Neutral Citation Number: [2015] EWCA Civ 515

Case No: A3/2014 2122
A3/2014 2123
A3/2014 2127
A3/2014 2128

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Vos
[2010] EWHC 2771 (Ch) &
[2010] EWHC 1071 (Ch)
Mr Justice Henderson
[2014] EWHC 4302 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2015

Before :

LADY JUSTICE ARDEN DBE
LORD JUSTICE PATTEN
and
LORD JUSTICE FLOYD

- -

Between:

LITTLEWOODS LIMITED and others	**Respondents/ Claimants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants/ Defendants**

- -
- -

Jonathan Swift QC, **Andrew Macnab, Peter Mantle** and **Imran Afzal** (instructed by the **General Counsel and Solicitor to HMRC**) for **HMRC**
Laurence Rabinowitz QC, Steven Elliott, Michael Jones and Maximilian Schlote (instructed by **Weil, Gotshal & Manges**) for **Littlewoods**

Hearing dates: 24-27 and 30 March 2015

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Approved Judgment

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Lady Justice Arden DBE:

1. In this judgment, which is the judgment of the court to which all members have contributed, we use the abbreviations set out in the table below:

ACT	Advance corporation tax
Chalke (High Court)	*F.J. Chalke Ltd v Revenue and Customs Commissioners* [2009] EWHC 952 (Ch); [2009] STC 2027
"CJEU" or "ECJ"	The Court of Justice of the European Union
Chalke (CA)	*F.J. Chalke Ltd v Revenue and Customs Commissioners* [2010] EWCA Civ 313; [2010] STC 1640
DMG	*Deutsche Morgan Grenfell v Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 AC 558
FA 1972	Finance Act 1972
FA 1984	Finance Act 1984
FA 1989	Finance Act 1989
FA 2004	Finance Act 2004
FA 2007	Finance Act 2007
FII (CA)	*FII Test Claimants v Revenue and Customs Commissioners* [2010] EWCA Civ 103; [2010] STC 1251
FII (High Court)	*FII Test Claimants v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch); [2009] STC 254
FII (ECJ) I	Case C-446/04 *Test Claimants in the Franked Investment Income Group Litigation v Inland Revenue Commissioners* [2007] STC 326

FII (ECJ) III	Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2014] AC 1161
FII (SC)	*FII Test Claimants v Revenue and Customs Commissioners* [2012] UKSC 19; [2012] 2 AC 337
HMRC	The Commissioners for Her Majesty's Revenue and Customs
ITC (No 2)	*Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2013] EWHC 665 (Ch); [2013] STC 1129
Kleinwort Benson	*Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349
Littlewoods	The Respondents to Appeals A3/2014/2122 and A3/2014/2123; and the Appellants in Appeals A3/2014/2127 and A3/2014/2128
Littlewoods (ECJ)	Case C-591/10 *Littlewoods Retail Ltd and others v Revenue and Customs Commissioners* [2012] STC 1714
Littlewoods (No 1)	*Littlewoods Retail Ltd and others v Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch); [2010] STC 2072
Littlewoods (No 2)	*Littlewoods Retail Ltd and others v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch); [2014] STC 1761
Marleasing	Case C-106/89 *Marleasing SA v La Commercial International de Alimentacion SA* [1990] ECR I-4135;

	[1992] CMLR 305
MCT	Mainstream corporation tax
Metallgesellschaft	Joined Cases C-397/98 and C-410/98 *Metallgesellschaft v IRC; Hoechst AG v IRC* [2001] Ch 620
San Giorgio	Case C- 199/82 *Amministrazione Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595
Sempra	*Sempra Metals Limited v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561
Thin Cap (High Court)	*Test Claimants in the Thin Cap group Litigation v HMRC* [2009] EWHC 2908 (Ch); [2010] STC 301
TMA or TMA 1970	Taxes Management Act 1970
VAT	Value added tax
VATA or VATA 1994	Value Added Tax Act 1994
Woolwich	*Woolwich Equitable Building Society v IRC* [1993] AC 70

2. Over the period 1973 to 2004 Littlewoods overpaid a total of some £204 million in VAT to HMRC. HMRC have now repaid the principal sums together with simple interest at the rates provided for in section 78 of VATA 1994. By these two claims Littlewoods seek to recover in restitution the time value of the sums which they wrongly paid, which they claim exceeds the simple interest available under VATA by a sum which is of the order of £1 billion.

3. The appeals which are before us are from two separate judgments. The first is the judgment of Vos J (as he then was) given on 19 May 2010 in a first stage of the trial mainly concerned with liability: *Littlewoods (No 1)*. The second is the judgment of Henderson J given on 28 March 2014 in a second stage of the trial concerned with outstanding issues of liability and with quantum: *Littlewoods (No 2).*

4. Vos J decided in *Littlewoods (No 1)* to refer certain questions to the CJEU. A Grand Chamber of the CJEU heard the reference on 22 November 2011 and gave its decision on 19 July 2012: *Littlewoods (ECJ)*.

5. The combined effect of *Littlewoods (No 1), Littlewoods (ECJ)* and *Littlewoods (No 2)* is that Littlewoods have been successful thus far on their claim. HMRC appeal from parts of both *Littlewoods (No 1)* and *Littlewoods (No 2)*. Littlewoods have a cross appeal which, if successful, allows them to succeed by a different route.

6. On this appeal Mr Jonathan Swift QC argued the case for HMRC. Mr Laurence Rabinowitz QC and Mr Steven Elliott argued the case for Littlewoods.

Claims for overpaid tax

7. It is not necessary for the purposes of this judgment to explain in any detail why Littlewoods paid tax which was not due. There is no longer any live dispute between the parties over whether the tax was in fact wrongly paid, and the details of why that is the case are not relevant to any issue we have to decide. The details are, in any event, comprehensively explained in the judgment of Henderson J in *Littlewoods (No 2)*. It is sufficient to point out, because it is relevant to the way in which the jurisprudence in this area has developed, that this is not a case of the premature levying of tax, but of tax being levied which should not have been paid at all.

8. It is, however, necessary for a proper understanding of the issues in this case to identify and distinguish between the two types of cause of action in the English law of restitution about which there is argument in this case, and the way in which they have developed. The first type of action is based on the principle in *Woolwich*. In that case the House of Lords recognised the existence of a claim in restitution based solely on payment of money pursuant to an unlawful demand by a public authority. Prior to that decision the common law had only permitted recovery where the payment had been made under a mistake of fact (but not law) or under limited categories of compulsion. It is of relevance that the limitation period for a *Woolwich* claim is six years from the date of payment.

9. The second type of action has been referred to in argument as a "mistake-based restitution claim". In *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 the House of Lords held that the rule of law which precluded the recovery of money paid under a mistake of law could no longer be maintained. A cause of action in restitution therefore lay wherever money was paid under a mistake, whether of fact or law. This second type of cause of action had advantages in some circumstances because of the limitation period which applied. By section 32(1)(c) of the Limitation Act 1980, which provides for cases where the claim is for relief from the consequences of a mistake, the six year limitation period only begins to run from the date when the mistake was or could with reasonable diligence be discovered. However, as Lord Goff made clear in his speech in that case at pages 381 to 382, this mistake of law remedy did not, at least yet, apply to tax.

10. In *DMG* the House of Lords held that the mistake of law remedy under the common law did extend to a taxpayer who wrongly paid tax under a mistake of law. In consequence, at common law, a taxpayer who wrongly pays tax has concurrent

remedies albeit with different limitation periods, and may, in general, choose the cause of action which best serves his own interests: see per Lord Goff at [51].

11. Finally, in *FII (CA)* the Court of Appeal held that the *Woolwich* cause of action was not limited to cases where there had been a formal demand, but extended to any case where tax had been unlawfully exacted from a person by virtue of a legislative requirement. The Supreme Court, in *FII (SC),* agreed: see Lord Hope at [10], Lord Walker at [64] to [83] and Lord Sumption at [171] to [174].

Interest claims

12. In a series of cases including *London, Chatham & Dover Railway Co v South Eastern Railway Co* [1893] AC 429 and culminating in *President of India v La Pintada Cie Navigacion SA* [1985] AC 104, the English courts had held, subject to limited exceptions, that there was no general power at common law, in the absence of any agreement, to award interest as compensation for the late payment of a debt or damages. In *Sempra* the House of Lords held that that rule should no longer apply and the courts had a common law jurisdiction to award interest, simple and compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and tort. Further, a claimant seeking restitution of money paid under a mistake could also in principle recover interest. We will have to consider that decision in greater depth later in this judgment.

The issues

13. With that introduction it is possible to turn to the issues which arise for our decision in this case. These were set out for us in a helpful document produced pursuant to the court's direction, and which formed the basis for the oral argument which we heard. The numbering of issues derives from that employed below: not all those issues are live on this appeal. The issues which arise in relation to liability are the following:

1. Are Littlewoods' restitution claims excluded by sections 78 and 80 VATA 1994 as a matter of English law and without reference to EU Law?

2. If Littlewoods' restitution claims are excluded by sections 78 and 80 VATA 1994, is that exclusion contrary to EU law? Specifically, notwithstanding the right to interest under section 78 VATA 1994, does that exclusion violate the principle of effectiveness by depriving Littlewoods of an adequate indemnity for the loss occasioned through the undue payment of VAT?

3. If issues 1 and 2 are answered in the affirmative:

(A) Can sections 78 and 80 of VATA 1994 be construed so as to conform with EU law (and if so how), or must they be disapplied?

(B) If section 78 and 80 VATA 1994 must be disapplied, must they be disapplied so as to allow only *Woolwich*-type restitution claims, or (b) both *Woolwich*-type restitution claims and mistake based restitution claims?

14. The issues which arise in relation to quantum are the following:

6A. As a matter of English law, is the benefit to HM Government from the overpayments of tax correctly measured by (a) "the objective use value" of the money measured by reference to the cost to HM Government of borrowing money in the amount of the sums overpaid or (b) by reference to the actual use made by HM Government of the overpayments and "actual benefit" which HM Government derived therefrom?

6B. If, as a matter of English law, the measure of Littlewoods' restitution remedy is less than the objective use value of the overpaid amounts, is that consistent with EU law?

6C. If compound interest is payable, should it continue to run after the date of the repayment of the principal amounts of the overpaid VAT until the date of judgment?

6D. Was Vos J wrong to hold that the receipt of the overpayments in "year 1" must have gone to reduce government borrowing at the end of the tax year?

Issue 1: Are Littlewoods' restitution claims excluded by sections 78 and 80 of VATA 1994 as a matter of English law and without reference to EU Law?

15. HMRC contend, as a matter of English law and without reference to EU law, that Littlewoods' common law claims are excluded by sections 78 and 80 VATA 1994. Littlewoods contend that this is not so, and that such claims can be maintained by them purely as a matter of English law.

16. The relevant parts of sections 78 and 80 of VATA 1994 are set out below in the amended form in which they existed at the date of Littlewoods' claims. Although there have been amendments to the sections over time, none is material for present purposes. We start with section 80, which was first enacted as section 24 of the Finance Act 1989 and brought into force on 1 January 1990, before being consolidated into VATA 1994.

> 80 <u>Credit for, or repayment of, overstated or overpaid VAT</u>
>
> (1) Where a person-
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount. …

> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose. …
>
> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.…
>
> (4) The Commissioners shall not be liable on a claim under this section –
>
> (a) to credit an amount to a person under subsection (1) or (1A) above, or
>
> (b) to repay an amount to a person under section (1B) above,
>
> if the claim is made more than 3 years after the relevant date.
>
> (6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.
>
> (7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them".

17. The limitation period in section 80(4) differs from that which was originally enacted, and indeed from those which have applied in the interim, but these amendments are not material to the issues we have to decide. Sections 80(4ZA) and (4ZB) contain detailed provisions concerning the "relevant date", which are also not material and therefore not reproduced above.

18. When VAT was first introduced in 1973 there was no general provision for payment of interest in the VAT legislation. Her Majesty's Customs & Excise ("HMCE") which administered VAT until their absorption into HMRC in 2005, would pay interest in limited circumstances. Thus it would pay interest following a decision of a VAT tribunal (see section 40(4) of the FA 1972), or where an appeal was settled (see section 25 of the FA 1984), or where HMCE considered it was appropriate to pay an award of interest on an *ex gratia* basis.

19. Section 78 was originally enacted as section 38(A) of the Value Added Tax Act 1983, inserted by section 17 of the FA 1989 which received Royal Assent on 25 July 1991. It was then consolidated (apart from an amendment immaterial for our purposes) within VATA 1994. According to the evidence of Robina Dyall, a Senior Civil Servant heading the Administrative Framework Group within Central Policy at HMRC, the change replaced the system of *ex gratia* payments and ensured that all traders were placed on the same footing. The previous system was considered to have favoured those traders with professional advisers, at the expense of smaller traders who did not.

20. Section 78 is in the following terms:

> "78 Interest in certain cases of official error
>
> (1) Where, due to an error on the part of the Commissioners, a person has-
>
> (a) accounted to them for an amount by way of output tax which was not output tax due from him and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him, or
>
> …
>
> *then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest* to him on that amount for the applicable period, but subject to the following provisions of this section. …
>
> (3) Interest under this section shall be payable at the rate applicable under section 197 of the Finance Act 1996.
>
> (4) The "applicable period" in case falling within subsection (1)(a) or (b) above is the period –
>
> (a) beginning with the appropriate commencement date, and
>
> (b) ending with the date on which the Commissioners authorise payment of the amount on which interest is payable."

(emphasis supplied)

21. The passage emphasised in section 78(1) is central to the argument on this issue. Section 78(5) explains "appropriate commencement date" and is not set out above. The rates of interest "applicable under section 197 of the Finance Act 1996" referred to in section 78(3) are in fact to be found in the Air Passenger Duty and Other Indirect Taxes (Interest Rates) Regulations 1998, section 197 being an enabling section. Regulation 8 contains a table specifying simple interest rates varying by reference to historical time periods, going back to the beginning of VAT in 1973. The rates range between 6 and 15 percent.

22. Finally we should note the relevant powers of tribunals and courts to award interest. The Value Added Tax and Duties Tribunal always had power to award interest, at such rate as the Tribunal might determine, on amounts of overpaid VAT that it orders to be repaid. Such a power was first enacted in section 40(4) of the Finance Act 1972, was re-enacted as section 40(4) of the Value Added Tax Act 1983 and became section 84(8) of VATA 1994. Similarly, section 35A of the Supreme Court Act 1981 (now the Senior Courts Act) gave the court power to award interest in proceedings before the High Court for the recovery of debt or damages at such rate as the court thinks fit.

23. Issue 1 was resolved in favour of HMRC for the purposes of this case by Vos J in his judgment in *Littlewoods (No 1)* at [45] to [62], but the same issue had previously been addressed and resolved in the same way by Henderson J in *Chalke (High Court)* at [57] to [75]. Although many of the other issues decided by Henderson J in *Chalke (High Court)* were the subject of an appeal to the Court of Appeal in *Chalke (CA)*, there was no appeal from Henderson J's conclusion on Issue 1.

24. In arriving at their construction of sections 80 and 78, both Vos J in *Littlewoods (No 1)* and Henderson J in *Chalke (High Court)* relied on the decision of this court in *Monro v HMRC* [2009] Ch 69. That case was concerned with whether section 33 of the TMA 1970 impliedly excluded remedies available at common law, in particular mistake-based restitution claims. At [22] Arden LJ said:

> "In my judgment, the authorities give clear guidance that if Parliament creates a right which is inconsistent with a right given by the common law, the latter is displaced. By "inconsistent" I mean that the statutory remedy has some restriction in it which reflects some policy rule of the statute which is a cardinal feature of the statute. In those circumstances, the likely implication of the statute, in the absence of contrary provision, is that the statutory remedy is an exclusive one."

25. Thus it was, and is, argued that where sections 80 and 78 provide specifically for a statutory remedy for undue payment of VAT and for interest in certain cases of error, then it is inconsistent to allow common law claims to circumvent the statutory provisions.

26. On this appeal Littlewoods contend, in essence, that Vos J's reasoning in *Littlewoods (No 1)* and Henderson J's in *Chalke (High Court)* both pay insufficient attention to the words "*then, if and to the extent that [HMRC] would not be liable to do so apart from this section, they shall pay interest…*" in section 78(1). We refer to these words as "the section 78(1) reservation". It is important to note that the section 78(1) reservation means, as Mr Rabinowitz accepted, that the availability of other liabilities of HMRC to pay interest (whatever the class of those liabilities is) takes precedence over the simple interest provided for under section 78(3). It is thus, as Mr Rabinowitz put it, not merely residual (in the sense that the taxpayer can elect for it if there is no better alternative) but subordinate. If there are liabilities to pay interest outside section 78(1) then they take priority, and section 78 must yield to them, whether they are more favourable to the taxpayer or not.

27. In more detail, Mr Rabinowitz submits:

i) It is not possible to construe the section 78(1) reservation, applying accepted methods of statutory construction, as preserving statutory rights to interest but not those available at common law. There is no basis in the language of the reservation to do so.

ii) Littlewoods' construction is not inconsistent, in the *Monro* sense, with some policy or cardinal feature of the statute. The *Monro* principle is a tool which courts deploy in order to imply an exclusive character into provisions which are silent as to whether they are exclusive or not. It has no application to section 80, which is expressly exclusive, and none to section 78, which, by reason of the section 78(1) reservation is expressly non-exclusive.

iii) Littlewoods also contend that section 80(7) relates only to claims for repayment of principal, not interest. Thus, the fact that section 80(1) provides the only means for claiming repayment of principal sums does not have any bearing on claims for interest, which are dealt with by section 78, and are subject to the section 78(1) reservation.

