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SECTION 36 OF THE LIMITATION ACT 1980

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ABSTRACT. *The law concerning limitation periods has long been recognised to be unsatisfactory. One area which poses particular problems concerns whether a limitation period can apply to equitable claims "by analogy" under section 36 of the Limitation Act 1980. This article considers three relatively recent decisions of the Court of Appeal* – P & O Nedlloyd BV v Arab Metals Co. (The UB Tiger) *[2006] EWCA Civ 1717, [2007] 1 W.L.R. 2288,* The Commissioners for Her Majesty's Revenue and Customs v IGE USA Investments Ltd. *[2021] EWCA Civ 534, [2021] Ch. 423 and* The Claimants in the Royal Mail Group Litigation v Royal Mail Group Limited *[2021] EWCA Civ 1173 – which illustrate that very different approaches have been taken. It is argued that The* UB Tiger *was wrongly decided, or at least should be limited to specific performance, and revives calls for legislative reform.*

KEYWORDS: *limitation periods*; *equity*; *specific performance*; *rescission*; *injunction*

I. INTRODUCTION

The law concerning limitation periods has long been recognised to be "unfair, complex, uncertain and outdated".[1] One area which presents particular difficulties concerns equitable remedies. The crucial statutory provision is section 36 of the 1980 Act:

> 36. Equitable jurisdiction and remedies
>
> (1) The following time limits under this Act, that is to say –
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> (a) the time limit under section 2 for actions founded on tort;

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[1] *Limitation of Actions*, Law Com No. 270 (2001), paragraph 1.4.

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time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.

This is not an easy provision to interpret. The rationale for applying statutory limitation periods to equitable claims by analogy is "obscure",[2] and it is unpredictable when the courts will apply a limitation period by analogy. Statutory reform would be desirable,[3] but sadly does not appear to be forthcoming.[4] It is therefore important to understand the case law in this area.

Unfortunately, the law regarding the application of section 36 is in something of a mess, and three relatively recent decisions of the Court of Appeal highlight the unsatisfactory position reached. In *P & O Nedlloyd BV v Arab Metals Co. (The UB Tiger)* it was held that specific performance is not subject to a limitation period by analogy to claims for damages for breach of contract.[5] By contrast, in *The Commissioners for Her Majesty's Revenue and Customs v IGE USA Investments Ltd.* the court decided that the six-year limitation period under section 2 of the Limitation Act 1980 for claims founded on the tort of deceit applies by analogy to claims for equitable rescission of a contract for fraudulent misrepresentation.[6] The thrust of the reasoning in *The UB Tiger* and *IGE* point in opposite directions, and in both cases, the appellate court overturned the decision of the judge below. It may be said that specific performance and rescission are simply different remedies to which different regimes apply, but reconciling the cases in this way is made trickier by the decision of the Court of Appeal in *The Claimants in the Royal Mail Group Litigation v Royal Mail Group Limited*.[7] The court held that it was bound by *The UB Tiger* to conclude that, for the purpose of section 36, an injunction to compel the defendant to perform its statutory duty was not analogous to a claim in tort for breach of that same statutory duty. Yet *Royal Mail* did not concern breach of contract,

[2] C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff & Jones: The Law of Unjust Enrichment*, 10th ed. (London 2022), paragraph 33-11.

[3] As proposed by the Law Commission in *Limitation of Actions* (2001): see Section VI below.

[4] Having initially accepted the Law Commission's proposals, the Government decided not to take the reform proposals forward: Hansard, HC Deb., 19 November 2009, col. 13 WS. In *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2002] A.C. 1, at [252], Lord Reed and Lord Hodge bleakly thought that there is "no prospect that Parliament will enact a legislative solution".

[5] [2006] EWCA Civ 1717, [2007] 1 W.L.R. 2288.

[6] [2021] EWCA Civ 534, [2021] Ch. 423.

[7] [2021] EWCA Civ 1173.

and – if the same approach as that adopted in *IGE* had been taken – their Lordships could have distinguished *The UB Tiger* by confining it to specific performance in the contractual context. Inconsistent reasoning plagnes this area of the law.

