

# BETWEEN ROCKS AND HARD PLACES: LIMITATION, PRIVILEGE, AND MISTAKES OF LAW

The Court of Appeal’s decision in *Jazztel plc v HMRC* [2022] EWCA Civ 232 (“*Jazztel*”) is a striking example of the difficulties raised by the limitation period applicable to claims for restitution of payments made under mistakes of law. In particular, the case throws into sharp relief under-noticed problems at the intersection of privilege and limitation. As things stand, mistake of law claimants may find themselves unable to show that their claim has been brought in time without waiving privilege over much of their legal advice—thereby potentially exposing weaknesses in their claim. More broadly, *Jazztel* demonstrates that it is not merely claimants who find themselves caught between rocks and hard places: the current limitation rules were not drafted with mistake of law claims in mind; therefore, judges have struggled to construe the relevant provisions in a manner which is both conceptually sound and practically workable. There may be no option left but legislative reform.

Between early-2000 and mid-2008, *Jazztel plc* made 23 payments (totalling £5,753,780) of stamp duty reserve tax (“SDRT”) on the issue of “chargeable securities”, pursuant to the Finance Act 1986, s.87. SDRT was normally charged at 0.5%; however, s.96 required some payors (including *Jazztel*) to pay at the higher rate of 1.5%.

From the start, *Jazztel* protested that the enhanced rate was contrary to EU law. Nevertheless, they paid so as to “avoid any interest or penalties if... [the] charges were ultimately found to be applicable”. Significantly, *Jazztel*’s concerns were detailed in a letter to the Revenue from their solicitors, Linklaters, dated 11 January 2000. In 2009, *Jazztel*’s complaints proved well-founded: the CJEU held in *HSBC Holdings plc v HMRC* [2009] ECR I-9047; [2010] S.T.C. 58 that s.96 was contrary to Article 11 of EC Council Directive 69/335 of 17 July 1969.

The Revenue considered that at least some of *Jazztel*’s protests amounted to “claims” under regulation 14 of the Stamp Duty Reserve Tax Regulations 1986, which provided that “[i]f on a claim it is proved... that too much tax has been paid... the excess... shall be repaid”, provided (as relevant) that the “claim... [was] made within a period of 6 years beginning with... the date on which the payment was made”. Therefore, on 28 January 2010, the Revenue repaid £3,327,078 in respect of SDRT paid after 17 December 2003. A further repayment of £1,819,060 was made in September 2014, this being the amount *Jazztel* paid on 7 January 2000 (interestingly, while this repayment treated the 11 January 2000 letter as the relevant “claim”, it is not obvious what “claim” prompted the January 2010 repayment— it

cannot also have been the 11 January letter as this pre-dated the relevant payments). The sums paid between 7 January 2000 and 17 December 2003 were never repaid.

Jazztel commenced proceedings on 19 December 2013 seeking restitution of the overpaid tax as paid under a mistake of law. Ordinarily, a substantial part of Jazztel’s claim would have been time-barred. In *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All E.R. 890, Hobhouse J held (at 942–943) that s.5 of the Limitation Act 1980 applied to common law claims for unjust enrichment, meaning that such claims are usually time-barred six years after receipt of the payment (i.e., Jazztel would have had no claim for payments made any earlier than 19 December 2007). However, Jazztel argued that the limitation period was postponed pursuant to s.32(1)(c) of the 1980 Act, which provides that where a claim is for “relief from the consequences of a mistake... the period of limitation shall not begin to run until the plaintiff has discovered the... mistake... or could with reasonable diligence have discovered it”.

The Revenue denied liability for multiple reasons, including that Jazztel was not mistaken and that the Finance Act 2004, s.320 had disapplied s.32(1)(c).