28. Littlewoods also take a point based on section 81(1) of VATA 1994, not advanced below, which provides for the set off of interest owing between HMRC and the taxpayer. Section 81(1) is in the following terms:

> "Any interest payable by the Commissioners (whether *under an enactment or instrument or otherwise*) to a person on a sum due to him under or by virtue of any provision of this Act shall be treated as an amount due by way of credit under section 25(3)." (emphasis added)

29. Littlewoods submit that section 81(1), by using the words "or otherwise", recognises the existence of non-statutory claims to interest. They submit that section 81(1) shows that Parliament recognised that HMRC might have a liability to repay tax outside the provisions of a statute, and that same proposition should be recognised within the section 78(1) reservation itself.

30. Mr Swift responds for HMRC along the following lines:

i) The section 78(1) reservation does not assist Littlewoods. In order to rely on the reservation, Littlewoods have to rely on some non-statutory basis for claiming interest. The only such basis which they identify is the restitution claim. However that claim is expressly excluded by section 80(7).

ii) The claim in the present case was a mistake based restitution claim of the kind precluded by section 80(7) and could not therefore form a basis for recovering interest.

iii) Vos J in *Littlewoods (No 1)*) and Henderson J in *Chalke (High Court)* were both correct to recognise that the *Monro* principle applied so as to limit the available claims to those supplied by statute.

iv) Section 81(1) does not provide any clear statutory recognition of claims to common law interest. The words of section 81(1) were more likely chosen out of an abundance of caution so as to ensure that all interest claims however arising were treated as giving rise to a VAT credit.

31. There can be no doubt that section 80 provides an exclusive statutory scheme which deals specifically with the case where a taxpayer claims repayment of tax which is not due. Thus section 80(1) imposes a statutory duty on HMRC to credit the taxpayer with the amount of the overpaid tax. The liability to repay imposed on HMRC by section 80(1) is to the exclusion of any other liability "to credit or repay any amount

accounted for or paid to them by way of VAT that was not VAT due to them": section 80(7). The net effect of these provisions is that the only cause of action available to the taxpayer for the repayment of the principal sums is that afforded by section 80(1). Quite apart from the fact that the scheme has numerous detailed features (such as a special statutory defence of unjust enrichment, limitation period, etc), section 80(7) expressly says so.

32. Accordingly there can be no doubt that restitutionary claims for repayment of VAT are barred by section 80(7). As Henderson J said in *Chalke (High Court)*, thus far it is "crystal clear".

33. Although Mr Rabinowitz did not concede the point, it is equally clear in our judgment that, absent the section 78(1) reservation, section 78 would be an exclusive statutory scheme for providing for interest in cases where an overpayment is made and an error on the part of the Commissioners is established. Henderson J put it in this way in *Chalke (High Court)* at [72] in a passage with which we agree:

> "The section 78 interest regime is limited to cases where one of the four specified circumstances in paragraphs (a) to (d) of subsection (1) has occurred, and where the occurrence is "due to an error on the part of the Commissioners". This limitation defines the scope of the section, and in itself strongly implies that no interest is to be payable save in one of the four specified cases of official error. Further indications that the section 78 regime is meant to be comprehensive are the specified rates of interest laid down for the whole period back to 1973, the detailed rules for ascertaining the period for which interest is payable, the special limitation period for making claims in subsection (11), and the provision in subsection (2) which relieves the Commissioners from any obligation to pay interest under subsection (1) where the claimant is entitled to repayment supplement under section 79. All of these features would be subverted if a general right to recover interest at common law, whether sounding in contract, tort or restitution, were to be permitted to co-exist with section 78."

34. It follows that if Littlewoods' claims are to escape the scope of section 78, they must come within the scope of the section 78(1) reservation, properly construed.

35. We first consider HMRC's argument that Littlewoods do not have a common law claim which can take advantage of the section 78(1) reservation. We have already explained that section 80(7) unequivocally ousts any common law claim Littlewoods have to return of the principal sums on the basis of restitution, whether by way of *Woolwich* or mistake-based restitution. Do Littlewoods nevertheless have common law restitution claims for the interest? HMRC's suggestion that they do not was not argued before Vos J, but no objection was taken to the point being raised before us.

36. It is plain that any claim for interest must be founded on the claimant's right to return of the principal sum. But for section 80(7), Littlewoods would encounter no difficulty with the contention that they could claim in restitution for the principal sums overpaid and for interest on those sums. That conclusion follows from *Sempra*. *Sempra* also

makes clear that the fact that the principal sums are repaid is no bar to a claim for interest.

37. The principal speech in *Sempra* on this aspect is that of Lord Nicholls. In the paragraphs culminating at [100] Lord Nicholls considers the anomalous situation created by the common law exception of claims to interest when assessing damages. He concludes at [100]:

> "the court has a common law jurisdiction to award interest, simple and compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort."

38. Lord Nicholls then turns, in a section headed "Interest benefits and restitution" to consider the corresponding rule in restitution which was that no interest whether compound or simple could be recovered at common law in an action for restitution (although simple interest might be recovered in equity). At [112] Lord Nicholls held that the court had power in the exercise of its common law restitutionary jurisdiction to make an award of compound interest. For present purposes what is important is Lord Nicholls' analysis of Sempra's claim at [102]:

> "… The benefits transferred by Sempra to the Inland Revenue comprised, in short, (1) the amounts of tax paid to the Inland Revenue and, consequentially, (2) the opportunity for the Inland Revenue, or the Government of which the Inland Revenue is a department, to use this money for the period of prematurity. The Inland Revenue was enriched by the latter head in addition to the former. The payment of ACT was the equivalent of a massive interest free loan. Restitution, if it is to be complete, must encompass both heads. Restitution by the Revenue requires (1) repayment of the amounts of tax paid prematurely (this claim became spent once set off occurred) and (2) payment for having the use of the money for the period of prematurity."

39. *Sempra* was a case about prematurely paid taxes which were ultimately set off against liability to the revenue when those taxes fell due. This did not affect the liability to pay interest as Lord Nicholls explained at [115]:

> "Further, as with the damages claim in the present proceedings, so also with the two restitutionary claims, no difficulty arises from the fact that Sempra's ACT payments were mostly used before the inception of proceedings. The Inland Revenue had the benefit of the use of each payment of ACT for at least eight months. Setting off a payment of ACT against Sempra's mainstream corporation tax liability did not extinguish the Inland Revenue's restitutionary liability in respect of the interest benefits it had by then obtained from the ACT payments."

40. Lord Hope said at [25]:

> "The unjust enrichment principle supports the free-standing cause of action to recover interest, which is the measure of the enrichment."

41. Lord Walker agreed at [178] to [179]:

> "178. The crucial insight in the speeches of Lord Nicholls and Lord Hope is, if I may respectfully say so, the recognition that what Lord Nicholls calls income benefits are more accurately characterised as an integral part of the overall benefit obtained by a defendant who is unjustly enriched. Full restitution requires the whole benefit to be recouped by the enriched party: otherwise "the unravelling would be partial only" (Lord Nicholls in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627, 1637).
>
> 179. That was a case where money paid in damages had to be refunded in consequence of an appellate judgment. The same principle has been applied by differently constituted divisions of the Court of Appeal of New South Wales and by the Full Court of the Supreme Court of South Australia (*Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600; *Roads and Traffic Authority v Ryan (No 2)* [2002] NSWCA 128 (16 May 2002); *Cornwall v Rowan (No 2)* [2005] SASC 122 (1 April 2005)). In the first of these cases Mason P (at pp 604-606) cited from his judgment in *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (23 April 1997, unreported). Having set out a long catalogue of cases in which the *London, Chatham* rule had been bypassed, Mason P continued:
>
>> "Passing *London, Chatham* like ships in the night, these cases proceeded upon the obvious principle that, when A retains money owned by or owing to B over a period of time, A derives a benefit (at B's expense) usually measurable by what A would have had to pay in the market to borrow that sum for that period. Since this benefit is derived without justification and at the expense of the person to whom the principal sum was due, we should now recognise it as an unjust enrichment. It stands independently of, but appurtenant upon the obligation to pay, the 'principal' sum."
>
> He also noted the doubts as to a "free-standing" right to interest expressed in the High Court in *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285, 316-7."

42. The question posed by the present case is whether, when section 80(7) takes away the right to claim the repayment of the principal sums in restitution, it remains open to the taxpayer to advance a claim in restitution for the interest. Even when the cause of action for repayment of the principal in restitution is swept away, it remains the case that the tax is wrongly paid, that HMRC were at all material times under a liability to repay it (albeit under section 80(1)), and have been enriched by the retention of the

interest. These elements are, it seems to us, enough to constitute a cause of action in restitution.

43. Whilst, therefore, we reject HMRC's initial point, the discussion thus far throws some light on the issue of construction of section 78. All claims for repayment of wrongly paid VAT are claims under section 80(1), and will normally carry with them a restitutionary claim for interest, including compound interest. Moreover, subject to the section 78(1) reservation, all claims for interest (at least in the case of error on the part of the Commissioners) are within section 78, and therefore intended to be subject to the simple interest provision of section 78(3). If the section 78(1) reservation includes restitutionary claims for interest, section 78 would never apply. That is because, given the residual and subordinate nature of the section 78(1) reservation it must yield to the common law restitutionary remedy which will always be available.

44. There are potentially two solutions to this conundrum. One is to construe the section 78(1) reservation so as to exclude common law claims for restitution based on the time value of money. The other is to say that the words used are apparently unqualified, and that at the time that Parliament enacted the sections in 1991 it used language which, although it did not appreciate it at the time, was wide enough to include a common law restitutionary claim for the time value of overpaid tax when that cause of action finally came to be recognised.

45. The words chosen by Parliament in the section 78(1) reservation are not obviously apt to cover a restitutionary claim for the time value of money. The words are "*if and to the extent that they would not be liable to do so apart from this section, they shall pay interest*". Thus the liability must be one "to pay interest". It is true that in some circumstances the restitutionary claim will lead to relief for the claimant, intended in general terms to reverse the benefit gained by unjust enrichment, which may be calculated by reference to interest rates. But it is a strained use of language to describe this as a liability to pay interest.

46. Mr Rabinowitz responds to this point by saying that if the restitutionary claim is not a liability to pay interest, then section 78 is not an obstacle to bringing it at all. Section 78 is only an exhaustive code for interest. If the restitution claim is not properly described as interest, then it escapes the clutches of section 78 altogether.

47. We do not accept that argument. Section 78 can and does form a coherent code for compensating taxpayers for the time value of money. It is inconsistent with that code in the *Monro* sense to allow restitutionary claims for the time value of money. The method of compensation of the taxpayer which Parliament has chosen is to require HMRC to pay interest under the section unless they would be liable to pay interest, in the sense in which we understand it, under some other provision. That construction gives precedence to other interest regimes, such as the power of the tax tribunal to award interest after a successful appeal in section 84 of VATA 1994, or the court's power to award interest under section 35A of the Senior Courts Act, but otherwise preserves the operation of the section 78 scheme in other cases. Section 78(1), read as a whole and in the context of fiscal legislation, makes it clear that the object of the reservation was to ensure all taxpayers in all situations had the same minimum entitlement to interest, not to give taxpayers a springboard for asserting a right of a much more generous nature.

48. The fact that the common law did not recognise restitutionary claims to the time value of overpaid tax when section 78(1) was enacted is not, in our judgment, a factor which helps one to construe that section in the sense contended for by Littlewoods. It is of course the case that one cannot narrow the express language of the section 78(1) reservation by reference to later changes in the common law. If it were clear that the section 78(1) reservation included the common law claim for the time value of overpaid tax, then, as Mr Rabinowitz submits, it would not be legitimate to narrow its scope merely because later developments in the law meant that it would never apply. That fact, which we have described as a conundrum above, merely prompts one to ask what Parliament meant when it spoke of HMRC's liability to pay interest in 1991. We think it is clear that Parliament did not intend to include within that expression HMRC's (at that stage unknown) liability to compensate the taxpayer in restitution in a claim for the time value of money.

49. We also do not consider that Littlewoods' new point on section 81(1) takes them any further. In that section the drafter was plainly concerned to sweep up all possible sources of interest. It does not provide a stepping stone for an argument that the section 78(1) reservation was intended to open the door to claims in restitution for the time value of money.

50. Accordingly we dismiss Littlewoods' appeal on this point and affirm the decision of Vos J. Littlewoods' restitution claims are excluded by sections 80 and 78 VATA 1994 as a matter of English law and without reference to EU Law.

Issue 2: If Littlewoods' restitution claims are excluded by sections 78 and 80 VATA 1994, is that exclusion contrary to EU law? Specifically, notwithstanding the right to interest under section 78 VATA 1994, does that exclusion violate the principle of effectiveness by depriving Littlewoods of an adequate indemnity for the loss occasioned through the undue payment of VAT?

51. Littlewoods contend that the exclusion of their restitution claim, which we have found to exist, violates the principle of effectiveness by depriving them of an adequate indemnity. HMRC contend that this is not so. Vos J expressed short provisional views on this issue at [63] to [71] of *Littlewoods No 1*, but referred questions to the CJEU. Henderson J decided this issue in favour of Littlewoods at [253] to [310] of *Littlewoods No 2*.

52. At paragraph [29] of its judgment in *Littlewoods (ECJ)* the ECJ said that the principle of effectiveness requires that national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of "an adequate indemnity" for the loss occasioned through the undue payment of VAT. Much of the argument on this appeal has been directed to the interpretation of that paragraph of the judgment. It is regrettable in the extreme that, despite the reference to the CJEU, the parties remain diametrically opposed on the test which has to be applied to ensure conformity with EU law. Littlewoods contend that a payment of what they contend is only 25% of their actual loss does not amount to an adequate indemnity. HMRC contend that the simple interest paid to Littlewoods pursuant to section 78 was an adequate indemnity, and that Henderson J's conclusion to the contrary was wrong.

53. The starting point for any discussion of a taxpayer's remedies in respect of tax charges levied in breach of EU law is the decision of the CJEU in *San Giorgio* where the Court said this at [12]:

> "… entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable thereto, the fact nevertheless remains, as the Court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law".

54. This right has been referred to and become known as the "*San Giorgio"* right. It is an EU law right which is distinct from the right to claim damages against the Member State for breach of EU law, the so-called *Francovich* claim after Joined Cases C-6/90 and 9/90 *Francovich and others v Italy* Case C-6/90 and C-9/90 [1991] ECR 1-5357, [1993] 2 CMLR 66. As the cited passage from *San Giorgio* explains, it is for national law to lay down the procedural framework for the repayment of tax, subject to the twin principles of equivalence and effectiveness, summarised in the final sentence.

55. There were two lines of authority on the subject of claims for payment of interest in this general type of claim. The first of these lines of authority held that interest was an ancillary matter solely within the province of the national court. So in Case 26/74 *Société Roquette Frères v Commission* [1976] ECR 677 the court said :

> "In the absence of provisions of Community law on this point, it is currently for the national authorities, in the case of reimbursement of dues improperly collected, to settle all ancillary questions relating to such reimbursement, such as any payment of interest."

56. In a later case, Case C-130/79 *Express Dairy Foods Ltd v Intervention Board for Agricultural Produce* [1980] ECR 1887 at [16] to [17], the ECJ was asked whether, if a Member State is bound to refund any sums wrongly charged, it was bound under Community law to pay interest thereon and if so, from what date and at what rate. The court's answer was:

> "16. To reply to this question it is sufficient to recall that, since disputes in connexion with the reimbursement of amounts collected for the Community are at the present time a matter for the national courts, they must be settled by those courts under national law in so far as Community law has not provided otherwise.

> 17. In the absence of provisions of Community law on this point it is at present for the national authorities, and particularly for national courts, in a case concerning the recovery of charges improperly imposed, to settle all ancillary questions relating to such reimbursement, such as the payment of interest, by applying their domestic rules regarding the rate of interest and the date from which interest must be calculated."

57. A first step in a retreat from the theory that interest was a purely ancillary matter solely within the province of the national court was taken in *Metallgesellschaft.* Unlike resident companies, companies resident outside the United Kingdom were not permitted to make a group income election, which would have had the consequence that their English subsidiaries were not obliged to pay ACT on dividends paid to the foreign parent company. The claimant companies maintained successfully that such a provision was contrary to Article 52 of the EC Treaty which prohibited restrictions on the freedom of establishment of nationals of one Member State in the territory of another. The companies had two alternative claims against the Inland Revenue Commissioners, one for damages for breach of the Treaty, and another for restitution. The companies could not claim the tax back, because in due course the sums paid by way of ACT fell due as MCT. For this reason the sum claimed was, and was only, for the loss of the time value of money between the date of payment as ACT and the date when MCT became due, when the sums were utilised to discharge the lawful liability.

58. In *Metallgesellschaft* the United Kingdom contended that the rules relating to recovery of sums unduly paid were for national law alone. It accordingly relied on the principle of English law, as it then stood, that no action would lie for interest where the principal sum was no longer due. One question asked of the court was whether the EU right arising out of the Treaty gave rise to a restitutionary right or only an action for damages. The court answered this question at [81] by saying that it was not for the ECJ to assign a legal classification to the actions brought by the companies before the national court. It was for those companies to specify the nature and basis of their actions (whether they are actions for restitution or actions for compensation for damage), subject to the supervision of the national court.

