysis of the CJEU authorities. Nor was Lord Neuberger’s instinctive conclusion about the limited meaning of the Proviso in the Stringer case intended to be a fully reasoned or comprehensive explanation of its full purpose and effect. I need reach no final conclusion in this case, but would tentatively suggest the following analysis.

45.
First, the Proviso should not be regarded as some free-standing rule, separate from the principle of equivalence. Rather it is part of the Court of Justice’s expression of the principle of equivalence itself, directed to explaining the standard of treatment which that principle imposes upon member states when providing procedures for the vindication of rights based in EU law. What is required is that the

procedure should be broadly as favourable as that available for truly comparable domestic claims, rather than the very best available.

46.
Secondly, the Proviso is, like the principle of equivalence of which it forms part, best understood in the light of its purpose. Although nowhere expressly stated, I consider that HMRC were correct to submit that it is to prevent member states from discriminating against claims based upon EU law by affording them inferior procedural treatment from that afforded to comparable domestic claims.

47.
On that basis I consider that the conclusion of the Court of Appeal on this issue, set out in the passage quoted above from the judgment of Arden LJ, is broadly correct. I would only add that this would not justify the choice of some exceptionally tough set of procedural rules already applied to some domestic claim for reasons particular to that type of claim. But such a claim would be most unlikely to be a true comparator in any event.

Conclusion

48.
I would therefore dismiss this appeal, on the ground that there has not been shown to be any true comparator among domestic claims sufficient to engage the principle of equivalence in relation to the imposition of a pay-first requirement upon traders seeking to appeal assessments to VAT.