At first instance, Marcus Smith J. allowed Jazztel’s claims in part. He held that s.320 only partially disapplied s.32(1)(c) and that Jazztel otherwise had a prima facie cause of action. Both parties appealed against Marcus Smith J.’s conclusion on s.320. However, by the time the matter reached the Court of Appeal, a more significant issue had arisen. In *Test Claimants in the FII Group Litigation v HMRC* [2020] UKSC 47; [2022] A.C. 1 (“*FII(2)*”), decided after Marcus Smith J.’s judgment, the Supreme Court re-considered how s.32(1)(c) operates in the context of mistake of law claims. It held (at [242]) that mistakes of law are discoverable, for the purposes of s.32(1)(c), when the claimant

“could with reasonable diligence know, that he made such a mistake ‘with sufficient confidence to justify embarking on the preliminaries to the issue of a writ...’; or [in other words] could... recognis[e] that a worthwhile claim arises.”

The Revenue therefore sought permission to amend their grounds of appeal to argue that Jazztel discovered, or could with reasonable diligence have discovered, their mistake at such point as would mean that Jazztel’s claims were time-barred. This note focuses on the Court of Appeal’s consideration of this issue.

As the wording of s.32(1)(c) makes clear, the running of time is only postponed until the earlier of one of two points: either when the claimant actually discovers their mistake, or when they could with reasonable diligence have done so. Although the Revenue’s proposed amendment pleaded both, the case in fact focused on the former (see e.g. [123] and [133])—the question was, in other words, when

Jazztel subjectively came to realise the true position, rather than when a reasonable claimant objectively would have done so (cf. *Beswick* (*Oxford Business Law Blog*, 1 April 2022)); i.e., when Jazztel had “sufficient confidence to justify embarking on the preliminaries to the issue of a writ”

The Court of Appeal began by noting (at [105]) that an appeal court will not usually allow a new point to be taken if (as relevant) consideration of that point would necessitate new evidence. Therefore, the Revenue were entitled to take the point only if it could be decided “from the existing findings and documentary evidence” (at [108]).

The Court of Appeal reviewed the available correspondence between Jazztel and their solicitors, Linklaters (at [109]–[119]). They accepted Marcus Smith J.’s finding that, until 11 January 2000, “Jazztel’s state of mind remained predominantly that the tax was due and that such doubt as it had was ‘marginal’” (at [128]). However, as mentioned above, Linklaters sent the Revenue a letter on 11 January 2000 requesting repayment of the previous payments. The letter “correctly identified the basis on which the SDRT could be impugned” (at [129]) and was ultimately treated as a “claim” for the purposes of regulation 14 of the SDRT Regulations. The Court of Appeal therefore concluded (at [132]) that Jazztel must have discovered their mistake by 11 January 2000, with the result that its claim (issued in December 2013) was time-barred.

With respect, the Court of Appeal may have erred in attaching such significance to the 11 January letter. The Court of Appeal reasoned (at [131]) that

“just as a person who has issued a claim form cannot be heard to suggest that he lacked the requisite knowledge for the purposes of the 1980 Act, Jazztel cannot be heard to suggest that it had not discovered its mistake when it had already succeeded in making a “claim” for repayment under regulation 14.”

This argument depends upon the legitimacy of equating the “claims” one can bring under regulation 14 with the “claims” one might bring before a court. There are two reasons to doubt this. First, there is minimal risk involved in making a “regulations claim” as they can be made informally and there are no consequences for unsuccessful claims. Therefore, there is little reason not to make even tentative “regulations claims”. In contrast, litigation involves considerable costs, and so more confidence is required “to justify embarking on the preliminaries to the issue of a writ” (*FII(2)* at [242]). Second, one cannot inadvertently issue a claim form. Conversely, because “[n]o special form has ever been prescribed... for the making of a claim under regulation 14” (*Jazztel* at [9]), one can make a “regulations claim” in correspondence without appreciating that one has done so.

However, it is unlikely that these concerns affect the result. The proceedings in *HSBC Holdings* were filed on 2 September 2004. The underlying basis of those proceedings must therefore, following *FII(2)*,

have been reasonably discoverable a non-negligible time before that date. Since Jazztel's claim form was issued over nine years later, the claim ought in any event to have been time-barred.