59. The court was also asked whether the national court was obliged to provide a remedy (whether by way of restitution or damages) where national law did not provide one when the principal sum was no longer owing. In the light of its decision on the first question, the court considered this question on two alternative bases, first that the claim was a restitutionary claim and secondly that it was a claim for damages. On the restitution basis it affirmed its previous decisions in *Roquette Frères* and *Express Dairy* in relation to cases where the claim for interest was ancillary to the repayment of tax, but distinguished them on the basis that the claim in the present case was "the very objective" i.e. the whole of the claims: see the judgment at [86] and [87]. The court therefore concluded that Article 52 entitled the companies to obtain interest on the ACT between the date of payment and the date on which MCT became due and that sum could be claimed by restitution:

> "87. … In such circumstances, where the breach of Community law arises, not from the payment of the tax itself but from its being levied prematurely, the award of interest represents the "reimbursement" of that which was improperly

> paid and would appear to be essential in restoring the equal treatment guaranteed by Article 52 of the Treaty."

60. The court went on to emphasise at [88] that in an action for restitution the principal sum due was none other than interest that would have been generated by the sum, use of which was lost by the premature levy of tax.

61. Moreover, if the claim was to be treated as a claim for damages for breach of Article 52, the companies were also entitled to damages. Two cases fell for consideration under this head. In the first, Case C-66/95 *R v Secretary of State for Social Security, ex parte Sutton* [1997] ICR 961 the ECJ had ruled that payment of interest on arrears of benefits was not to be regarded as an essential component of the right conferred by a Directive. In the second, Case C-271/91 *Marshall v Southampton and Southwest Hampshire Area Health Authority (Teaching)* [1993] ECR I-4367 the court held that reparation for loss and damage caused by discriminatory dismissal could not leave out of account factors such as the effluxion of time, which may in fact reduce its value, and that the award of interest was an essential component of compensation for the purposes of restoring real equality of treatment.

62. The court held, at [95] that the situation of the companies in *Metallgesellschaft* was such that an award of interest was essential if the damage caused by breach of the Treaty was to be repaired.

63. As Henderson J pointed out in *Chalke (High Court)*, had the ECJ's jurisprudence stopped there, claims such as that in issue in that case and in the present case would still have faced the difficulty that they were ancillary claims for interest parasitic on the unduly levied tax. That would have remained the position even though the tax had been repaid, as their essential nature cannot be altered by that fact.

64. The next ECJ case is *FII (ECJ) I.* This was a complex case again involving, amongst other charges, charges to ACT. The court, at [201] to [203] (a) reaffirmed that it is for the national court to assign legal classifications of actions, (b) explained the *San Giorgio* right in the well established terms, and (c) reaffirmed that it was for the national court to lay down the detailed procedural rules for safeguarding the *San Giorgio* right, subject to the principles of equivalence and effectiveness. The court then summarised the effect of the decision in *Metallgesellschaft* as follows:

> "205. …where a resident company or its parent have suffered a financial loss from which the authorities of a Member State have benefited as the result of a payment of advance corporation tax, levied on the resident company in respect of dividends paid to its non-resident parent but which would not have been levied on a resident company which had paid dividends to a parent company which was also resident in that Member State, the Treaty provisions on freedom of movement require that resident subsidiaries and their non-resident parent companies should have an effective legal remedy in order to obtain reimbursement or reparation of the loss which they have sustained.

65. The court then explained that it followed that:

> "205. … where a Member State has levied charges in breach of the rules of Community law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax. As the Court held in paragraphs 87 and 88 of *Metallgesellschaft and Others*, that also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely."

66. This statement in paragraph [205] of *FII (ECJ) I*, places side by side the right to reimbursement of the principal sum of tax and the right to sums retained by the state which relate directly to that tax. It is also said that this latter right includes what has been referred to as the time value of money.

67. It was against this background that Vos J ordered the reference in the present case to the CJEU. The questions referred to the CJEU on this topic were the following:

> "1. Where a taxable person has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation, does the remedy provided by a Member State accord with EU law if that remedy provides only for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums in accordance with national legislation, such as section 78 of the VATA 1994?
>
> 2. If not, does EU law require that the remedy provided by a Member State should provide for (a) reimbursement of the principal sums overpaid, and (b) payment of compound interest as the measure of the use value of the sums overpaid in the hands of the Member State and/or the loss of the use value of the money in the hands of the taxpayer?
>
> 3. If the answer to both questions 1 and 2 is in the negative, what must the remedy that EU law requires the Member State to provide include, in addition to reimbursement of the principal sums overpaid, in respect of the use value of the overpayment and/or interest?"

68. Put shortly the questions were: (i) simple interest? (ii) compound interest? (iii) if neither simple nor compound, then what?

69. The court was assisted by an opinion of Advocate General Trstenjak. Because HMRC submit that the court, in its judgment, effectively adopted the opinion of the Advocate General, it is necessary to consider the opinion in more detail than would normally be necessary. In paragraph [8] of her opinion the Advocate General makes it clear that the court was aware that Littlewoods' claims exceeded £1 billion in aggregate. At [19] she pointed out that Littlewoods had not brought any actions for damages based on an infringement of European Union law by the United Kingdom, i.e. no *Francovich* claims. It is common ground that the requirements for a state liability claim for damages under EU law are not satisfied. The proceedings therefore

only concerned actions for reimbursement of VAT collected in breach of EU law, and not actions for damages.

70. In a passage starting at [21] of her opinion the Advocate General begins to discuss the procedural autonomy of the Member States, that is to say the freedom of Member States to lay down the precise procedural rules for giving effect to EU law rights. At [24] she describes the concept of procedural autonomy as affording a margin of discretion in the context of laying down procedural rules governing claims stemming from EU law, the judicial enforcement of which is not regulated in detail in EU law. She goes on to opine that the concept also extends, to some degree, to laying down the substantive content of the claims stemming from European Union law, with the result that procedural autonomy also includes a certain "remedial autonomy" of the Member States.

71. At [27] and [28] the Advocate General goes on to explain the two lines of cases concerned with payment of interest on sums collected in breach of EU law. She explains the earlier series, including *Roquette Frères* and *Express Dairy* as cases where the court treated the payment of interest on sums wrongly collected under European Union law as an ancillary question to be settled entirely by national law. Those cases are summarised earlier in this judgment.

72. The Advocate General goes on to explain that in the second series of judgments, on the other hand, the court had ruled that under EU law the taxpayer had a right to payment of interest on taxes levied in breach of EU law. This line of case-law started with *Metallgesellschaft* which dealt with the premature levying of tax, and included *FII (ECJ) I* where the court extended the rule developed in *Metallgesellschaft* to all cases where the levying of tax as a whole infringed EU law. The distinction between advance payments of tax and cases where the levying of tax as a whole infringed EU law could thus no longer be maintained. Both types of case proceed from the finding that because of the unavailability of money the taxpayer has suffered losses which are regarded as amounts retained by the Member State or paid to it in breach of EU law. The Advocate General did not suggest that the content of the EU law right was to be different in the two classes of case.

73. At [30] the Advocate General then confirms:

> "In the light of these considerations, Member States which have levied charges in breach of EU law must in principle, according to the Court's more recent case-law, both reimburse the charges levied in breach of EU law and pay interest in compensation for the unavailability of the sums paid. The taxable person therefore has a right to reimbursement of the charge and a right to payment of interest. Those rights enjoyed by the taxable person are based on the provisions of EU law prohibiting the taxes levied."

74. The Advocate General then returns to the notion of procedural autonomy:

> "Applying the case-law on the procedural autonomy of the Member States, it is for the Member States to lay down detailed substantive and procedural rules governing the taxable person's

> interest claim under European Union law. The Member States are therefore entitled to determine the detailed rules relating to payment of interest having regard to the principles of effectiveness and equivalence. Those detailed rules include the decision whether interest is paid on the basis of a system of 'simple interest' or on the basis of a system of 'compound interest'."

75. At [32] the Advocate General states that it is clear that the United Kingdom has, through section 78 of VATA 1994, granted the taxpayer an interest claim. She next considers whether the United Kingdom has breached the principle of effectiveness in laying down its detailed rules governing the interest claim. It would not do so unless the national law rules made it virtually impossible or excessively difficult to exercise the rights conferred by EU law. At [34] she said this:

> "In the context of determining the detailed rules governing an interest claim stemming from EU law, a breach of the principle of effectiveness would therefore arise *only if the interest were so low that it largely deprived the interest claim stemming from EU law of substance*" added emphasis.

76. Having reviewed the mechanism for calculating interest the Advocate General said:

> "The United Kingdom reimbursed to the applicants in the main proceedings the VAT which had been obtained in the period between 1973 and 2004 in breach of EU law, amounting to approximately GBP 204 774 763 together with simple interest amounting to GBP 268 159 135. Accordingly, the applicants in the main proceedings were granted a claim for payment of simple interest pursuant to section 78 of the VATA 1994, under which the amount of interest accrued over a period of around 30 years (GBP 268 159 135) exceeds the principal sum (GBP 204 774 763) by more than 25%."

77. The Advocate General concludes, as a result of that comparison of the simple interest earned over thirty years with the principal sum, that section 78 "readily complies with the principle of effectiveness".

78. In summary, it was the opinion of the Advocate General that although the EU right mandates the availability in national law of a claim to interest, the content of the EU law right goes no further. In particular the principle of effectiveness means and means only that the national law claim to interest should not provide for a rate of interest which is so low that it largely deprives the claim to interest of any substance.

79. In its judgment the court also notes at [23], as the Advocate General did, that Littlewoods' claim is not a *Francovich* claim against the Member State, but an action for VAT wrongly levied. The court then reasoned as follows:

> "24. It is settled case-law that the right to a refund of charges levied in a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on

individuals by provisions of EU law as interpreted by the Court (see, inter alia, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 84). The Member State is therefore in principle required to repay charges levied in breach of Community law (Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20; *Metallgesellschaft*, paragraph 84; Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraph 93; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 202).

25 The Court has also held that, where a Member State has levied charges in breach of the rules of Community law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax. That also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely (*Metallgesellschaft*, paragraphs 87 to 89, and *Test Claimants in the FII Group Litigation*, paragraph 205).

26 It follows from that case-law that the principle of the obligation of Member States to repay with interest amounts of tax levied in breach of EU law follows from that law.

27 In the absence of EU legislation, it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation (simple or 'compound' interest). Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible (see, to that effect, *San Giorgio*, paragraph 12; *Weber's Wine World*, paragraph 103; and Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 17).

28 Thus, according to consistent case-law, the principle of effectiveness prohibits a Member State from rendering the exercise of rights conferred by the EU legal order impossible in practice or excessively difficult (Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67, and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 57).

29 In this case, that principle requires that the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of an adequate

> indemnity for the loss occasioned through the undue payment of VAT."

80. At paragraph [30] the court explained that it is for the referring court to determine whether the taxpayer is or is not deprived of an adequate indemnity in the present case, "*having regard to all the circumstances of the case*". The court then noted as follows:

> "In that regard it should be noted that it is apparent from the order for reference that, under the provisions of section 78 of the VATA 1994, the Commissioners paid Littlewoods interest on the VAT levied in breach of EU law. Pursuant to those provisions, Littlewoods received payment of simple interest, in accordance with the said provisions, in an amount of GBP 268 159 135, corresponding to interest due over about 30 years, which amount exceeds by more than 23% that of the principal sum, which amounts to GBP 204 774 763."

81. This observation by the CJEU on the facts is heavily relied on by HMRC to suggest that the CJEU was hinting that Littlewoods had already had an adequate indemnity.

82. The CJEU's answer to the reference in the present case is not its last word on the subject. In Case C-565/11 *Irimie v Adminsitraţia Finanţelor Publice Sibiu and another* [2013] STC 1321 the applicant claimed repayment of a pollution charge wrongly levied by the Romanian government. Under the relevant national law, interest on sums to be repaid from public funds only ran from the date of the claim to repayment. It is of interest to note the submissions made to the court by the governments who were represented, and by the European Commission, which were recorded by the Advocate General at [15] to [18] of his opinion:

    i) Romania submitted that Member States had the right to lay down the conditions for allowing interest on compensation for the loss caused to individuals by the payment of taxes charged contrary to EU law, in accordance with the principles of the effectiveness, equivalence and proportionality of remedies.

    ii) Spain submitted that EU law does not, in principle, preclude provisions of national law which limit either the compensation that may be obtained by an individual whose right is infringed or the amount to be repaid by reason of a payment that was not due. There is inconsistency with the principle of effectiveness only if the interest payment was so small that it would considerably limit, 'render meaningless' or reduce to zero the right to payment of interest. The payment of interest from the date of the claim for repayment of the illegal tax did not render that right meaningless.

    iii) Portugal submitted that it was for Member States to lay down the details of the amount to which the individual is entitled by reason of the infringement of European Union law, provided that those details do not entail a substantial reduction in the amount to which the individual is entitled and cannot be regarded as an obstacle to the exercise of that same right.

iv) The Commission submitted that a provision of national law which, as in the present case, limits considerably the taxpayer's right to recover losses incurred as a result of the non-availability of the amount illegally levied was not consistent with the principle of effectiveness.

83. The Advocate General expressly disagreed with the submissions made by Spain and Portugal:

> "Given the lack of European Union rules on the subject, it is for the domestic legal system of each Member State to designate, in accordance with the principle of procedural autonomy, the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness). In addition, contrary to the arguments of the Kingdom of Spain and the Portuguese Republic …, although the principle of procedural autonomy leaves it to the domestic legal system of each Member State to determine the procedural remedies for safeguarding rights which individuals derive from European Union law, that principle cannot have the consequence of restricting or undermining the substance of those rights."

84. Having summarised the development of the law through the early "ancillary" cases, through *Metallgesellschaft*, *FII (ECJ)*, and *Littlewoods (ECJ)* the Advocate General said:

> "In my opinion, the right to interest representing an adequate indemnity for the loss occasioned through the undue payment of tax contrary to European Union law ranks equally, in consequence of the *Littlewoods Retail and Others* judgment, with the right to repayment of the tax and is therefore a subjective right derived from the legal order of the European Union. In my opinion, that subjective right necessarily entails the payment of interest from the date of payment of the tax. It is obvious that it is from that date, and not from any other subsequent date, that the taxpayer suffers a loss arising from the unavailability of the sums in question."

85. As Henderson J explained in *Littlewoods (No 2)* at [270], the phrase "subjective right" does not read easily in English. It derives from the French "*droit subjectif*" which means a private or personal right.

86. In its judgment the court agreed with the conclusion of the Advocate General as follows:

> "26 As regards the principle of effectiveness, that principle requires, in a situation of repayment of a tax levied by a Member State in breach of European Union law, that the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of adequate compensation for the loss sustained through the undue payment of the tax (see *Littlewoods Retail and Others*, paragraph 29).
>
> 27 In this case, it must be found that a system such as that at issue in the main proceedings, which limits interest to that accruing from the day following the date of the claim for repayment of the tax unduly levied, does not meet that requirement.
>
> 28 That loss depends, inter alia, on the duration of the unavailability of the sum unduly levied in breach of European Union law and thus occurs, in principle, during the period between the date of the undue payment of the tax at issue and the date of repayment thereof."

87. In Joined Cases C-113/10, C-147/10 and C-234/10 *Zuckerfabrik Jülich AG v Hauptzollamt Aachen; British Sugar plc v Rural Payments Agency and another; Tereos v Directeur general des douanes et droits indirects,* ("*British Sugar*"), British Sugar and other companies in the sugar sector claimed repayment of the amount plus interest of sugar production levies which they were wrongly charged by the responsible authority in their Member State. In the case of British Sugar the relevant authority was the Rural Payments Agency ("RPA"). British Sugar's payments to the RPA had been accounted for by the RPA to the European Commission. Although the RPA could recover the payments from the European Commission, there was no provision allowing it to claim interest. Accordingly the RPA had not been enriched by the wrongly charged sugar levies. Nowithstanding this feature of the case, the court held that the RPA had to pay interest, relying, amongst other cases, on *Littlewoods (ECJ)*.

88. [29] of the judgment in *Littlewoods (ECJ)* is the first occasion on which the phrase "adequate indemnity" has been used in the judgments of the ECJ in the area of unlawfully levied taxes. A similar phrase, "adequate compensation" was, however, used by the ECJ in its judgment in *Marshall* (cited at [61] above), a case concerned with discrimination on the grounds of gender. Ms Marshall had been dismissed by her employer, but the employer contended that her damages were limited by the statutory maximum payment permitted under section 65(2) of the Sex Discrimination Act 1975. The tribunal nevertheless awarded her a greater sum plus interest. The House of Lords referred questions to the ECJ which included a question as to whether Ms Marshall's compensation for her loss should include an award of interest on the principal amount. The reasoning of the ECJ is contained in the following paragraphs of its judgment:

> "22. Article 6 of the Directive puts Member States under a duty to take the necessary measures to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. Such obligation implies that the

measures in question should be sufficiently effective to achieve the objective of the Directive and should be capable of being effectively relied upon by the persons concerned before national courts.

23 As the Court held in the judgment in Case 14/83 *Von Cohort and Kamann v Land Nordrhein-Westfalen* [1984] EC R 1891, at paragraph 18, Article 6 does not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but leaves Member States free to choose between the different solutions suitable for achieving the objective of the Directive, depending on the different situations which may arise.

24 However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. As the Court stated in paragraph 23 of the judgment in *Von Colson and Kamann*, cited above, those measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.

25. Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal contrary to Article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained.

26 Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.

The first and second questions

27 In its first question, the House of Lords seeks to establish whether it is contrary to Article 6 of the Directive for national provisions to lay down an upper limit on the amount of compensation recoverable by a victim of discrimination.