This article will argue that *The UB Tiger* was wrongly decided, and that the remedy of specific performance following a breach of contract should be subject to a limitation period of six years by analogy. It is apparent that the Court of Appeal in *Royal Mail* was uneasy with the result reached in *The UB Tiger*, and expressed its "reservations" about that decision.[8] At the very least, it is suggested that *The UB Tiger* should not be considered the dominant decision in this area: the contrasting approach in *IGE* is to be commended and should be followed. It is therefore unfortunate that *IGE* was not discussed in the judgment of the Court of Appeal in *Royal Mail*.[9] There is no doubt that the Limitation Act 1980 is an unhappy statute, and section 36 is difficult to apply coherently. But parties should not be able to circumvent limitation periods simply by seeking equitable relief instead of a common law remedy, and courts should be more willing to apply limitation periods by analogy than is sometimes the case.

II. The Importance of Limitation Periods

Lord Sumption has deprecated the fact that "issues of limitation are bedevilled by an unarticulated tendency to treat it as an unmeritorious procedural technicality".[10] As His Lordship went on to explain:

> [Limitation] has been part of English statute law for nearly four centuries. It has generated analogous non-statutory principles in equity. Some form of limitation is a feature of almost all other systems of law .... Limitation reflects a fundamental and all but universal legal policy that the litigation of stale claims is potentially a significant injustice. Delay impoverishes the evidence available to determine the claim, prolongs uncertainty, impedes the definitive settlement of the parties' mutual affairs and consumes scarce judicial resources in dealing with claims that should have been brought long ago or not at all.[11]

Significantly, limitation periods do not operate solely for the benefit of an individual defendant, but for the wider public interest. Lady Hale has observed that "[f]rom the state's point of view, there is also an interest both in fair trials and in an end to litigation".[12]

This public interest applies both at common law and in equity. Any coherent system would not distinguish the limitation period according to

[8] Ibid., at [182].
[9] All the more surprising, perhaps, since Asplin L.J. was on the panel in both those cases.
[10] *Abdulla v Birmingham City Council* [2012] UKSC 47, [2013] 1 All E.R. 649, at [41].
[11] Ibid.
[12] *AB v Ministry of Defence* [2012] UKSC 9, [2013] 1 A.C. 78, at [164].

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whether the remedy was classified as legal or equitable.[13] It is symptomatic of the incoherent development of the statutes concerning limitation that under section 36 equitable remedies are only subject to limitation periods by analogy.

Equitable remedies might not be awarded due to laches. Laches is a general equitable defence which bars the grant of equitable relief when the claimant has been guilty of undue delay in asserting their rights.[14] Where there has been a delay in bringing a claim, often laches may bar the remedy regardless of whether a limitation period has elapsed. But this will not always be the case – as highlighted by the recent Court of Appeal decisions which are the focus of this article – and there is a general public interest in applying limitation periods to bar equitable remedies also. This was quickly appreciated by the courts. Rather than reject limitation periods in equity, chancery judges sought to establish a consistent approach. For example, in the leading decision of *Knox v Gye*,[15] the House of Lords dismissed a claim for an account in equity on the ground of limitation because, even though the Limitation Act 1623 only applied to actions for an account at law, equity adopted the statute "by analogy". Lord Westbury said:

> For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a court of equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in equity corresponds with an action at law which is included in the words of the statute, a court of equity adopts the enactment of the statute as its own rule of procedure.[16]

This passage has framed the crucial issue as being whether "the remedy in equity is correspondent to the remedy at law". Different courts have interpreted this dictum in different ways. This is well illustrated by examining the approaches taken by the Court of Appeal to specific performance, rescission and injunction.

[13] The Law Commission's proposals would apply to all "civil claims": Draft Limitation Bill, cl.1. This would avoid the unfortunate elision in section 36 of the characterisation of the remedy with whether an analogy can be drawn to a common law claim. Similar views have been expressed in other jurisdictions: eg Law Reform Commission of Western Australia, *Limitation and Notice of Actions* (Project 36II, 1997), [13.76]; Limitation Act 2005 (WA), s. 13. For broader discussion, see e.g. M. Liu, "Application of Limitation by Analogy: Equity Exceptions" (2016) 25 Australian Property Law Journal 150.