More significantly, the exercise in which the Court of Appeal engaged should serve as a stark warning of the dramatic implications of the Supreme Court's new approach to s.32(1)(c). In particular, the reliance placed upon Linklaters' advice to Jazztel, while correct following *FII(2)*, demonstrates the concerning relationship between *FII(2)* and the law of privilege.

Once limitation has been raised, it is for the claimant to prove that their claim is not time-barred (*Wilby v Henman* (1834) 2 Cr. & M. 658; 149 E.R. 924). This means, in the context of s.32(1)(c), that the claimant must prove that they only discovered, and could with reasonable diligence only have discovered, their mistake within six years of issuing their claim form. Proof of the former will rarely, if ever, be possible without proving when the mistake was actually discovered. As *Jazztel* shows, this will typically involve the claimant showing when they were advised of the existence of a potential claim.

The problem for claimants is that they must waive privilege over any legal advice relied upon in evidence. The situation is analogous to *MAC Hotels Ltd v Rider Levett Bucknall UK Ltd* [2010] EWHC 767, in which the claimants sought to apply s.14A of the Limitation Act 1980, which allows a claimant to bring an action in negligence for latent damage within three years of acquiring (as relevant) "the knowledge required for bringing an action". The claimants relied on their solicitors' statement affirming that, prior to the relevant three-year period, an investigation had revealed nothing meriting a claim against the defendants (see at [71]). Judge Havelock-Allan QC held (at [72]) that, by referring to and relying upon that investigation (which otherwise would have been covered by litigation privilege), the claimants had waived privilege in respect of all material pertaining to that investigation.

Although some cases have recognised the concept of "limited disclosure", viz., that documents might be disclosed only for particular purposes without waiver of privilege for any other purposes (see e.g. *DuPont Nutrition Biosciences ApS v Novozymes A/S* [2013] EWHC 155 at [60]), this has arisen only in the context of disclosure prior to litigation or to third parties. No case has recognised an entitlement to deploy an otherwise-privileged document in litigation for a particular purpose while asserting privilege in respect of that document for all other purposes in the same proceedings.

Legal advice and litigation privilege are justified by the importance of being able to receive informed and candid advice from lawyers "without fear that these communications may be relied on by an opposing party" (*Ventouris v Mountain* [1991] 1 W.L.R. 607 at 611; [1991] 3 All E.R. 472 at 475). Without it, one "would not venture to consult any skilful person or would only dare to tell his counsel half his case" (*Greenough v Gaskell* (1833) 1 My. & K. 98 at 103; 39 E.R. 618 at 621). But *Jazztel* demonstrates that tying the running of time to the claimant's legal understanding means that there will

rarely be a mistake of law case (where limitation is at issue) in which the claimant will not be compelled to waive privilege. To prove the date of discovery, they will almost certainly be required to deploy their legal advice in evidence. Consequently, claimants may struggle to conceal any weaknesses in their case canvassed in that advice.

This problem is exacerbated by the rules against “cherry-picking”: a party who discloses a privileged document may not assert privilege in respect of other documents where this would “allow an individual item to be plucked out of context” (*Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp* [1981] Com. L.R. 138 at 139). For example, these rules might be used to prevent a claimant disclosing recent advice suggesting the existence of a worthwhile claim whilst withholding older advice to the same effect. The relevant question is whether those further documents pertain to the same “transaction” or “issue” in respect of which privilege was waived (*PCP Capital Partners LLP v Barclays Bank plc* [2020] EWHC 1393; [2020] Lloyd’s Rep. F.C. 460 at [85]). In the present context, the relevant “issue” is “at what point did the claimant recognise they have a worthwhile claim?”. In order properly to investigate this issue, it is likely that all legal advice pre-dating the cut-off point for limitation will have to be disclosed; otherwise, claimants could selectively withhold earlier advice indicating the existence of a worthwhile claim.

Admittedly, in *MAC Hotels*, Judge Havelock-Allan QC took a more restrictive approach in respect of s.14A (see at [52]–[53]). However, as his judgment makes clear (at [54]), this was only possible because s.14A(9) states that the claimant’s legal understanding is irrelevant. The opposite is true of s.32(1)(c) regarding mistake of law claims. Therefore, it is probable that claimants will be required to disclose substantial amounts of privileged material.