28. In its second question, the House of Lords asks whether Article 6 requires (a) that the compensation for the damage sustained as a result of the illegal discrimination should be full and (b) that it should include an award of interest on the principal amount from the date of the unlawful discrimination to the date when compensation is paid.

> 29 The Court's interpretation of Article 6 as set out above provides a direct reply to the first part of the second question relating to the level of compensation required by that provision.
>
> 30 It also follows from that interpretation that the fixing of an upper limit of the kind at issue in the main proceedings cannot, by definition, constitute proper implementation of Article 6 of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.
>
> 31 With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment."

89. Finally we should mention Council Directive 2008/9/EC which lays down rules for the refund of VAT to taxable persons not established in the Member State of refund but established in another Member State. The Directive provides by Article 27 for payment of interest for a specified period where VAT is refunded. The interest rates are those specified for refunds of VAT to taxable persons in the Member State of refund under its national law, but if no interest is payable under that law it is to be the rate which the Member State itself applies to tax paid late.

The judgment of Henderson J

90. The judge rehearsed the development of the ECJ jurisprudence on the right to the payment of interest on unduly levied tax. Having done so he concluded at [270] that the latest cases, and in particular *Irimie,* made it clear that the right to interest representing an adequate indemnity ranked equally with the right to repayment of the unlawfully levied tax. The right was a personal or private right. He went on to reject HMRC's contention that the Advocate General's opinion in *Littlewoods (ECJ)* was endorsed by the Court. Relying on *Marshall,* and the fact that the right to interest ranked equally with the right to repayment of tax, he held at [291] that the award of interest must be broadly commensurate with the loss of the use value of the overpaid money in the hands of the taxpayer.

The arguments on this appeal

91. Before this court Mr Swift reprises the arguments which failed to find favour with Henderson J. These arguments are in essence:

i) The court in *Littlewoods (ECJ)* was endorsing the opinion of Advocate General Trstenjak.

ii) Thus, whilst EU law does require national law to provide the taxpayer with an interest claim, because national law is afforded a wide margin of discretion or autonomy as to substance and procedure, the content of that claim is specified entirely by the principle of effectiveness.

iii) What EU law requires to be remedied is the unavailability of money between the date of payment and repayment of the tax.

iv) Accordingly Member States were entitled to devise their own rules to comply with the obligation to provide a claim for interest within the boundaries which the principle of effectiveness provides. This may mean that the content of the EU right to interest will vary as to its substance between Member States. If the content of the right were fixed, the court would not have expressed itself as it did at [27] of its judgment.

v) The principle of effectiveness did not require cases to be considered on an individual basis. It was open to a Member State to set up a system of rules, even if those rules might appear to operate harshly on the facts of an individual case. Limitation rules were an example of that principle in operation. Mr Swift characterised the present case as an "outlier" which did not mean that the operation of section 78 was not in conformity with EU law. The system needed only to provide a fair balance of the interests of the individual taxpayer and interests of society as a whole which is consistent with the principles of effectiveness and equivalence.

vi) It was significant that the court had not answered question 2 of the questions referred by saying that there was a rule that required the payment of compound interest. The judgment at [30] was an indication that the court itself regarded the payments of simple interest that had taken place in this case as an adequate indemnity.

vii) Mr Swift also relies on Council Directive 2008/9/EC (which is summarised above). He submits that the absence in Directive 2008/9 of any reference to compound interest makes it less likely still that the ECJ was contemplating a standard of compound interest in *Littlewoods (ECJ)*.

92. Mr Swift accepts, as he must in the light of the decision in *Irimie*, that in assessing whether the remedy afforded in national law is an adequate one, one may look to such matters as the period over which interest is paid, and whether the rates of interest paid are significant. He submitted that the interest must be "interest in some recognisable form". Assuming that is correct, he submits that there is nothing in *Irimie* or *British Sugar* which is inconsistent with that approach. In *Irimie* the system did not allow for the payment of interest over the entire period, and in *British Sugar* the question was whether the RPA could avoid the need to pay interest altogether.

93. Like the judge, we consider that it is logically necessary first to identify the content of the right to interest now recognised by the ECJ. It is only then that one can answer the question of whether the UK's procedural rules in the form of section 78 VATA

give effect to that right in a way which does not violate the principle of effectiveness. In other words, what is it that EU law requires UK law to remedy?

94. We consider that it is now tolerably clear that EU law requires national law to reimburse the losses occasioned by the unavailability of money as a result of tax being levied unlawfully. That is what the court is saying at [25] of its judgment in *Littlewoods (ECJ),* at least in relation to tax levied prematurely, and the distinction between such a case and one in which the tax itself is wrongly levied has plainly been abandoned. The use of the word "reimbursement" in [25] is, in our judgment, of great importance.

95. We do not understand the court to be saying that EU law merely requires the provision of a remedy which meets the description "interest". That, as we read her opinion, is what the Advocate General had in mind when she speaks in [30] of "a right to reimbursement of the charge and a right to payment of interest". This allowed her to conclude that the principle of effectiveness would be complied with provided that it did not result in a payment so low as to deprive it of substance.

96. The court's formulation is quite different. The taxpayer is "entitled to reimbursement … of the amounts paid to that state or retained by it" which "includes losses constituted by the unavailability of sums of money". Thus, far from saying that the principle of effectiveness is complied with provided that the resulting payment is not deprived of substance, the court says expressly at [29] that the application of the national rules should not result in the taxpayer being deprived of an adequate indemnity "for the loss occasioned through the undue payment of VAT". The differences between the two approaches is stark. Under the Advocate General's approach one would only ask whether the ultimate payment had substance. This consideration may well explain why she felt able to reach a clear conclusion that section 78 did not offend the principle of effectiveness. However, the answer to the question whether section 78 affords an adequate remedy for the losses occasioned to an individual taxpayer was not obvious and will, as the court says at [30], depend on a consideration of "all the circumstances of the case".

97. We think there is support for that approach to be found in *Irimie*. The reason that the court felt able in that case to say that the principle of effectiveness had not been complied with was that the national rule, which gave interest only from the date of claim and not from the date of overpayment, would not provide (except in an unrealistic case where payment and claim were very close in time) reimbursement of the losses constituted by the unavailability of money. Had the court been applying the approach of the Advocate General in *Littlewoods (ECJ),* it would have been necessary to ask whether the interest Ms Irimie in fact received was devoid of substance, which it may not in fact have been. It is moreover significant that the submissions made by Spain and Portugal tracked very closely the test propounded by the Advocate General in *Littlewoods (ECJ)* and were plainly rejected.

98. How then should one understand [27] of the Court's judgment in *Littlewoods (ECJ)* which expressly states that it is for the internal legal order of the Member State to lay down the conditions in which interest must be paid, including the method of calculation and whether it is simple or compound? Mr Swift places very considerable weight on this paragraph. He argues that it was Littlewoods' case that they should be compensated by way of compound interest. How, he asks, can it be a requirement of

EU law that compound interest should be paid, when this paragraph says the exact opposite.

99. We think this submission misunderstands both Littlewoods' case before the ECJ and the point being made at [27] of the judgment. As to Littlewoods' case, Henderson J explained this at [273] of his judgment:

> "Secondly, the case advanced by Littlewoods in their detailed written observations submitted to the Court was not that EU law always required the payment of compound interest on overpaid tax, but rather that interest reflecting the use value of the money received should be paid in all cases where tax had been unlawfully collected contrary to EU law, in order to satisfy the principle of effectiveness, and that the Court should state this principle while leaving it to the national court to apply it in the varying factual circumstances of each case. So, for example, it was said in paragraph 94 that:"
>
> > "… Littlewoods does not suggest that this Court needs to specify the rate of interest, or (if appropriate) the frequency of compounding, that will satisfy the principle of effectiveness. These are factual matters that will differ depending on the circumstances of particular cases. This Court can however rule on the principle that must be applied, viz that a remedy must be given in respect of use value that is commensurate with the benefit gained by the Member State. It is then for the national court to determine what that principle requires in particular cases.
> >
> > 95. Thus, the decision of the Court of Justice in Metallgesellschaft required that interest be paid, but it was not necessary for the Court to specify the rate or to rule on compounding. That was (properly) left for the national courts to determine.""

100. [27] of the court's judgment is therefore doing no more than pointing out that it is for the national court to decide on a way of working out the award – the method of calculation. Simple interest at an appropriate rate may well be a satisfactory way of arriving at an adequate indemnity in many cases, with higher rates being necessary for longer periods. The difference between simple and compound interest, moreover, only starts to emerge once several years are involved, particularly where rates are low. It is for the national court to do the arithmetic.

101. Thus understood, [27] of the court's judgment also explains why the court does not provide an answer to question 1 or 2 in the reference.

102. Once one appreciates from [25] that the content of the right is reimbursement of the losses sustained by the unavailability of money, a formulation which is echoed in [29], the argument that [27] is concerned in any way with modifying the content of the right falls away. HMRC's argument therefore places weight on [27] which it cannot properly bear.

103. We are also unable to accept HMRC's submission that one should approach the question of whether section 78 affords an adequate indemnity by looking at the system as a whole and ignoring "hard cases" or "outliers". Firstly, the EU law right is, in the terms in which it is expressed in the case law, a private or personal right of the taxpayer. National law must give effect to that right, and it is no answer to the individual taxpayer's claim that national law has done so for other taxpayers, or even for the vast majority of them. Secondly, it is clear from the way in which the court expressed itself at [29] to [31] of its judgment that what it envisaged in the present case was an assessment of the position of the individual taxpayer, and not a generic assessment of the overall functioning of the section. Thus the court asked whether the taxpayer "in the case at issue" and "having regard to all the circumstances of the case" had been deprived of an adequate indemnity.

104. For similar reasons we reject Mr Swift's argument that if the CJEU had meant full reimbursement of losses in [29] it would have said so in that paragraph. One answer may be that it did say so in [25]. In fact, a characteristic of this case was that both sides had arguments which ran along the lines that if the court had meant what the other side said it meant, it could and would have said so more clearly. Thus, given that the court was expressly asked if simple interest was enough, Mr Rabinowitz also asks forensically why the ECJ did not simply say "yes". Similar arguments in the field of contractual interpretation of an imperfectly drafted document seldom carry much weight. In the present case we see no value in speculating why the CJEU used the language they did in [29]. The fact is they did, and our duty is to interpret it as best we can.

105. We also do not think that Mr Swift gains any assistance from Council Directive 2008/9/EC. That directive does not cater for tax which is wrongly levied, but for refunds of VAT which fall due in the ordinary course of things.

106. It is of course true that Member States are free to introduce limitation periods in order to ensure that claims are made promptly and that this may have the consequence of containing their liability to interest claims of the present kind. However we do not consider that this has any bearing on the content of the underlying EU right to reimbursement of the time value of money. As the CJEU explained in Case 62/00 *Marks & Spencer v Customs & Excise Commissioners* [2003] QB 866, it is, in the interests of legal certainty, compatible with EU law for Member States to lay down reasonable time limits for bringing proceedings, provided that they do not render virtually impossible or excessively difficult the exercise of rights conferred by EU law. Difficulties have arisen in the past with limitation periods which are imposed retrospectively, but we are not concerned with those questions here.

107. For the above reasons we consider that "adequate indemnity" in [29] of the court's judgment in *Littlewoods (ECJ)* does not have the meaning contended for by HMRC. Strictly speaking, that is as far as it is necessary for us to go, because HMRC do not contend that simple interest provides an adequate indemnity on the judge's test that the compensation must be broadly commensurate with the loss of the use value of the overpaid tax. For our part we would prefer to leave the test as that which the court has consistently spelled out, namely that the taxpayer is entitled to reimbursement of the losses constituted by the unavailability of sums of money as a result of a tax being levied.

108. We would emphasise that the conclusions which we have reached are those which apply in the circumstances of this case. As we have endeavoured to emphasise (see e.g. paragraph 100 above), "adequate indemnity" is not a rigid straitjacket, and certainly does not go as far as to require compound interest in every case. Nevertheless, in the circumstances of this particular case, and having regard to the extent of Littlewoods' claim, we hold that section 78 VATA 1994 deprives Littlewoods of an adequate indemnity for the loss occasioned through the undue payment of VAT.

Issue 3: If issues 1 and 2 are answered in the affirmative:

> *(A) Can sections 78 and 80 of VATA 1994 be construed so as to conform with EU law (and if so how), or must they be disapplied?*
>
> *(B) If section 78 and 80 VATA 1994 must be disapplied, must they be disapplied so as to allow only Woolwich-type restitution claims, or (b) both Woolwich-type restitution claims and mistake based restitution claims?*

109. If section 78 VATA 1994 does not provide Littlewoods with the adequate indemnity for their loss referred to in paragraph [27] of the ECJ's judgment then it is common ground that the national court must give effect to their *San Giorgio* rights to interest either by construing section 78 in a way that is compatible with the enforcement of those rights under the *Marleasing* principle or by disapplying sections 78 and 80 VATA 1994. These are issues 3A and 3B respectively.

110. In terms of outcome, nothing turns on which is the appropriate method of achieving conformity with EU law. In principle, they should each be capable of producing the same legal result. The central question under issue 3 of whether the national court is required to allow only the *Woolwich* claims to proceed or both the *Woolwich* and the mistake-based claims is therefore unaffected by the choice of remedial route. But the first of those routes (conforming construction) may be excluded if the only effective way of construing the words to achieve this purpose would, to use the traditional terminology, go against the grain of the legislation. The limitations on what is achievable by conforming construction were summarised by Vos J at [74] of his judgment in *Littlewoods (No 1):*

> "For present purposes, it is sufficient to highlight the constraints on the broad and far-reaching nature of the interpretative obligation, namely that the meaning should "*go with the grain of the legislation*" and be "*compatible with the underlying thrust of the legislation being construed*", and should not be "*inconsistent with a fundamental or cardinal feature of the legislation"* since this would cross the boundary between interpretation and legislation."

Issue 3A: conforming construction

111. The argument relied on by Littlewoods both before Vos J in *Littlewoods (No. 1)* and before Henderson J in *Littlewoods (No. 2)* can be stated quite shortly. Mr Elliott submits that if the proper construction of section78(1) is that it provides an exhaustive remedy for the provision of interest in cases where VAT has been overpaid and the

words in section78(1) "if and to the extent that they would not be liable to do so apart from this section" do not preserve common law restitutionary claims for interest of the kind relied on in these proceedings then the removal of the statutory bar on those claims and therefore the enforcement of Littlewoods' *San Giorgio* rights can be achieved by the simple expedient of construing those words as including the common law causes of action. This, he says, does not involve any fundamental re-formulation of the scope of the legislation because the words in question have always recognised that section78 is not an exhaustive code which admits of no exceptions. The widening of those words therefore merely serves to expand the alternative bases for the recovery of interest which was always its purpose.

112. This suggested construction of section 78(1) only achieves the result of admitting Littlewoods' restitutionary claims if the bar to their enforcement lies in section 78(1) itself rather than in section 80(7). If Mr Swift is right and there is no cause of action in restitution for interest absent a cause of action for the recovery of the overpaid tax itself then a wide construction of section 78(1) to preserve common law causes of action does not help. None exists. But it would achieve Littlewoods' objective if the correct view of construction in purely domestic terms is that the "if and to the extent" proviso does not include the common law claims in restitution and section78(1) itself operates as an exhaustive code.

113. Vos J in *Littlewoods (No. 1)* dismissed the construction route quite shortly. He said:

> "76. Ingenious though this approach is, it seems to me that it cannot work. For much the same reasons as I have given under issue 1, and as Warren J gave in <u>John Wilkins</u>, and as Arden LJ gave in <u>Monro</u>, the construction for which Mr Rabinowitz contends cuts straight across the grain of the legislation and is contrary to its fundamental or cardinal features. The legislation provided that taxpayers like Littlewoods should have only simple interest when they were repaid VAT upon an error being made by the Commissioners, and Mr Rabinowitz's construction gives them something much more. That would not be construction but legislation. One may ask rhetorically, what on earth would have been the point of section 78 if its exclusionary words were to be construed as allowing a quite different common law interest remedy in every case? I have little doubt that, if there is an EU right to the use value of the money, that right can only be given effect by the dis-application of section 78 in cases where the right exists (which one may note will be substantially all cases to which it applies)."

114. Support for the view that Littlewoods' construction of section 78(1) does not cut across the grain of the legislation is said to be contained in part of the reasoning of the Supreme Court in *FII (SC).* It will be necessary to return to this case in more detail shortly when we consider the question of whether the English legal system operating in conformity with the principles of effectiveness and equivalence requires more than a *Woolwich* cause of action to be made available as part of the conforming construction or disapplication of sections 78 and 80 VATA 1994. But, for present purposes, it is enough to say that the principal issue in the case by the time it reached

the Supreme Court was whether legislation in the form of section 320 FA 2004 and section 107 FA 2007 which had the effect respectively of disapplying section 32(1)(c) of the Limitation Act and retrospectively limiting mistake-based claims for restitution in the cases to six years from the date of payment had been introduced compatibly with EU law. In a small number of cases involving claims for the repayment of corporation tax under Case V of Schedule D which had been levied by assessment it was also necessary to consider section 33 of TMA 1970 which, like section 80 VATA 1994, created a statutory right to obtain repayment of tax paid by mistake under an assessment provided that the claim was made within a period of six years. In *Monro* (which concerned a purely domestic claim for overpaid tax) this Court held that section 33 provides an exclusive and therefore exhaustive remedy for the repayment of the tax to which it applies and therefore bars any common law claims to restitution. In any claim based on the taxpayer's EU rights it would, however, be subject to the principles of EU law including the principle of effectiveness.