[14] *Lindsay Petroleum Company v Hurd* (1874) L.R. 5 P.C. 221, 239; *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764, at [60]–[64]. See too *Gerace v Auzhair Supplies Pty Ltd.* [2014] NSWCA 181, (2014) 87 N.S.W.L.R. 435, at [27]–[34].

[15] (1872) L.R. 5 H.L. 656.

[16] Ibid., at 674.

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III. Specific Performance: *The UB Tiger*

Containers of scrap metal were delivered by the claimant carrier to the defendant buyer under a bill of lading in June 1998. The defendant refused to accept the containers on the grounds that the contents of the containers were radioactive. The claimant ultimately commenced proceedings for damages for breach of the contract of carriage in March 2004. Subsequently, in December 2004, the claimant applied to amend its claim to plead, in the alternative, specific performance. Colman J. held that the claim for specific performance was time-barred since the six-year limitation period applicable to an action founded on contract under section 5 of the Limitation Act 1980 applied by analogy.[17] The Court of Appeal allowed the claimant's appeal on the basis that permission to amend should be granted even if the new claim was statute-barred.[18] The claimant then sought summary judgment on its specific performance claim. Tomlinson J. refused to grant specific performance since damages would be an adequate remedy,[19] and this decision was overturned by the Court of Appeal, which held that Tomlinson J. was wrong to decide that the claim for specific performance had no real prospect of succeeding at trial. For present purposes, the crucial aspect of the judgment of Moore-Bick L.J. (with whom Buxton and Jonathan Parker L.JJ. agreed) concerns the conclusion that the claim for specific performance could not be subject to a limitation period, disagreeing with the earlier decision of Colman J.

Moore-Bick L.J. examined the operation of section 36 in some detail, and focused on whether the suit in equity (for specific performance) corresponds with the action at law (for damages for breach of contract).[20] His Lordship relied upon earlier authorities[21] for his conclusion that "in cases where the facts capable of supporting a claim for equitable relief differ from those capable of supporting a claim at law, or where the equitable remedy differs in a material respect from that available at law", no limitation period should apply by analogy.[22] Insisting upon a requirement of "substantially identical relief"[23] represents a very narrow approach when ascertaining the scope of section 36. It led Moore-Bick L.J. to conclude that no limitation period could apply by analogy to specific performance, since specific performance is not "substantially identical" and "differs in a material respect" from damages for breach of contract. Significantly,

[17] [2005] EWHC 1276 (Comm), [2005] 1 W.L.R. 3733.
[18] [2006] EWCA Civ 1300, [2007] 1 W.L.R. 2483.
[19] [2006] EWHC 2433 (Comm).
[20] [2006] EWCA Civ 1717, at [38]ff.
[21] E.g. ibid., at [45], relying upon *Knox v Gye* (1872) L.R. 5 H.L. 656; *Coulthard v Disco Mix Club Ltd.* [2000] 1 W.L.R. 707; and *Cia de Seguros Imperio v Heath (REBX) Ltd.* [2001] 1 W.L.R. 112.
[22] [2006] EWCA Civ 1717, at [45].
[23] Ibid.

specific performance may be available in situations where there has not been a breach of contract,[24] which prompted Moore-Bick L.J. to say that "[i]t is therefore wrong in principle to treat specific performance as merely an equitable remedy for an existing breach of contract".[25]

Burrows has diplomatically called the result in *The UB Tiger* "controversial".[26] The major reason for this is because specific performance is "almost always"[27] a remedy for breach of contract. Textbooks consistently deal with specific performance as a remedy for breach of contract.[28] Even though there are some rare instances of specific performance being awarded in the absence of breach, those isolated cases should not distort the law or govern whether specific performance can *never* be subject to a limitation period. It is better to focus on the particular facts of a case. The limitation period concerning claims for breach of contract should apply by analogy where specific performance is sought as an alternative to damages for breach of contract, as was the case in *The UB Tiger*: the function of the specific performance remedy was to diminish the loss which would otherwise sound in damages. Moreover, it might often be possible to draw an analogy between specific performance and the action for an agreed sum, since both are concerned with enforcing the primary obligations voluntarily assumed by contracting parties. And claims in debt are subject to a limitation period of six years.[29]