Unusually, in *Jazztel* the advice in question had already been disclosed (to show that Jazztel had indeed been mistaken about its liability to pay SDRT). But this was the peculiar result of the fact that Jazztel had all along been paying under protest. The Court of Appeal’s approach to the case demonstrates that, post-*FII(2)*, waiver of privilege will be the norm, rather than the peculiar exception.

It is not only claimants who find themselves caught between rocks and hard places: the relationship between s.32(1)(c) and mistakes of law ensnares the law itself in a dilemma. Neither of the approaches taken so far have proved satisfactory.

Prior to *FII(2)*, the House of Lords concluded in *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49; [2007] 1 A.C. 558 that, until an authoritative judgment, the claimant “could not have discovered the truth because the truth did not yet exist” (at [31]). This created a paradox: “a claimant [could] be unable to discover the existence of his cause of action even after he has brought his claim” (*FII(2)* at [173]). This was both conceptually unsatisfactory and undermined the purpose of the

Limitation Act: it meant that claims could theoretically be brought an indefinite period after the events occurred.

While *FII(2)* solved the former problem, it did not solve the latter. In relative terms, time will always start running earlier under the new approach. However, the postponement under s.32(1)(c) is still theoretically indefinite. Legal understanding can take generations to change (witness the slow emergence of the law of “unjust enrichment” itself), and so “worthwhile claims” may lie dormant for decades.

Furthermore, the *FII(2)* approach raises problems of its own. First, it is nearly impossible to identify a precise date on which a claim appeared “worthwhile” (especially in the context of “reasonable discoverability” rather than “discovery”). Shifts in legal understanding are usually gradual rather than sudden. So far, none of the three cases on the matter have squarely raised the issue. In both *FII(2)* and *British Telecommunications plc v HMRC* [2021] EWHC 1095; [2021] S.T.C. 1113, determination of the precise date was left to be decided at trial. In *Jazztel* itself, the 11 January 2000 letter so obviously pre-dated the relevant cut-off date that there was no need to identify the precise date from which time began to run.

A second issue—that *FII(2)* encourages speculative litigation—is demonstrated by the reliance on the 11 January 2000 letter. *Jazztel*’s claim that the money was not owed was, at that stage, somewhat tentative. Only days prior “*Jazztel*’s state of mind remained predominantly that the tax was due” (at [128]). The current approach encourages claimants to bring even doubtful claims, lest they later find that the claim has become time-barred. This risk is especially pronounced because of hindsight bias: when a court later concludes that the claim was right, it is easier for it to appear to have been “worthwhile” all along. As a result, court time may increasingly be wasted on unmeritorious claims.

Finally, ethical issues may arise when claimants seek to rely on their legal advisers as witnesses to show that a claim was brought in time. As Fraser J. noted in *SRCL Ltd v NHS England* [2018] EWHC 1985; [2019] P.T.S.R 383 (at [79]):

“there is a line that ought to be preserved in terms of potential conflicts of interest... It will only be in extremely rare circumstances that it will necessary and/or permissible for a party... to call its own trusted adviser to give evidence on substantive issues of fact”.

In conclusion, *Jazztel* is an important illustration of the issues created by the new approach to the discoverability of mistakes of law. The underlying problem is that s.32(1)(c) was never intended to apply to claims based on mistakes of law: its drafting pre-dated the abolition of the mistake of law bar by 11 years. Parliament therefore did not have the opportunity to design s.32(1)(c) so as to accommodate

the unique problems posed by mistakes of law. As a result, no judicial interpretation of the section has yet proved wholly satisfactory. Further legislative intervention may, therefore, be necessary. A helpful template may be the 1986 reforms, which introduced special rules for latent damage in negligence. An extended limitation period (analogous to the s.14B(1) longstop), coupled with the disapplication of s.32(1)(c) to mistake of law claims, may provide a better solution. This would strike a balance between achieving finality whilst also accommodating the difficulties mistake of law claimants may have in promptly bringing their claims.

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