115. Section 33(2A) also excluded a right to repayment in cases "where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made". In *FII (CA)* HMRC conceded that section33(2A) was incompatible with EU law because it would operate to remove any liability to repay the tax paid in breach of EU law on the basis of the HMRC's misapplication of that law. But it was submitted that this could be overcome by a conforming construction of section33 under the *Marleasing* principle so as to bring the claims for repayment within the six-year limitation period. The Court of Appeal considered that this could be achieved by reading section33(2A) as subject to a proviso that it would only apply if and to the extent that the UK could impose such a restriction consistently with its EC Treaty obligations (see *FII (CA)* at [261]) and that this would not go against the grain of the legislation.

116. In the Supreme Court, Lord Walker of Gestingthorpe expressed doubts as to whether the qualification of section33(2A) in this way could be said to be consistent with the grain of the legislation. It was, he said, a long-standing condition designed to protect the public revenue and what might be called a cardinal feature of the legislation. His view (at [119]) was that a conforming construction of section33 could be achieved not by qualifying section33(2A) as the Court of Appeal had suggested but by not treating section33 as an exhaustive remedy:

> "119. I have grave doubts as to whether that interpretation does not go against the grain of the legislation, since the "practice generally prevailing" condition is of long standing and has always been regarded as an important safeguard for the public revenue. I am inclined to think that Mr Aaronson was right (Day 2, pp 25-26) to call it a "cardinal feature" of the legislation. In my view the *Marleasing* principle can be applied in a simpler and more natural way by not construing section 33 as impliedly setting itself up as an exclusive provision (which it did not do expressly, unlike section 80 of the Value Added Tax Act 1994). The test claimants submit that the application of *Marleasing* cannot rework section 33 in a way that serves any relevant purpose. But to read it as non-exclusive does not go against its grain. It would merely exclude an implication which

> is itself no more than a process of statutory construction. In practical terms the effect is the same as that which Henderson J reached by the second limb of his reasoning. I would therefore allow the appeal on this point (although it may not, in the end, make much practical difference)."

117. Lord Sumption reached a similar conclusion at [204]:

> "This provision applies only to assessed taxes, and therefore only to a very small part of the present claims. It confers a right subject to highly restrictive conditions to invoke what is essentially a discretionary power of the Commissioners to grant a refund of overpaid tax. No one suggests on this appeal that such a limited remedy could possibly be enough in itself to satisfy the virtually unqualified obligation of the United Kingdom to provide an effective means of recovering tax overcharged contrary to EU law. This does not of course matter if it is an additional remedy as opposed to an exclusive one. There is certainly nothing in the provision which expressly excludes the availability of other causes of action at common law. If that is its effect, it must be by implication. In the ordinary way, such an exclusion might be implied, on the ground that where Parliament confers a restricted right of recovery, that must impliedly displace a corresponding right at common law which would be unrestricted. However, it is axiomatic that the courts cannot imply an exclusion of unrestricted rights of action at common law where that would be inconsistent with an overriding rule of EU law that an unrestricted right must be available. Section 33 cannot therefore be an exclusive right to recover tax overcharged contrary to EU law. Whether it is an exclusive right in other circumstances, is not a point which needs to be considered on this appeal."

118. It is important for this argument to note that section33 TMA, unlike section 80 VATA 1994, does not contain any express exclusion of other claims. There is no equivalent to section 80(7). The construction of section 33 as an exhaustive remedy was therefore a matter of implication based on the principles set out in *Monro*. But, in the present case, the statutory bar in VATA 1994 to common law claims for compound interest stems from section 80(7) whether one adopts the first or the second approaches to construction we have set out in relation to issue 1. Even if section 80(7) does not have the effect of removing Littlewoods' cause of action in restitution for interest, it does have an obvious impact on the construction of section 78(1) in terms of whether it should be treated as an exhaustive remedy. The two sections have to be construed as a consistent code. Looked at in this way, it is difficult to treat the exclusion of the common law claims for interest as anything but a cardinal feature of the legislation and, in our view, the conforming construction suggested by Mr Elliott does go against the grain. The accommodation of Littlewoods' EU claims has therefore to be advanced through the disapplication of sections 78(1) and 80(7) VATA 1994.

Issue 3B: selective disapplication

119. Under domestic law a claimant is entitled to pursue at his own election whatever causes of action are available to him in order to obtain the relief he seeks: see *DMG* at [51]. The only restrictions on this freedom of choice are collateral ones in the form of the limitation periods prescribed by statute. In the present case, any *Woolwich* claims have a six-year limitation period without the benefit of section32(1)(c) of the Limitation Act 1980. But the *DMG* mistake-based claims have the benefit of the extended limitation period based on the discovery of the mistake which has allowed the claims to go back 30 years.

120. Both sides are agreed that, subject to one qualification to which we will return in issue 6B, the *Woolwich* and the *DMG* claims are both EU compliant in the sense that they are capable of providing an appropriate measure of recovery to vindicate the taxpayer's *San Giorgio* rights. Compound interest is recoverable on *Sempra* principles in both cases. Therefore, if English law had not developed so as to recognise a mistake-based claim to restitution in relation to overpaid tax as it did in *DMG* and the *Woolwich* claim had remained the only cause of action on which they could rely, Littlewoods accept that no further changes to domestic law would have been required in order to make the enforcement of their *San Giorgio* rights effective.

121. On the back of these areas of common ground, HMRC advance the submission that, in order to provide the adequate indemnity which the ECJ has said in [29] of its judgment the principle of effectiveness requires, the national court is not required to disapply sections 78(1) and 80(7) beyond the point of allowing Littlewoods to pursue their *Woolwich* claims. EU law, it is said, can be satisfied and more particularly does not require the taxpayer to be permitted to rely on its *DMG* claims. The practical effect of this would be to greatly reduce Littlewoods' claims to interest as a result of the application of the six-year limitation period without the benefit of section 32(1)(c). But Mr Elliott on behalf of Littlewoods accepts that the difference between the relevant limitation periods is not material to whether the domestic law remedies are effective in terms of EU law since the fixed six-year period is still EU compliant. The less generous position in relation to limitation which a selective disapplication of sections 78(1) and 80(7) would produce does not therefore of itself impact on whether selective disapplication is a legal possibility.

122. HMRC's argument on this point was accepted provisionally by Vos J in *Littlewoods (No. 1)* at [77] to [92] but rejected by Henderson J in *Littlewoods (No. 2)*. Building on what he had said in *Thin Cap (High Court)* at [223] and held in *ITC (No 2)* he reached the conclusion (at [328]-[341]) that the effect of disapplying the statutory bar under domestic law was to leave a claimant free to pursue the full range of remedies available under domestic law. He best explains this in [46] of his judgment in *ITC (No 2):*

> "On that basis, the next main question is whether Mr Swift is right in his submissions about the appropriate starting point, and the distinction which he draws between the position in the present case and the position in the *FII* litigation. In my judgment he is plainly right to draw attention to the fact that of VATA 1994 is a statutory provision of long standing, which as a matter of national law provides an exclusive remedy for the

> recovery of overpaid VAT, and rules out any common law cause of action which might otherwise co-exist with it. In that respect, the position is clearly different from that which faced the *FII* test Claimants. But does the distinction remain important once the exclusionary effect of s 80 has been disapplied by EU law? My answer to that question is no. In my judgment, once the exclusionary rule in s 80(7) has been over-ridden, the position is the same as it would be if common law causes of action had always been permitted to co-exist with s 80, and in those circumstances no warrant can be found, in either English or EU law, for confining a Claimant to only one such common law remedy, or for trying to identify the remedy which objectively provides the best fit for the claim. That was, in essence, what the Court of Appeal held should be done in *FII (CA)*, but that approach has now been shown to be wrong by the majority in the Supreme Court. In short, once the exclusionary rule has been removed by force of EU law, I see no answer to the simple point that the normal principle of freedom of choice under English domestic law should be allowed to prevail."

123. Both Vos J and Henderson J relied on the *FII* litigation as providing some guidance on this point. Vos J had said at [85] of his judgment in *Littlewoods (No. 1)* that the decision of the Court of Appeal in *FII (CA)*:

> "is clear authority for the proposition that the English court will not dis-apply an exclusionary rule so as to allow an alternative remedy to give effect to a San Giorgio right, if another remedy is already available without the need for such a dis-application. The Court of Appeal decided obiter that the English court could choose which of two remedies should be provided to give effect to the San Giorgio right, if both required the dis-application of some domestic law rule to allow them to comply with the principle of effectiveness. "

124. But Henderson J, with the benefit of the decision of the Supreme Court in *FII (SC),* came to a different conclusion. Although the decision in *FII (SC)* was not, he accepted, of direct application to the present case, the Supreme Court had, he said, rejected the argument that EU law is not engaged so long as the claimant is left with a single EU law-compliant remedy: see [340].

125. It is therefore necessary to say a little more about the issues in *FII (SC)* before returning to the differences in analysis between Vos J and Henderson J in the present litigation.

126. The majority of the claims in *FII* were for overpaid ACT between 1973 and 1999. In proceedings issued in June and September 2003 the test claimants made mistake-based claims for the recovery of the tax in order to rely on the extended limitation period available under section 32(1)(c). On 8 September 2003 it was announced that legislation would be introduced in the form of what became section 320 FA 2004 to disapply section 32(1)(c) in respect of mistake-based claims made on or after 8

September 2003. Following the decision of the House of Lords in *DMG* came section 107 FA 2007 which was enacted to disapply section 32(1)(c) retrospectively in respect of all mistake-based claims whenever made. Neither of these sections was introduced with transitional provisions to cater for taxpayers who had extant claims and were currently within the extended limitation period but whose claims would become statute-barred by the disapplication of section 32(1)(c).

127. Henderson J held in *FII (High Court)* that HMRC could not rely on section 320 or section 107 as an answer to the EU law claims because of the absence of any transitional provisions: a decision ultimately upheld by the ECJ in *FII (ECJ) III* on the reference from the Supreme Court. But the Court of Appeal decided that because the *Woolwich* cause of action was not limited to cases where there had been a demand and was therefore available in all cases of overpaid tax, it provided the test claimants with a domestic remedy which was sufficient to give effect to their *San Giorgio* claims. The Court of Appeal went on to hold (in [225]) that since neither of the principles of effectiveness and equivalence required domestic law to provide a further mistake-based remedy in the form of a *DMG* claim, the practical curtailment of the *DMG* claims by the disapplication of section 32(1)(c) without any transitional arrangements did not therefore affect the claimants' rights under EU law:

> "225. We have held, in respect of Issues 11 and 12, that a demand is not an essential ingredient of the *Woolwich* cause of action, and that that cause of action provides an effective remedy for all the claimants' *San Giorgio* claims. Thus the cause of action for repayment of monies paid under a mistake is not a cause of action required by Community law. The cause of action for repayment of monies paid under a mistake is a domestic remedy of wide application, which Community law does not require the Member States to provide, attended by a limitation period (i.e. s32(1)(c) of the Limitation Act 1980) that goes beyond the requirements of Community law: see *Marks & Spencer* ([2002] STC 1036, [2003] QB 866, para 35 of the judgment), in which the ECJ considered a three-year limitation period to be reasonable. Community law restricts the effectiveness of domestic legislation curtailing a limitation period applicable to a domestic cause of action that protects a Community right. That domestic cause of action is the *Woolwich* claim, and it is unaffected by ss320 and 107."

128. The position in *FII (SC)* differed from that in the present case because, until the enactment of sections 320 and 170 which disapplied section 32(1)(c) in respect of mistake-based claims, the test claimants had available to them under domestic law both *Woolwich* and *DMG* causes of action for the recovery of the tax. The issue for the Supreme Court was not therefore whether in disapplying national legislation in order to give effect to a claimant's *San Giorgio* rights it was necessary to make available to the claimant the full range of claims he would otherwise enjoy under domestic law. It was whether Parliament could, compatibly with EU law, summarily remove one of the domestic causes of action already available to give effect to the taxpayer's EU claims by removing retrospectively without transitional arrangements the more favourable limitation period available to *DMG* claims.

129. The ECJ in *FII (ECJ) III* answered this question by re-affirming its established jurisprudence that the principle of effectiveness does permit the imposition of reasonable time limits *de novo* or the imposition of more restrictive time limits provided that taxpayers with existing claims are protected by suitable transitional relief:

> "37. However, as the Court held in paragraph 38 of *Marks & Spencer*, whilst national legislation reducing the period within which repayment of sums collected in breach of EU law may be sought is not incompatible with the principle of effectiveness, it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the previous legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.
>
> 38. It follows that national legislation curtailing, retroactively and without any transitional arrangements, the period within which repayment could be sought of sums collected in breach of EU law is incompatible with the principle of effectiveness (see, to that effect, *Marks & Spencer*, paragraph 47).
>
> 39. The fact that in the *Marks & Spencer* case the taxpayer had only one legal remedy, whilst in the case in the main proceedings the taxpayer has two such remedies, cannot, in circumstances such as those in issue before the referring court, lead to a different conclusion."

130. This seems to us to be a clear rejection of the Court of Appeal's view that the test claimants in *FII* were not entitled to protection in respect of both existing domestic causes of action which were capable of giving effect to their EU *San Giorgio* rights. This seems to us to be a clear rejection of the Court of Appeal's view that the test claimants in *FII* were not entitled to protection in respect of both existing domestic causes of action which were capable of giving effect to their EU *San Giorgio* rights. In the Supreme Court which made the reference views differed on this point but Lord Hope, Lord Walker and Lord Reed, all considered that the summary removal of the *DMG* claims by the disapplication of s.32(1)(c) was incompatible with the principles of equivalence and effectiveness. The principle of equivalence has played only a minor part in the argument before us on issue 2. But in *FII (SC)* it could have provided what was really an obvious and relatively easy answer to the argument that Parliament could remove the test claimants' *DMG* claims without diminishing their rights under EU law.

131. As Lord Hope said at [20]-[21]:

> "[20] The crucial question, however, is whether the retrospective application of that limitation period to claims based on mistake was in conformity with the principles of equivalence and effectiveness, as explained by the Grand Chamber in its judgment in these proceedings: Case C-446/04 [2007] STC 404, para 203. I accept, of course, that the *Woolwich* remedy on its own was an effective way of vindicating the *San Giorgio* right. But what about the principle of equivalence which, as Lord Reed points out in para 218, is a complementary requirement? The *Woolwich* remedy was not the only remedy in domestic law, as it was held in *DMG* that a taxpayer who wrongly paid tax under a mistake of law is entitled to a restitutionary remedy against the revenue. The theory is that judicial decisions must be taken to declare the law that applies to the case with retrospective effect, whenever the events that gave rise to the claim occurred. So, in the events that have happened, the *DMG* remedy must be taken to have been always available. It is not just a mirror image of the remedy that is afforded under *Woolwich*. Both remedies lead to the same result. But they are different remedies founded upon different principles and they are subject to different limitation periods. There may be other differences, depending on the facts and circumstances of each case.
>
> [21] There is no obvious way of deciding which of these two remedies must be adopted if only one can be allowed. Is it to be held the Claimant is under an obligation, if both are available, to select the remedy which best suits his opponent? This would be an odd result, as I said in *DMG* [2007] 1 AC 558, para 51. For the reasons which I gave in that paragraph, I think that domestic law must reject this idea because it has no basis in principle. In fairness, the Claimant ought to be free to choose the remedy that best suits his case. The principle of equivalence requires that the rules regulating the right to recover taxes levied in breach of EU law must be no less favourable than those governing similar domestic actions. So it seems to me that it must follow, if the means of recovering of taxes levied contrary to EU law are to match those in domestic law, that both remedies should be available."

132. Lord Reed, referring to the issue of compatibility with EU law, said at [212]:

> "In considering that issue, there appear to me to be three central questions, which can at this stage be broadly stated as follows. The first is whether the ground of action enabling taxes levied in breach of EU law to be recovered on the basis of mistake falls within the ambit of the EU principle of effectiveness. It is argued that it does not, since the ground of action based on an unlawful demand in itself fully satisfies the requirement of EU law that there should be an effective remedy. Since no

> additional remedy is required by the principle of effectiveness, it follows, so the argument runs, that the additional ground of action which English law provides, based on mistake, falls outside the scope of that principle. I disagree. As I shall explain, it appears to me that the EU principle of equivalence, which is the complement of the principle of effectiveness, applies to the grounds of action available for the recovery of taxes in domestic law. Where an action for the recovery of taxes under domestic law can be based either on the ground of mistake or on the ground of unlawful demand (or, as in the present case, on both grounds), it follows from the principle of equivalence that both grounds of action should also be available in similar circumstances to enforce an analogous right under EU law. So long as they must both be available, they must also both be effective. The principle of effectiveness therefore applies to both grounds of action."

133. In the present case, the principle of equivalence does not assist the taxpayer either in relation to this issue of selective disapplication or (had it been relevant) in relation to issue 2. Mr Elliott accepts that VATA 1994 contains provisions which are not based on the implementation of the relevant EC Directives but are purely domestic provisions so that not every claim for overpaid VAT is necessarily a *San Giorgio* claim. Since sections 78(1) and 80(7) apply indiscriminately to both domestic and EU law claims for the repayment of overpaid tax, it cannot therefore be said that there is any disparity between the remedies made available for the enforcement of domestic claims for overpaid VAT and those for the enforcement of claims under EU law. In both cases there is a single statutory remedy in the form of sections 78(1) and 80(1). The disapplication of those provisions has therefore to be based, if at all, on the principle of effectiveness.