Moore-Bick L.J. was correct to conclude that dicta in older cases are inconclusive.[30] However, in *Redgrave v Hurd*, Sir George Jessel M.R. thought it to be "a settled doctrine of equity, not only as regards specific performance, but also as regards rescission", that a limitation period could apply by analogy.[31] This passage from *Redgrave v Hurd* was cited in *The UB Tiger*, but sadly not on this point.[32] The decision of *The UB Tiger* clearly departs from the well-established dictum of Sir George Jessel M.R.

It is suggested that the outcome in *The UB Tiger* is both surprising and novel. The contrary judgment of Colman J. appeared preferable, since the result in the Court of Appeal means that we now have "an extremely anomalous remedial regime which could have no intelligent justification in the context of a modern system of commercial law. The remedial

[24] *Hasham v Zenab* [1960] A.C. 316.
[25] [2006] EWCA Civ 1717, at [47].
[26] A. Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 L.Q.R. 232, 251.
[27] Ibid.
[28] E.g. H. Beale (ed.), *Chitty on Contracts*, 34th ed. (London 2021), ch. 30 (within Part Nine on "Remedies for Breach of Contract"); A. Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed. (Oxford 2019), ch. 22.
[29] Limitation Act 1980, s. 5.
[30] [2006] EWCA Civ 1717, at [45], citing J. Beatson, "Limitation Periods and Specific Performance" in E. Lomnicka and C. Morse (eds.), *Contemporary Issues in Commercial Law: Essays in Honour of Professor AG Guest* (London 1997).
[31] (1881) 20 Ch.D. 1, 13.
[32] [2006] EWCA Civ 1717, at [58], when considering laches.

dislocation involved could be justified neither in terms of logic nor public policy".[33] It is unfortunate that contracting parties may now be able to circumvent the limitation period which applies to the damages claim by seeking specific performance.

IV. Rescission: *The Commissioners for Her Majesty's Revenue and Customs v IGE USA Investments Ltd.*

Just as the Court of Appeal in *Redgrave v Hurd* had treated specific performance and rescission in a similar way, early decisions following *The UB Tiger* thought that the two should remain linked.[34] Unlike *Redgrave v Hurd*, though, the result was that no limitation period applied by analogy to either specific performance or rescission. However, in *IGE* the Court of Appeal held that claims for rescission for fraudulent misrepresentation are subject to a limitation period by analogy with the tort of deceit.

GE entered into a settlement agreement with HMRC in 2005. Having subsequently discovered allegedly new information, HMRC purported to rescind the settlement agreement for material misstatements of fact and issued its claim against GE in 2018. The following year, HMRC issued an application to amend the particulars of claim and introduce a claim that the representations were made fraudulently. One of the bases on which GE opposed permission being granted for HMRC's claim to rescind the settlement agreement in equity for fraudulent misrepresentation was that it had an arguable limitation defence.

At first instance, Zacaroli J., influenced by the approach adopted in *The UB Tiger*,[35] held that no limitation period applied to the remedy of rescission. That decision was overturned by the Court of Appeal. Henderson L.J. (with whom Asplin L.J. and Birss L.J. agreed) carefully explained that the court was bound by the earlier decision of the Court of Appeal in *Molloy v Mutual Reserve Life Insurance Company*,[36] which was clearly good law at the time the 1939 Act came into force.[37] In *Molloy*, the claimant sought to rescind an insurance policy for fraudulent misrepresentation, and to recover the payments made by him under the policy. The court held that his claim was barred because the six-year limitation period that applied to a claim for damages in the tort of deceit applied by analogy.