134. Mr Elliott sought to argue that the principle of equivalence was engaged because the relevant comparator was not a domestic claim for overpaid VAT but a domestic claim for other tax which would not be excluded by sections 78(1) and 80(7) and could be enforced (as in the case of ACT) by a combination of *Woolwich* and *DMG* claims. We are not persuaded by this. As Moses J held in *Marks and Spencer plc v Customs and Excise Commissioners* [1999] STC 205, the principle of equivalence has been stated in a tax context to involve a comparison of the treatment of infringements of EU law and domestic law "with respect to the same kind of charges or dues": see case C-231/96 *Edilizia Industriale Siderurgica Srl (edis) v Ministero delle Finanze* [1998] ECR I-4951 at I-4991, para.36.

135. In *Littlewoods (ECJ),* the Court of Justice received submissions from the Commission and a number of Member States as to what the relevant comparator should be. The Commission argued for a general comparison with other taxes whereas the UK, Netherlands and France said that the comparator should be other indirect or similar taxes. In its judgment at [27] the Court of Justice stated that the comparison should be with "similar claims" which, in the context of this case, we take to mean claims for repayment of domestic VAT.

136. Neither the decision of the Supreme Court in *FII (SC)* nor that of the ECJ on the subsequent reference in *FII (ECJ) III* therefore provides what can be treated as

definitive guidance on issue 3B. But the decision of the ECJ (together with that of the Supreme Court) does clearly dispose of the decision in *FII (CA)* as authority for some general proposition that the national court can choose which of the two remedies should be provided where both require the disapplication of the exclusionary rule. The decision of the ECJ in *FII (ECJ)* confirms that, at least in relation to existing domestic remedies made available for the enforcement of EU claims, it is no answer to the removal of one such remedy to say that an alternative continues to exist.

137. In our view, the answer to issue 3B depends on identifying what principles are engaged when EU law in the shape of the principle of effectiveness (or, for that matter, equivalence) requires the court to disapply some rule of national law in order to give effect to the claimant's EU law rights. The starting point of that analysis has to be section 2(1) of the European Communities Act 1972 which provides:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ["enforceable EU right"] and similar expressions shall be read as referring to one to which this subsection applies."

138. Section 2(1) imposes on the court an obligation and gives it the power to enforce the relevant rights under EU law in priority to and notwithstanding any contrary provisions of domestic law. It therefore allows Littlewoods' *San Giorgio* rights to override sections 78(1) and 80(7) VATA 1994 but it does not prescribe how the courts applying domestic law are to give content to those rights. That is done by applying (so far as necessary) the principles of equivalence and effectiveness which qualify the long-standing EU principle of procedural autonomy to the extent that the remedies available under national law may be inadequate. That is why the ECJ in [27] of its judgment in *Littlewoods* (ECJ) states that:

> "In the absence of EU legislation, it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation (simple or 'compound' interest). Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible (see, to that effect, *San Giorgio*, paragraph 12; *Weber's Wine World*, paragraph 103; and Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 17)."

139. The fourth question referred to the ECJ in this case was:

> "If the answer to question 1 is in the negative, does the EU law principle of effectiveness require a Member State to disapply national law restrictions (such as ss 78 and 80 of the 1994 Act) on any domestic claims or remedies that would otherwise be available to the taxable person to vindicate the EU law right established in the Court of Justice of the European Union's answer to the first three questions, or is it sufficient that the national court disapplies such restrictions only in respect of one of these domestic claims or remedies?"

140. In [32] and [33] of its judgment the ECJ said:

> "32. According to the referring court, application of s 78 of the 1994 Act has the effect of excluding two actions provided for by common law, namely the *Woolwich* claim and the restitution action based on an error of law. In essence, the referring court asks whether, if it is found that s 78 and s 80 of the 1994 Act are contrary to EU law, a failure to apply the restriction contained therein in relation to the *Woolwich* claim in the main proceedings could lead to payment of interest which is compatible with EU law or whether the restriction contained in s 78 and s 80 of the 1994 Act should be disapplied in respect of all the claims or remedies under common law.
>
> 33. As is apparent from consistent case law, when faced with a rule of law that is incompatible with directly applicable EU law, the national court is required to disapply that national rule, it being understood that that obligation does not restrict the power of the competent national courts to apply, amongst the various procedures of the internal legal order, those which are appropriate to safeguard the individual rights conferred by EU law (see in particular, to that effect, *Van Gemert-Derks v Bestuur van de Nieuwe Industriële Bedrijfsvereniging* (Case C-337/91) [1993] ECR I-5435, para 33; *Ministero delle Finanze v IN CO GE '90 Srl* (Cases C-10/97 and C-22/97) [1998] ECR I-6307, para 21; and *Filipiak v Dyrektor Izby Skarbowej w Poznaniu* (Case C-314/08) [2010] All ER (EC) 168, [2009] ECR I-11049, para 83)."

141. The statement of principle in [33] confirms that the process of disapplying any domestic rule of law in favour of EU law leaves the national court with procedural autonomy in relation to available remedies. But consistently with that, it does not give to the national court any power of selection which it does not have under domestic law. The national court is left to apply its ordinary domestic rules in the form of the causes of action which are available to a taxpayer seeking to enforce its EU claims. The difficulty with HMRC's argument on this point is that it seeks to attribute to or invest the national court as a function of the principle of effectiveness with the power to select which remedies the claimant should be permitted to pursue when the object of the principle of effectiveness as explained in *Littlewoods* (ECJ) is to ensure that the taxpayer's *San Giorgio* rights are enforced. The ECJ in [33] and the earlier cases there referred to has made it clear that the choice and availability of

remedies is exclusively a matter of domestic law subject only to their being effective remedies for the purpose of enforcing the EU rights in question. We consider that there is no support in these cases for what Henderson J described as this minimalist approach to disapplication and that such a rule would be contrary to principle. Once it is clear that the domestic law rules for the recovery of overpaid tax are incapable of providing recovery in accordance with the *San Giorgio* principle, they fall to be disapplied in favour of the claimant's EU rights. The national court has no power in our view to disapply the domestic bar to the enforcement of those rights on a selective basis. The procedural autonomy it is granted under EU law simply requires it to make available to the claimant the remedies which domestic law would give him had the claim for overpayment been a purely domestic one. Once therefore section 78(1) falls to be disapplied in order to give effect to Littlewoods' *San Giorgio*-based claims the English court has no further control over the causes of action available to the claimant. Its only power is to adjudicate and enforce those claims in accordance with the law.

142. Henderson J was therefore right in our view to reject HMRC's argument that the Court should determine which of the otherwise available domestic causes of action Littlewoods should be permitted to rely upon. That is a matter of domestic law and the decision of the House of Lords in *DMG* confirms that this is a matter of choice for the claimant.

Issue 6: quantum

Introduction

143. We have concluded that section 78 has to be disapplied to enable Littlewoods to recover more than simple interest by using either its *Woolwich* claims or its *DMG* claims in accordance with its rights under EU law. Both are claims in restitution. However, as we explained in paragraphs 8 and 119 above, there is an important difference between them: the *Woolwich* claims are in general time-barred after six years from the time of overpayment, and so Littlewoods prefers to rely on its *DMG* claims.

144. Issue 6A, to which we now turn, is directed to the question how much Littlewoods can recover by way of unpaid interest in restitution. This depends on (a) what rate of interest would be awarded by the court, and (b) whether the court would award compound interest. At trial Henderson J determined that the rate of interest should be determined objectively, that it should be the rate at which the Government could borrow at the relevant time, and that the rate should be compound. Government borrowing rates were accepted to be the appropriate rate if market rates of interest have to be used. This, Henderson J held, was the way in which interest was to be awarded on a restitutionary claim save in circumstances which in his judgment did not apply in this case. Henderson J found, however, that, on the basis of Dr Richardson's evidence if the test is what actual benefit HMRC obtained from the overpayment, the interest saved as a result of the overpayments did not reduce government borrowings, as the Government's annual borrowing target was fixed according to macro-economic factors, but instead funded government expenditure or was used to reduce taxation. On this basis it would not be appropriate to calculate interest on a compound basis but only on a simple basis. Henderson J went on to doubt the finding made by Vos J that

the receipt of overpaid tax went to reduce government borrowings at the end of the year of receipt.

145. The amount at stake on this Issue is substantial: Littlewoods' claim for outstanding interest on a compound basis amounts to ca. £1.2bn. By contrast, if the time value of the outstanding interest has to be calculated on a simple basis, the amount payable on the judge's primary finding (which has not been appealed) is £70.6m (Henderson J, *Littlewoods (No 2)* [405]). HMRC therefore argue under this issue on this appeal that Henderson J was wrong in domestic law to conclude as he did. If he was wrong, then, under Issue 6B below, we have to consider whether, irrespective of domestic law, Littlewoods are entitled to the amount of interest awarded by Henderson J under EU law.

146. There are two more sub-issues under Issue 6. Under Issue 6C we are asked to determine whether the interest awarded to comply with EU law should be calculated on the outstanding amount down to the date of judgment or whether it should cease on the date that the principal amount of overpayments was repaid. Lastly, under Issue 6D, we are asked to set aside the finding by Vos J (referred to in paragraph 144 above) that overpayments were used to reduce government borrowing at the end of the year of receipt and hold that they instead went to fund expenditure or reduce taxation.

147. Littlewoods do not seek to argue that HMRC should pay interest at the rate it would have cost a commercial organisation, such as themselves, to borrow the amounts which they overpaid. They, therefore, must be taken to accept that restoration of the benefit on the basis that the interest saved is to be calculated at the cost of borrowing at government rates amounts to a full indemnity for the purposes of EU law on this part of their case.

Issue 6A –As a matter of English law, is the benefit to HM Government from the overpayments of tax correctly measured by (a) the "objective use value" of the money measured by reference to the cost to HM Government of borrowing money in the amount of the sums overpaid or (b) by reference to the actual use made by HM Government of the overpayments and the "actual benefit" which HM Government derived from them?

Sempra and Benedetti: the starting point is objective use value but (obiter) in some cases the court may order the defendant to provide restitution of his actual use of the money only

148. The answer to Issue 6A depends on the correct interpretation of two cases: the decision of the House of Lords in *Sempra* and the recent decision of the Supreme Court in *Benedetti*. Of these two cases, *Sempra* is more directly in point on the facts since it concerned a claim for interest following repayment of tax paid prematurely and thereby in breach of EU law. In *Benedetti*, the unjust enrichment was the acceptance of services without an agreement quantifying the remuneration payable for those services. Where, in such circumstances, there is an implied agreement to pay a reasonable amount, objective use value is immediately engaged.

149. Mr Swift contends that Henderson J was wrong on the authorities not to hold that the appropriate measure of recovery was the benefit which the government actually obtained from use of the overpayments. He submits that Henderson J was also wrong to treat the opportunity to use the money as the item to be valued. Applying the

majority in *Sempra,* the starting point, on his submission, is to apply the conventional borrowing rate appropriate for the particular defendant unless the defendant shows that his actual benefit from the use of the money was less than that because, for example, he put the money in a low interest-bearing account. Mr Swift submits that the same applies on the facts of the present case, where the interest that might otherwise have been saved on government borrowings by reason of the receipt of the principal amounts of the overpayments, was absorbed in normal government expenditure and was not dedicated to reducing Government borrowing.

150. Littlewoods seeks to uphold the decision of Henderson J. Mr Rabinowitz submits that the courts apply an objective approach to the value of property, whether money, land or goods. They do so because unjust enrichment is concerned with reversing transfers of (in the case of money) the opportunity to use the money. He submits that there are good policy reasons for using an objective approach: it is a more straightforward inquiry than an inquiry into actual benefit. If HMRC's argument were correct, it would, submits Mr Rabonowitz, be necessary to value all the actual benefit which the government received, including the benefits of the additional spending which HMRC were able to make. Mr Rabinowitz submits that the objective approach applied in *Sempra* is consistent with the objective approach used to value the occupation of real property (see the decisions of this court in *Lewisham LBC v Masterson* (2000) 80 P&CR 117 (CA) and *Cheese v Thomas* [1994] 1 WLR 129) and the value of the use of chattels (see *Dimond v Lovell* [2002] 1 AC 384). Mr Rabinowitz accepts that there may be cases of "subjective devaluation" where the court values the benefit according to the amount of actual benefit, but that cannot be applicable here where the government undoubtedly valued the money in the ordinary way and made use of it (see further per Henderson J in *Test Claimants in the FII Group litigation v HMRC* [2014] EWHC 4302 (Ch) at [420]). In the present case, he submits that Henderson J rightly concluded that this case was not one in which subjective devaluation was available.

151. *Sempra* was a historic decision. Until the decision in *Sempra* was handed down, the common law of England and Wales did not allow a person to claim interest as damages for late payment. *Sempra* had to give effect in national law to the ECJ's decision in *Metallgesellschaft.* In *Metallgesellschaft*, the ECJ held that, where a company had been required to make advance payments of corporations tax (ACT) contrary to Community law (now EU law) it was entitled to a sum equivalent to the interest that would have been generated on the sums forgone, since otherwise the exercise of rights conferred by Community law would be rendered impossible in practice or excessively difficult. Moreover the ECJ held that, where the interest sought was not merely ancillary but was itself the principal sum claimed, any national rule excluding the payment of interest where no principal sum was due was excluded.

152. As we have explained, the House of Lords departed from the earlier common law rule which prevented interest being claimed as damages. The speeches dealt with the award of interest on contract and tort claims and also claims in restitution. We are concerned in the main with that part of *Sempra* which dealt with the claims in restitution. It is important to note that the House was unanimous that compound interest could be recovered in restitution to reflect the time value of corporation tax which, as in that case, was mistakenly paid prematurely. It is also important to note that the ECJ was not asked for a preliminary ruling on how interest should be

calculated. The House assumed that it would say that that was a matter for the national court. On the claims in restitution, it is also important to note that the Revenue (now HMRC) did not claim that it did not use the money at all but simply that the interest which it had earned or saved could not be ascertained.

153. The issue on the claims in restitution which caused a sharp division in the House was how the interest should be calculated. The claim in restitution was not a claim to enable the claimant to recover its loss. The majority thought that, in order for the claimant to recover the gain which the defendant had made at its expense, interest should be calculated on a market basis taking account of relevant particular characteristics of the defendant, which meant that the rate would be the same rate as the government would have to have paid to borrow the funds, whereas the minority thought that only actual benefits should be taken into account.

154. In their characterisation of the applicable rule, the majority accepted that market value was not a universal rule and that there were circumstances in which the rate of interest could be even less than the market value adjusted to take account of relevant particular characteristics of the defendant. We will summarise the speeches in *Sempra* but note that this further point was not necessary for the decision in *Sempra* and therefore forms no part of the ratio of the case. As will appear, the House did not specify the circumstances that would meet that exceptional case. It, therefore, falls to the court giving effect to these observations in *Sempra* to formulate appropriate circumstances. The Supreme Court in *Benedetti* also discussed this exception, but as it was also *obiter* in that case, the discussion did not determine the scope of the exception.

155. The majority in *Sempra* consisted of Lord Hope, Lord Nicholls and Lord Walker. Lord Hope's reasoning proceeded in six stages: (i) the restitutionary remedy was not discretionary: it focused on the benefit enjoyed by the defendant [26] to [31]; (ii) that benefit was the time value of the enrichment, and the HMRC had enjoyed the *opportunity* to turn the prematurely paid tax to account, so Sempra did not have to show what the HMRC had actually done with the money (as would be done on an account of profits) [32] to [33]; (iii) drawing on the analogy with trespass cases where the benefit was valued objectively, that benefit was to be measured by reference to an objective measure, that is, the market cost of borrowing (paragraph 45); (iv) since the claim was restitutionary (so that the aim was to reverse the benefit rather than to compensate the claimant for his loss), the rate should be appropriate to the defendant's circumstances. In that case, the appropriate rate was that at which the government could borrow, which was a lower rate than commercial parties would have to pay [46]; (v) the reversal of the onus was fair because such matters were within the direct knowledge of the defendant [47]; (vi) a defendant could demonstrate that there was no actual enrichment when the money came into his hands [48] and, (vii) while the right to return of the money at common law was a matter of right, and not, as a general rule, a matter of discretion [46)], the principles of the common law were informed by equity [48]. In *Sempra* itself, however, the HMRC failed to produce any evidence of what they had done with the prematurely paid corporation tax and so they could not discharge that burden.

156. In agreement with Lord Hope, Lord Nicholls held that Sempra had transferred to the HMRC "the opportunity" to use the money paid prematurely for the period of the prematurity [102] and that Sempra could recover the benefit to the HMRC which he

memorably called a "massive interest-free loan" to the government [102]. Lord Nicholls held that the benefit was best measured by the reasonable cost the HMRC would have incurred in borrowing the amount in question [102] (on both these points, see the passage set out in paragraph 38 above). He saw the exercise as one of valuing the benefit for which the defendant should pay, and the ordinary measure was in his judgment the price a reasonable person would pay for the right to use the asset transferred. This would not apply if the recipient could show that he made no use of the money transferred, or that for some other reason the benefit transferred was not worth its market value to others on the basis of what has been called "subjective devaluation".