[33] [2005] EWHC 1276 (Comm), at [23] (Colman J.).
[34] E.g. *Property Alliance Group Limited v The Royal Bank of Scotland PLC* [2016] EWHC 3342 (Ch), at [257]–[258]; *IGE* [2020] EWHC 2121 (Ch), [2020] S.T.C. 2091, at [126]–[130]. See too *Wood v Commercial First Business Ltd.* [2019] EWHC 2205 (Ch), at [180]–[181] (not considered on appeal: [2021] EWCA Civ 471, [2022] Ch. 123) and T. Grant and D. Mumford (eds.), *Civil Fraud: Law Practice and Procedure* (London 2018), [25-030].
[35] [2020] EWHC 2121 (Ch), at [130].
[36] (1906) 94 LT 756 (Collins M.R., Romer and Cozens-Hardy L.JJ.).
[37] J. Brunyate, *Limitation of Actions in Equity* (London 1932), 228.

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The reasons why the Court of Appeal in *IGE* disagreed with Zacaroli J. are revealing. First, Zacaroli J. had understood the ratio of *Molloy* to be limited to situations where a pecuniary remedy was sought along with rescission. As Henderson L.J. explained, that is too narrow. The key issue is whether a claimant sought rescission in circumstances where it could in principle have relied upon the same facts to bring an action for damages in deceit. Although rescission and damages are not *identical*, the Court of Appeal in *Molloy* held that they are sufficiently *similar* for the statutory six-year time limit to apply by analogy. This obviously differs from the approach taken by Moore-Bick L.J. in *The UB Tiger*, who unfortunately did not have the benefit of being taken to *Molloy*. By contrast, Henderson L.J. was able to draw upon *Molloy* for the sensible proposition that "the relief sought in the comparator common law claim does not have to be identical to that sought in equity: it is enough if the relief is 'similar'".[38]

Second, Zacaroli J. thought an analogy should more appropriately be drawn with rescission at common law rather than damages for deceit. But that is misconceived. Rescission at common law is not subject to any period of limitation.[39] Yet Section 36 of the 1980 Act demands an analogy with a cause of action for which a limitation period does exist. As a result, "[t]he fact that there is no statutory time limit ... at common law is simply irrelevant to the exercise mandated by section 36(1)".[40]

The Court of Appeal in *IGE* clearly took a broader approach to section 36 than the Court of Appeal in *The UB Tiger*. Henderson L.J. thought that the equitable remedy of rescission did not "differ in any material respect" from damages for deceit.[41] That appears to be more generous to defendants than the view of Moore-Bick L.J., who insisted specific performance could not be statute-barred since it was not "substantially identical relief" to breach of contract. In any event, Henderson L.J. did not need to engage with *The UB Tiger* since that was a case concerning specific performance rather than rescission, and regarding the remedy of rescission the decision of the Court of Appeal in *Molloy* was binding.[42] Such a discord between specific performance and rescission may seem odd, but could be explained as simply a product of the unhappy operation of section 36 of the 1980 Act; the law on limitation is riddled with confusion and inconsistencies, and courts cannot save the 1980 Act from itself. But the fundamental approach to the interpretation of section 36 and the

[38] [2021] EWCA Civ 534, at [54].
[39] This was "common ground" in *IGE* (ibid., at [20]) even though it may seem "anomalous" (at [90]) and "surprising" (at [93]).
[40] Ibid., at [83].
[41] Ibid., at [79].
[42] Ibid., at [74].

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application of the methodology concerning the analogy is different in *The UB Tiger* and *IGE*, which is bound to cause problems – especially since *Royal Mail* did not adopt the same approach as that taken in *IGE* and did not confine *The UB Tiger* to specific performance.

V. Injunction: *The Claimants in the Royal Mail Group Litigation v Royal Mail Group Limited*

Before 2009, it was generally assumed that no VAT was chargeable on postal services provided by Royal Mail because the services were exempt.[43] That assumption was incorrect: the Court of Justice of the European Union held that the domestic legislation did not correctly transpose EU law.[44] At least some of the services provided by Royal Mail were standard rated for the purposes of VAT. This meant that the costs charged by Royal Mail should have contained an element of VAT. Royal Mail ought to have accounted to HMRC for its output tax on those supplies, and the recipients of the services ought to have been able to deduct as input tax the VAT they paid. Since all parties had assumed VAT was not chargeable, Royal Mail did not issue VAT invoices. Following the discovery that VAT was chargeable, the recipients of the services sought to compel Royal Mail to issue invoices which showed the amount of VAT which ought to have been charged. One issue raised by these facts was whether the injunctive relief sought by the claimants against Royal Mail was subject to a limitation period by analogy. The claims in tort for breach of statutory duty were subject to a limitation period of six years as a result of section 2 of the Limitation Act 1980, and Royal Mail argued that the same limitation period should apply to the equitable remedy by analogy. This was important: the period of the claims went back as far as May 1977, and continued until at least April 2012.

The Court of Appeal (Lewison L.J., Asplin L.J. and Sir Timothy Lloyd) held that the claim for injunctive relief was not subject to a limitation period by analogy. Before Mann J. at first instance, Royal Mail conceded that the court was bound to follow the decision of the Court of Appeal in *The UB Tiger*. That was unfortunate: just as Henderson L.J. in *IGE* limited *The UB Tiger* to specific performance and not rescission, so could *Royal Mail* have held that cases on injunction were not limited by earlier decisions on specific performance.

The Court of Appeal considered that since the injunction sought would compel Royal Mail to perform its statutory duty, "it has something in

[43] Value Added Tax Act 1994, sched. 9.
[44] *TNT Post UK Ltd. v Revenue and Customs Commissioners* (C-357/07) [2009] 3 C.M.L.R. 752.

common with an order for specific performance despite not being based on contract".[45] The court therefore felt itself bound to apply *The UB Tiger*, despite "reservations",[46] since Royal Mail's submission that "there is no good reason why it should be supposed that a court of equity before 1940 would have granted such relief in support of a right at law which was statute-barred" had "some force".[47] The court identified the ratio of *The UB Tiger* as "no limitation period can be applied to a claim for specific performance because that remedy is so different from that which can be granted at law, namely damages, and it is therefore not 'correspondent to the remedy at law'".[48] However, the court immediately noted that "[i]t seems to us to be open to question whether that is what Lord Westbury meant by that phrase".[49] Quite right too.

The UB Tiger was applied by the Court of Appeal in *Royal Mail* without any substantial reasoning in support. This is perhaps understandable: once the court had decided that specific performance and injunction could not be cleaved apart, it considered itself bound to apply the narrow approach to section 36 endorsed in *The UB Tiger*. But it may be that Royal Mail did not put its best foot forward. It argued that *The UB Tiger* was *per incuriam* due to its inconsistency with an earlier decision of the Court of Appeal in *Cia de Seguros Imperio v Heath (REBX) Ltd.*,[50] but that contention was clearly hopeless: the Court of Appeal in *The UB Tiger* fully took into account the reasoning in *Cia de Seguros Imperio*. It would have been better to focus the court's attention squarely upon the overlooked decisions in *Molloy* and *IGE* to highlight that a broader approach to section 36 was both possible and endorsed by the Court of Appeal.

VI. Conclusion

The UB Tiger adopted a very narrow approach to the "correspondence" principle. This was based on a (mis)reading of *Knox v Gye* which was far from necessary, and indeed appears contrary to both *Redgrave v Hurd* and *Molloy*, the latter of which was unfortunately not cited. It would be a shame for *IGE* to suffer a similar fate. Yet its absence in the judgment of *Royal Mail*[51] indicates that this is a risk courts would do well to guard against.

[45] [2021] EWCA Civ 1173, at [169].
[46] Ibid., at [182].
[47] Ibid., at [173].
[48] Ibid., at [167].
[49] Ibid., at [167].
[50] [2001] 1 W.L.R. 112.
[51] In which *The UB Tiger* is described as "the latest decision at this level on the point" regarding section 36 [2021] EWCA Civ 1173, at [174]. *The UB Tiger* was also relied upon in *Kieran Corrigan & Co. Ltd. v OneE Group Ltd.* [2023] EWHC 649 (Ch), at [315]–[335] in rejecting an analogy between breach of confidence and any common law tort.