157. These points were made in the following paragraphs of Lord Nicholls' speech:

> **Measuring the value of the use of money**
>
> **116** I mentioned above that in cases of personal restitution the value of the use of money is *prima facie* the reasonable cost of borrowing the money in question. I should elaborate a little on this, noting first that a comparable objective measure is well established in the analogous case of valuing the benefit derived by a defendant from unauthorised use of the claimant's land or goods. In the modern terminology these are instances of restitution for wrongdoing as distinct from restitution for unjust enrichment. The Earl of Halsbury's chair and Lord Shaw's horse are famous hypothetical examples of the application of this "user" principle: see *The Mediana* [1900] AC 113, 117, and *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson* (1914) 31 RPC 104, 119. If the unauthorised use causes injury, damages will be recoverable. If the unauthorised use does not cause damage the defendant must still recompense the plaintiff for the benefit he unjustly received. This distinction was drawn explicitly in cases such as *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 and *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359. In *Attorney General v Blake* [2001] 1 AC 268, 278, I summarised the ordinary measure of the benefit in this type of case as the price a reasonable person would pay for the right of user.
>
> **117** The time value of money, measured objectively in this way, is to be distinguished from the value of the benefits a defendant actually derived from the use of the money. The latter value is not in point in the present case. Sempra retained no proprietary interest in the money it paid to the Inland Revenue, and it has no interest in the "fruits" of that money. Sempra's claim is a personal claim against the Inland Revenue in respect of the benefits it transferred to the revenue. The value of those benefits should be measured as described above.
>
> **118** In the present case there can be nothing unjust in requiring the Inland Revenue to pay compound interest, by way of restitution, on the huge interest free loan constituted by

> Sempra's payment of ACT. But this will not always be so. For instance, a recipient of a payment made by a mistake shared by both parties might make no actual use of the money. He might pay the money into a current account at a bank yielding little or no interest. When the mistake comes to light he repays the money. In such a case, depending on the circumstances, it might well be most unfair that he should be out of pocket by having to make an additional payment, whether as compound interest or even simple interest, in respect of the "time value" of the money he received.
>
> **119** Here, as elsewhere, the law of restitution is sufficiently flexible to achieve a just result. To avoid what would otherwise be an unjust outcome the court can, in an appropriate case, depart from the market value approach when assessing the time value of money or, indeed, when assessing the value of any other benefit gained by a defendant. What is ultimately important in restitution is whether, and to what extent, the particular defendant has been benefited: see *Burrows*, *The Law of Restitution,* 2nd ed (2002), p 18. A benefit is not always worth its market value to a particular defendant. When it is not it may be unjust to treat the defendant as having received a benefit possessing the value it has to others. In Professor Birks's language, a benefit received by a defendant may sometimes be subject to "subjective devaluation": *An Introduction to the Law of Restitution* (1985), p 413. An application of this approach is to be found in the Court of Appeal decision in *Ministry of Defence v Ashman* [1993] 2 EGLR 102. Whether this is to be characterised as part of the "change of position" defence available in restitution cases is not a matter I need pursue.

158. Clearly therefore both Lord Hope and Lord Nicholls considered that there were circumstances in which the court could depart from market value. In [118], Lord Nicholls introduces the term “subjective devaluation” and explains what he means by it. This term is also used by Lord Walker and Lord Mance and by the Supreme Court in *Benedetti*, though (as noted below) each of the members of the Supreme Court considered that the term was unsatisfactory. We accept that point, and have adopted for ourselves the vocabulary of “defendant-focused rate” to refer to the rate resulting from subjective devaluation.

159. Lord Walker stated that he “essentially” agreed with Lord Hope and Lord Nicholls [154]. He drew an illuminating distinction between (1) proprietary claims; (2) personal claims for an account of profits; and (3) personal claims for interest which represents the benefit which the defendant is presumed to have made [180]. He summarised the effect of the speeches of Lord Hope and Lord Nicholls to be to recognise “a restitutionary remedy available as of right at common law, subject to the court’s power to resort to ‘subjective devaluation’ in order to avoid injustice in hard cases” [184]. His preference would have been to develop the law of equity as that

would have allowed flexibility [187]. However, in reaching his conclusion he took into account that:

> (i) it is a case where Community law requires full restitution; (ii) the defendant is economically powerful and sophisticated and must be supposed (as the agreed "conventional basis" seems to recognise) to have taken full advantage of its premature receipts of ACT; and (iii) it is not suggested that the claimant has been at fault or has been dilatory in making or pursuing its claim. [186]

160. Lord Walker concluded that in those circumstances compound interest should be awarded [186]. He held that the result in *Sempra* would be the same whichever basis applied [188].

161. Lord Walker's reservation is thus predominantly one about the correct characterisation or taxonomy of the claim to restitution. He considered that it would be best seen as part of the court's equitable jurisdiction, whereas Lord Hope had clearly seen the claim as a common law claim. Lord Nicholls appears to have been indifferent to this dispute; what mattered to him was the substance.

162. We can summarise the speeches of the minority more briefly. The minority were Lord Scott and Lord Mance. Lord Scott considered that there could be no claim for recovery of the "wholly conceptual benefit of an ability to use the money" in the absence of proof of actual benefit. There had to be evidence that the HMRC had earned interest on the premature payments and that mere possession of the money was not enough.

163. Lord Mance held that it was not open to the House to recognise a common law restitutionary claim for the recovery of compound interest. If, however, such a claim did exist, it would depend upon proof of actual benefit. He rejected the adoption of a "conventional" or objective measure as being unfair and (in relation to "subjective devaluation") uncertain in its operation. He too would have sought to develop the equitable jurisdiction.

164. In short, all the members of the House agreed that compound interest should be awarded and that (the relevant claims being restitutionary) it was a question of valuing the benefit to the defendant. The majority held that the benefit was the opportunity to turn the asset transferred to account and that the defendant was to be taken to have made the profit that he could reasonably make on the market unless he demonstrated otherwise. This, as we see it, was a policy decision: the claimant did not have to prove that the defendant in fact received a benefit since that was likely to be something which the claimant would not necessarily know. We do not, however, read *Sempra* as excluding the possibility that the defendant could show that he received no benefit or less than a person might be expected to receive in the market and that the court would then award some other rate or possibly no interest at all: see per Lord Hope at [48], Lord Nicholls at [119], and Lord Walker at [154], who was "essentially" in agreement with Lord Hope and Lord Nicholls.

165. None of the members of the House in *Sempra* used the expression "personal value system," which the Supreme Court used in *Benedetti* and which the judge adopted.

That term has no accepted meaning. Therefore, we do not ourselves consider that that term can form part of a rule of law determining when subjective devaluation is or is not available. The Supreme Court did not indicate that the expression "personal value system" ought to be so used.

166. We now turn to *Benedetti*. Mr Benedetti provided brokerage services to Mr Sawiris without making an effective contract with him. He had received some €67m on account. The essential question was how his services should be valued. We do not intend to set out the facts in full, as they were made complex by the interposition of a number of corporate vehicles and the course of the parties' negotiations. No-one has suggested that those factors or any other complication in the case have any bearing on the analysis with which we are concerned, and so we will describe the facts disregarding the detail of both the facts and the legal issues which are not relevant to this case.

167. The trial judge, Patten J (as he then was), found that the market value of the services was €36.3m but he held that they should be valued at €75.1m for the purposes of Mr Benedetti's claim in unjust enrichment. There was evidence that this was the amount which Mr Sawiris would have been prepared to pay.

168. On appeal to this court (Arden, Rimer and Etherton LJJ), this court took the view that the services should be valued at their market value but that, as the valuation had related only to some 60% of the work, Mr Benedetti should have a further €14.52m for the remainder of his services.

169. The Supreme Court took the view that Mr Benedetti was entitled to a maximum of €36m, but disagreed on the facts with the point that the valuation had related to only 60% of the work, and so discharged this court's order for a further payment. The Supreme Court was unanimous that the starting place for valuing an unjust enrichment was the price which a reasonable person in the defendant's position would have had to pay for the services.

170. The Supreme Court was unanimous that the services could not in law be valued in excess of their market value. This would be by a process of valuation which had been called "subjective revaluation" in the literature.

171. The Supreme Court was not unanimous about "subjective devaluation", which, as Lord Nicholls explained, was what the court did when the valuation was not on a market value basis but on some lower basis. On the facts of *Benedetti*, subjective devaluation did not arise: it would only have arisen if Mr Sawiris's subjective opinion had been that Mr Benedetti's services were worth less than their market value. If that had happened, subjective devaluation might have enabled Mr Benedetti's services to be valued at less than their market value. Lord Clarke, with whom Lord Kerr and Lord Wilson agreed, found that it was open to a defendant to prove that he valued the services provided by the claimant at less than the market value. He added:

> "That principle is widely accepted by academic commentators and is based on the fundamental need to protect a defendant's autonomy. It is important to note that subjective devaluation is not about the defendants' intentions or expectations but is an *ex*

> *post facto* analysis of the subjective value of the services to the defendant at the relevant time." [18]

172. Lord Clarke considered that subjective valuation might apply to both the identification and valuation of a benefit. He considered that the principle of subjective valuation had been established in *Sempra:*

> "**21** After the claimant has adduced evidence of the objective value of the benefit which the defendant received, the burden of proof falls upon the defendant to prove that he did not subjectively value the benefit at all, or that he valued it at less than the market price: *Goff & Jones,* para 4-08; *Virgo*, pp 64, 66-67. That principle was established by the majority of the House of Lords in *Sempra Metals* [2008] AC 561: see para 48, per Lord Hope of Craighead, para 116, per Lord Nicholls of Birkenhead and para 180, per Lord Walker of Gestingthorpe. The minority took a different view, namely that it was for the claimant to establish the actual benefit obtained by the defendant: see especially per Lord Mance, at paras 231-232, and Lord Scott of Foscote, at para 147. As I see it, the difference between them is really no more than a different approach to the burden of proof. In each case the question is what was the value to the defendant."

173. Thus Lord Clarke expressed the view that the difference between the majority and the minority in *Sempra* was a matter of the onus of proof. The defendant's opinion would normally have to be manifested objectively [23]. Lord Clarke went on to consider *Ministry of Defence v Ashman* (1993) 25 HLR 513 as a possible example of subjective devaluation.

174. Lord Clarke summed up his views on subjective devaluation in [26] of his judgment. He did not see any great difference between his view and that of Lord Reed, but concluded by saying that it is not necessary to reach a final conclusion in the present case:

> "**26** The only real difference may be this. We agree that in the case where services have been rendered which, viewed objectively, confer a benefit on the defendant, but a benefit which the defendant did not and does not want and would not have paid for, as in the examples of Pollock CB's cleaned shoes or Professor Virgo's cleaned windows (*Virgo*, p 67), the claimant is not entitled to payment for the services because failure to pay would not unjustly enrich the defendant. The question is whether, in such circumstances, where there was no free acceptance of the services before or at the time they are rendered, but the defendant has accepted that he has received some benefit but not that the value of the benefit is as much as its market value, the defendant's figure should be accepted. In my opinion it should be open to the court so to conclude on the basis, on the one hand there would be unjust enrichment if the defendant paid nothing but, on the other hand, that it would not

> be just to award more than the benefit conferred on the defendant so calculated. Such an approach seems to me to respect the principle of freedom of choice or autonomy and to meet the case where the defendant sees the value of the benefit but would not have ordered the services save perhaps at a substantial discount to the market rate. I see no reason why a court should not take into account a defendant's subjective opinion of the value of the claimant's services in order to reduce the value of them to him, provided of course that the court is satisfied that it is his genuine opinion. If Lord Reed JSC's approach would produce a choice between a nil award and an award of the market value of the services, I would respectfully disagree. I prefer a nuanced approach, which seems to me to be more consistent with principle. However, given Lord Reed JSC's conclusions in para 138 of his judgment, there may be little, if anything, between us, especially since we both recognise the importance of respect for the defendant's autonomy or freedom of choice. It is not necessary to reach a final conclusion on these questions on the facts of this case. I certainly agree with Lord Reed JSC that the expression "subjective devaluation" is somewhat misleading."

175. The majority therefore saw a role for actual benefit in a case of subjective devaluation. If the claimant had rendered services to the defendant but the defendant had not freely accepted them and they had not had the same value to him as market value, then the court could value the benefit on the basis of their actual benefit (if any) to the defendant.

176. Lord Reed emphasised that the purpose of the remedy was to correct the injustice arising from the defendant's receipt of services on the basis that they would be remunerated. He held:

> "…the unjust enrichment arising from the defendant's receipt of the claimant's services can only be corrected by requiring the defendant to pay the claimant the monetary value of those services, thereby restoring both parties, so far as a monetary award can do so, to their previous positions." [99]

177. Lord Reed examined in detail how the market value was to be calculated, but we are not concerned with that part of his judgment. Lord Reed considered that to start with market value was consistent with the approach, among others, of Lord Hope in *Sempra*. He held that the use of government borrowing rates in *Sempra* did not prevent the valuation of the benefit in that case from being a valuation on the basis of market value. Subjective devaluation involved a reduction in market value established on this basis [109] to [110].

178. Lord Reed considered that the term "subjective devaluation" was unhelpful as the issue was whether the defendant had exercised his freedom of choice whether to accept financial responsibility for paying for the service at all (see [113] and [117]). (All the other members of the Supreme Court agreed that the nomenclature was unhelpful but no substitute was suggested). Lord Reed did not express a final

conclusion on an analysis based on subjective devaluation. We do not, however, read his judgment as saying that subjective devaluation may not be appropriate in some circumstances.

179. Lord Neuberger accepted that it "might well be that, in some cases of unjust enrichment, subjective devaluation could be invoked by a defendant to justify the award of a smaller sum than that which would be prima facie payable, namely a sum based on the market value of the benefits conferred on him" [87]. However, he refrained from expressing a concluded view as to the correct approach to be used when subjective devaluation should be permitted. He considered that it would be very rare in a case where the claimant provided services at the defendant's request and that the defendant had never said that he was not prepared to pay market value or suggested that the services were not worth their market value to him. Both had their attractions and problems. He suspected that, in most cases where unjust enrichment arose, the two approaches would lead to the same result. His observations contain a rich discussion of the circumstances which might arise:

> **187** In my view, it may well be that, in some cases of unjust enrichment, subjective devaluation could be invoked by a defendant to justify the award of a smaller sum than that which would be prima facie payable, namely a sum based on the market value of the benefits conferred on him. Lord Clarke JSC discusses the question in paras 18-26, and Lord Reed JSC does so in paras 110-118. Lord Clarke JSC adopts a so-called subjective devaluation approach, which involves a two-stage process, at the second stage of which the defendant may deny that the benefit conferred on him was worth as much as its market value, and leaves it to the court to decide on the facts whether he can justify such a subjective devaluation, and if so to what figure. Lord Reed JSC, on the other hand, tends to favour a so-called choice of benefit approach, which concentrates on whether the defendant was in some way responsible for the conferment of the benefit, and deals with the question of value as part of a holistic question of enrichment.
>
> **188** Given that it is unnecessary to do so, I would prefer to express no concluded view as to which approach is correct. I can see attractions and problems in each of the two approaches, and it appears that there are even differing views as to what each approach entails or should entail. Broadly speaking, the subjective devaluation approach has the attraction of making the defendant pay for the benefit in so far as it has improved his position, but it may involve a greater risk of letting the defendant name his price. The choice of benefit approach has the merit of greater simplicity in some cases, but it may be more likely to lead to a defendant receiving what many might regard as a windfall at the expense of the claimant, in circumstances where the defendant would (or, on some views, should) have been prepared to pay for the benefit.

189 I suspect that in the great majority of cases where unjust enrichment is raised these two approaches will lead to the same result. Indeed, the difference between the two approaches may turn out to be one of procedural analysis rather than outcome, particularly given what Lord Clarke JSC says at para 26 and Lord Reed JSC says at para 138. Whether that is right or wrong, where, as in this case, there is no doubt that the benefit was conferred at the defendant's request, or with his prior consent, it is hard to see how the two approaches would lead to different results. In particular, on either approach, I do not consider that subjective devaluation would be open to a defendant in a case such as the present, where, in the context of an arm's length commercial relationship, he voluntarily accepted the benefits, and said nothing to the claimant, before the benefits were conferred, or even while the benefits were being conferred, to suggest that they would be worth less than their market value to him, or that he expected to pay less than market value. This was a case of a claimant conferring a benefit on a defendant who was not merely free to reject it, but who positively encouraged the claimant to provide it, and who did so without ever suggesting that he would not pay the market value, or that the benefit would have limited value to him.

190 Assuming subjective devaluation is available in some cases, it would, in my view, require a very unusual case indeed before a defendant could rely on subjective devaluation where (i) the services were provided at the defendant's request or by agreement between the parties, (ii) either the request or agreement failed in some way to have legal effect, or it had no effective basis for quantifying the remuneration to be paid to the claimant, (iii) the defendant never gave the claimant to understand that the services had a lower than market value to him, or that he was not prepared to pay market value for them, and (iv) the claimant never gave the defendant to understand that he expected to be paid less than the market value. I am not prepared to say that subjective devaluation could never be relied on in such circumstances, but, as presently advised, I find it impossible to conceive of a case which includes these features where it could.