This is particularly important since the reasoning in *IGE* seems much more intuitive than that in *The UB Tiger*. Why should parties be able to circumvent limitation periods which bar common law remedies by seeking instead equitable relief which will have much the same effect? It is notable that in *IGE* Henderson L.J. reached his conclusion without any reluctance,[52] whereas in *Royal Mail* the reticence of the Court of Appeal was clear. The court said:

> it would serve no purpose for us to come to a conclusion as to whether *The UB Tiger* was right or not. Learned authors have expressed different views about it. In *Spry on Equitable Remedies*, 9th ed. (2014), it is said to be wrongly decided (at page 253) but *Chitty on Contracts*, 33rd ed. (2018) describes Moore-Bick L.J.'s judgment at paragraph 28-136 as excellent. In terms of judicial determination, the function of deciding that question is reserved exclusively to the Supreme Court.

It is worth noting that the editor of the relevant chapter of *Chitty* was Burrows – who had also called the result in *The UB Tiger* "controversial".[53] Enthusiastic support for the approach in *The UB Tiger* appears thin on the ground.

It is understandable why the Court of Appeal in *Royal Mail* considered that it was only for the Supreme Court to say whether *The UB Tiger* was correctly decided. But it could be some time before the Supreme Court is presented with a suitable opportunity.[54] As a result, it may be necessary to live with *The UB Tiger* for some time to come. But that does not mean that the decision needs to affect other areas: *The UB Tiger* should be confined to specific performance for breach of contract. As regards other equitable relief, analogies can be drawn on the somewhat broader basis favoured in *IGE*.

Of course, this approach cannot resolve all the uncertainties in the law. For example, it remains unclear whether a limitation period could apply by analogy where the remedy sought is equitable rescission for a negligent misrepresentation. As a matter of policy, it would be very odd for a claim for rescission on the basis of fraudulent misrepresentation to be time-barred after six years, following *IGE*, but for the claimant to be able to circumvent such a restriction by framing the claim as one for negligent misrepresentation. It would lead to the perverse situation where a defendant might be in a better position if it could establish that it committed fraud rather than merely negligence, in order to avail itself of a limitation period by analogy. Yet it is not clear whether an analogy can be made in the context of negligent misrepresentation: the obvious analogy is to a claim in tort under *Hedley Byrne & Co. Ltd. v Heller &*

[52] [2021] EWCA Civ 534, at [93].
[53] See Section III above.
[54] Permission to appeal was granted in both *Royal Mail* and *IGE*, although both disputes have settled.

Partners Ltd.,[55] but since that case was only decided by the House of Lords in 1963 it is uncertain whether a court would be prepared to say that a limitation period would have applied by analogy prior to 1 July 1940.[56]

As Henderson L.J. pointed out in *IGE*, it "reflects little credit on the current state of the law" that a trawl through pre-1940 authorities is required to establish whether a limitation period should apply to equitable relief by analogy.[57] This exercise is often difficult and inconclusive (and no good reason exists for why it should artificially end in 1940). Statutory reform is obviously desirable.[58] Such reform has been proposed by the Law Commission,[59] and was accepted by the Government, but legislative reform has since stalled. That is a shame, especially since this area seems eminently suited to the special procedure which allows "uncontroversial bills" to be introduced into Parliament.[60] Under the Law Commission's proposals, the general statutory limitation period of three years would directly govern equitable remedies, rather than by analogy. Such a simple approach would put the law on a much more stable footing.

[55] [1964] A.C. 465.
[56] Cf. *Cia de Seguros* [2001] 1 W.L.R. 112, 125.
[57] [2021] EWCA Civ 534, at [6].
[58] Ibid., citing *Cia de Seguros* [2001] 1 W.L.R. 112, 124.
[59] *Limitation of Actions* (2001).
[60] *Hansard*, HL Deb. vol. 721 col. 224 (7 October 2010).