191 Equally, where the defendant can return the benefit, it seems hard to justify a departure from market value, if he chooses not to return it—as in *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775. On the other hand, in some other circumstances, most obviously the classic case of an unreturnable benefit being conferred on a defendant without his prior or contemporaneous consent or knowledge, there is obvious force in the argument that, once he has paid the claimant a sum equal to what the benefit is worth to him, the enrichment he has gained thanks to the claimant cannot be

> unjust. Equally, in some cases, it may often be unreasonable for a claimant to claim a market-based payment, when he has taken the risk of providing benefits to a defendant without the protection of a contract specifying how his remuneration is to be quantified, or where there have been prior discussions and the defendant has indicated that he would not be prepared to pay as much as the market price for the benefit.
>
> **192** It would seem wrong, at least in many such cases, for the claimant to be better off as a result of the law coming to his rescue, as it were, by permitting him to invoke unjust enrichment, than he would have been if he had had the benefit of a legally enforceable contractual claim for a quantified sum. However, I would expressly leave open how far the personal tastes, or even the eccentricities and idiosyncrasies, of a defendant can be taken into account when assessing the subjective value—a point which would be of some potential relevance in this case if subjective valuation had been a maintainable argument: see para 179 above. As a general proposition, I would have thought that the more personal, and in particular the more objectively dependent on personal taste, a particular benefit is, the more powerful the case for giving great weight to the defendant's particular priorities and preferences….

180. Again we do not read the judgment of Lord Neuberger as opposed to the idea of subjective devaluation in appropriate cases.

Henderson J's analysis of the actual use point: our analysis of the point

181. As we explain below, Henderson J thought that the role for actual use value was very limited. Our view is that the court can order actual use value where the defendant demonstrates that it was lower than objective use (or market) value.

182. Henderson J's analysis of these decisions led him, rightly in our view, to conclude that the law on subjective devaluation was at an early stage of development and to emphasise the objective nature of the normal measure of valuation. He, therefore, accepted that subjective devaluation was possible. He then had to identify when the normal measure would be displaced:

> The normal measure can be displaced, in my view, only if the defendant is able to establish, the onus being on him, that the receipt of the money either did not have its ordinary commercial use value for him, or that it had no use value for him at all (because, for example, he would never have borrowed it in the first place, and after its receipt he merely placed it in a non-interest bearing account until it was repaid). In such a case, as it is put in *Goff and Jones* para 4–06, the value of the benefit to the defendant is assessed by reference to

> his personal value system rather than the market. (Judgment, [369])

183. Henderson J went on to express the cautious view that the defendant-focused rate would never be simply the actual benefit which the defendant obtained by use of the money:

> **[370]** Even at this second, essentially subjective, stage of the enquiry, it is in my judgment crucial to appreciate that the question is what was the value of the use of the money to the defendant. The question is not what benefit the defendant actually obtained by the use of the money, although the way in which the money was used may be evidence which throws light on the use value of the money to him, ie according to his personal value system. To substitute a test, at this stage, of what benefit the defendant actually obtained from the use of the money would in my view be subversive of the normal objective measure, and would in effect reintroduce the approach to valuation which was so powerfully advocated by the minority in *Sempra*, but (if my analysis is correct) was rejected by the majority in *Sempra*, as well as by all the members of the Supreme Court in *Benedetti*.
>
> **[371]** It seems to me that there is a real difference of substance between the approaches of the majority and the minority in *Sempra*, and that it goes well beyond the burden of proof, important though that is. The critical distinction, to my mind, lies in the need for the defendant to establish a personal value system which means that the money did not, in his hands, have its usual commercial use value. If this can be established by the defendant, the normal objective measure of benefit will be displaced; but otherwise it will prevail, even if the objective measure exceeds the actual benefit obtained by the defendant from the use of the money.
>
> **[372]** Another way of making essentially the same point is to say that what has to be valued, in the normal way, is the defendant's opportunity to use the money. The market value of the opportunity will be the same, once the appropriate market has been identified, whatever the use to which the money is actually put by the recipient.
>
> **[373]** I acknowledge that there is a certain tension between the observations of Lord Hope on the burden of proof, at [47] and [48] of *Sempra*, and his earlier endorsement of the objective approach to ascertainment of the benefit. A similar tension exists, if I may respectfully say so, in the views expressed by Lord Clarke in *Benedetti* at [21]. I do not find this surprising, when the subject is one of such difficulty, and the courts are still working their way towards a principled and satisfactory solution. I remind myself, too, that individual judgments, even

> of the highest court, should not be read as if they were statutes. In my view the observations of Lord Hope and Lord Clarke on the burden of proof do not form part of the ratio of either case, and although entitled to the greatest respect, they are not binding on me. I think I am therefore free to conclude, as I have done, that the difference between the majority and minority in *Sempra* goes beyond the burden of proof, and that the doctrine of subjective devaluation does not permit the defendant, in every case, to substitute his actual benefit from the use of the money (assuming he can establish it) for its market value as the measure of his unjust enrichment.

184. Our view is that *Sempra* and *Benedetti* did not require the judge to restrict subjective devaluation in this way. Both Lord Hope and Lord Nicholls in *Sempra* held that the defendant-focused rate might be appropriate precisely because his actual benefit had been lower than the market rate. Lord Nicholls, for example, said:

> A benefit is not always worth its market value to a particular defendant. When it is not it may be unjust to treat the defendant as having received a benefit possessing the value it has to others.

185. Henderson J did not attach weight to Lord Clarke's point that the difference between the views of the majority and minority in *Sempra* were not more than a different approach to the burden of proof. We agree with the judge that the question who has the burden of proof reflects a principled position taken by the law. But that does not mean that the point made by Lord Clarke is not a significant one in this context because it indicates that there is a role for actual benefit. While the law presumes that there was no actual benefit other than the saving of interest at an appropriate rate market rate, this presumption may give way if the defendant can show that the actual benefit was less than the presumed benefit. Thus, we would attach greater weight to Lord Clarke's view, speaking for the majority, than the judge did. The view expressed by Lord Clarke accords with that taken by the leading textbook, Goff & Jones, *Law of Unjust Enrichment*, to which Lord Clarke refers.

186. Henderson J also found support for his conservative view of the role for actual benefit in the proposition that it was the opportunity to use the money that was transferred. We do not agree with him on this since that opportunity could only sensibly be valued in the light of knowledge of the use the defendant had made of the opportunity.

187. We have accordingly reached the view that, under domestic law, since HMRC proved to the satisfaction of the judge that the actual benefit it obtained from Littlewoods' overpayments was less than market value of the time value of that money, actual use value could be relevant to valuing the benefit which the government received as a result of the overpayments. The judge did not consider this point and so we must go on to decide whether it is so relevant. That involves considering the judge's findings about the use by the government of the overpayments. On the judge's view of the law, these were alternative findings.

Henderson J's findings

188. Henderson J heard the evidence of Professor John Kay, the expert economist called by Littlewoods, and Dr James Richardson, the expert economist called by HMRC. On the time value of money, Henderson J preferred the evidence of Professor Kay. He found that Dr Richardson focused on the actual use made of overpaid tax. He held that this was contrary to the principles laid down in *Sempra* and endorsed in *Benedetti*. Actual use value would be relevant to a defence of change of position but Vos J had rejected that. Actual benefit would also be relevant to subjective devaluation, but, as we have explained, Henderson J's conclusion was that that principle had no role in this case. Thus Henderson J reasoned that the appropriate way to value the benefit to the government from the overpayments of money was to take the time value of money measured by reference to government borrowing rates.

189. Henderson J made alternative findings in case he was wrong in holding that actual benefit was irrelevant. It was relevant to find out what had happened to the interest which the government had saved because, instead of having to borrow, it would have the overpayments to use. On this part of the case, Henderson J preferred the evidence of Dr Richardson that the interest saved would have been absorbed in government spending in year 2 (i.e. the year following receipt) rather than used to reduce government borrowing on a compounding basis. The saved interest was just added to the general pool of resources which was allocated in year 2 to meet government expenditure (*Littlewoods (No 2),* [396]).

190. Henderson J considered that the amounts of the overpayments were immaterial in the year of receipt. Dr Richardson's approach was, he held, broadly equivalent to the payment of simple interest on the overpaid sums.

191. On this basis the quantum of the claim was £70,656,449 (*Littlewoods (No 2)* [414]). On a second approach put forward by Dr Richardson it would be £101,628,347. (We are not concerned with the reasons for this second approach.)

Should interest be awarded on the basis of the actual use which government made of Littlewoods' overpayments or on the basis of the objective time value of those overpayments?

192. Mr Rabinowitz fairly accepts that HMRC were an innocent recipient of the money paid to it. By that we understand that no fault is attributed to them in receiving Littlewoods' overpayments. That is an important part of the background.

193. Given that the aim of a claim for repayment of money paid under a mistake is to make the defendant restore the gain he has made, and not to confer some windfall on the claimant, or to compensate him for his loss, the starting point in principle ought in our judgment to be that an innocent recipient of an overpayment should not have to make restitution of more than he actually received, not knowing it was an overpayment, unless he freely accepted the benefit of having an overpayment and the obligation to pay for it at market rates. In expressing the principle in these terms, we are building on the approach of the Supreme Court in *Benedetti* to the defendant's autonomy. This can be seen clearly from [18] of the judgment of Lord Clarke:

> …A defendant, in my view, is entitled to prove that he valued the relevant services (or goods) provided by the claimant at less

than the market value. That principle is widely accepted by academic commentators and is based on the fundamental need to protect a defendant's autonomy. It is important to note that subjective devaluation is not about the defendants' intentions or expectations but is an ex post facto analysis of the subjective value of the services to the defendant at the relevant time. The editors of *Goff & Jones* put it thus at para 4-06:

> "People have different means and spending priorities, and they value benefits differently according to their personal tastes. Consequently, as Lord Nicholls said in *Sempra*, 'a benefit is not always worth its market value to a particular defendant', and 'when it is not it may be unjust to treat the defendant as having received a benefit possessing the value it has to others'. The common law 'places a premium on the right to choose how to spend one's money' [see *Peel v Ontario* [1992] 3 SCR 762, para 25, per McLachlin J], and this right might be unfairly compromised if a defendant were forced to make restitution of the market value of a benefit which he would only have bought for himself at a lower price, or which he would not have bought at all. To avoid this, the court may therefore assess the value of the benefit by reference to the defendant's personal value system rather than the market."

Professor Andrew Burrows makes the same point in *The Law of Restiution*, p 44:

> "The question of whether the defendant has been benefited/has received value is not straightforward because of the need to respect freedom of choice and individuality of value. Even if the defendant has been objectively benefited (ie a reasonable man could regard himself as benefited by what has occurred or, put another way, the claimant's 'performance' has a market value) he or she may validly argue that benefit has been of no value to him or her."…

194. In addition, a person does not freely accept a benefit which he has no option but to accept. He is in general an involuntary recipient of the benefit in that situation. A well-known example of this is the dictum of Pollock CB in *Taylor v Laird* (1856) 25 LJ Ex 329, 332, "[if the claimant] cleans another's shoes; what can the other do but put them on?" The modern equivalent might be the situation in which a person cleans the windscreen of a driver caught in the stationary line of cars at traffic lights knowing that the driver might decline to make any payment. The acceptance of the benefit in this situation might be wholly involuntary. It would be different if the driver indicates in some way that he would be willing to make an appropriate payment for this service.

195. In the present case, there is no evidence that HMRC actually knew Littlewoods had made what in law were overpayments or could have rejected them. Nonetheless, we do not consider that HMRC should be treated as if it were an involuntary recipient of overpayments of tax. Taxpayers have to pay tax even though they may not have received any assessment from HMRC. In this case there were also assessments. Even if HMRC had no idea at the time that Littlewoods was making overpayments of tax, it still cannot in our judgment be said to be in the position of the an involuntary recipient of a benefit. It is obvious that, under a system of self-assessment, tax will from time to time be paid in error and that that tax will have to be repaid. That is an inherent risk of a system of self-assessment. Statistically a certain percentage of tax receipts will have to be repaid, and we consider that government should not be able to discharge its obligations in restitution to the taxpayer by choosing to take a course which would dilute its repayment obligations.

196. In any event, the government was not an involuntary recipient of the benefit in another sense. The government was well able to make a decision as to whether to use the money. It is not compelled to use the money for government spending or reducing taxation. It was free to use the money for greater financial benefit by repaying borrowings or (subject to any restrictions on government investment) by placing the money on deposit. No doubt it would have repaid government borrowings if government borrowing rates were particularly high. The fact that it did not do so suggests that the rates may have been particularly favourable to government at the time.

197. In any event, if the money was spent on public projects, the court is entitled to take the view that it was well spent. It is difficult to value the benefit which the government obtains by spending the money for others' benefit. In those circumstances the court should err in favour of applying the objective use value to the benefits obtained by government. HMRC has not sought to prove that the money was not well spent or that there was some particular reason on the facts why it would be unfair to impose on government the burden of repayment with interest reflecting the savings in government borrowings.

198. For completeness, Littlewoods place some reliance on the holding of Lord Clarke in *Benedetti* at [23] that "a court will be very unlikely to accept such an assertion [i.e. one that he valued a benefit at less than market value] unless there has been some objective manifestation of the defendant's subjective views". That holding is not relevant where (as here) the defendant does not rely on his subjective views as to the value of the benefit.

199. Accordingly we do not accept that actual use value should in the circumstances of this case be applied to determine the time value of money in this case. Our answer to the issue is that, for the purposes of Littlewoods' claims for unjust enrichment, objective use value applies to the valuation of the time value of the overpayments made to HMRC.

Issue 6B. If, as a matter of English law, the measure of Littlewoods' restitution remedy is less than the objective use value of the overpaid amounts, is that consistent with EU law?

200. The answer to this issue as formulated by the parties is: this issue does not arise in the light of our answer to Issue 6A. We do not therefore need to address Littlewoods'

argument based on two cases decided by the ECJ. The first was Case C-398/09 *Lady & Kid A/S v Skatteministeriat* [2012] STC 854, where the ECJ held that a Member State was excused from having to return an unlawful tax only where the passing on exception applies [20]. The second was Case C-147/10 *British Sugar*, where the ECJ held that the Rural Payments Agency had to pay interest on unlawful sugar levies even though it had paid the principal amounts of the sugar levies on to the EU Commission and might not be able to recover interest from it.

Issue 6C. If compound interest is payable, should it continue to run after the date of the repayment of the principal amounts of the overpaid VAT until the date of judgment?

201. Henderson J held that interest should continue to run on the outstanding accrued interest until the date of judgment. He referred to his own earlier decision in *The Prudential Insurance Company Limited v HMRC* [2013] EWHC 3249 (Ch) at [245-6] and held:

> In short, it seemed to me that although there had been no appeal in *Sempra* from the decision of Park J that interest should run pursuant to s 35A for the period from utilisation of ACT until judgment, the logic of the majority speeches in the House of Lords showed that compound interest should also be available in respect of the post-utilisation period. I confirm that I remain of the same opinion, and I would therefore answer the comparable question in the present case in Littlewoods' favour. The Revenue did not, of course, concede the point before me, but recognised that it would be more sensible to reserve it for a higher court since I had so recently considered it myself and decided it against them.

202. HMRC contend that Henderson J was wrong and that any interest should run only until the date of the repayment of the principal amounts. Mr Swift relies on the decision of the ECJ in Case C-565/11 *Irimie v Administraţia Finanţelor Publice Sibiu.* [As we have explained in paragraph 82 above], this case concerned a claim for interest on a repayment of pollution tax unlawfully charged in Romania on the registration of a motor vehicle imported from another Member State. Under Romanian law interest was payable only from the day following the date of the claim for repayment. Applying its own decision in this case, the ECJ held that the Romanian interest provision was inconsistent with the principle of effectiveness. Interest should instead have been calculated from the date on which the unlawful tax was originally paid. Mr Swift relies on a statement by the ECJ that interest is payable down to the date of repayment:

> 28. That loss depends, inter alia, on the duration of the unavailability of the sum unduly levied in breach of European Union law and thus occurs, in principle, during the period between the date of the undue payment of the tax at issue and the date of repayment thereof.

203. Mr Rabinowitz submits that Henderson J was right to hold that interest should continue to run after the date of the repayment of the principal amounts of overpaid VAT on such amounts of accrued interest as remained outstanding.

204. We agree with Littlewoods, and on that basis we answer this issue in the affirmative. The situation that has arisen in this case was not before the ECJ in *Irimie* and therefore the statement of the ECJ on which HMRC relies cannot be taken to be directed to it. The ECJ was plainly dealing with the restriction on interest in Romanian law which prevented the person entitled to a repayment of tax unlawfully levied from claiming interest for a particular period, namely that between the date on which he paid the tax until the date of the claim for repayment.

Issue 6D. Was Vos J wrong to hold that the receipt of the overpayments in "year 1" must have gone to reduce government borrowing at the end of the tax year?

205. Vos J held that in the year of receipt (referred to in these proceedings as "year 1"), Littlewoods' overpayments must have gone to reduce the government borrowing at the end of the year (Vos J, *Littlewoods (No 1)* [122] to [123]). In [398] to [399] of his judgment, Henderson J doubted whether Vos J was justified in making this finding. He said that the finding was based on the proposition, advanced by Professor Kay, that Littlewoods' overpayment would have been immaterial in amount to any decision on government finances. Henderson J considered that, if Vos J's finding were correct, it would mean that all immaterial sums would not be spent but would simply go to reduce government borrowing, a proposition which he found absurd. Henderson J accepted, however, that the finding was binding on him.

206. Mr Swift submits that Henderson J was clearly right and that the court should therefore set aside the finding of Vos J, even though HMRC did not appeal it at the time.

207. Mr Rabinowitz submits that Vos J's finding was correct. Moreover, it would have to be considered on the basis of the evidence before Vos J unless this court were persuaded to allow HMRC to adduce the further evidence adduced before Henderson J. That evidence could have been adduced before Vos J and thus would not meet the usual principles for fresh evidence admissible on an appeal since HMRC could have adduced it before Vos J. Further Henderson J expressed yet further views in *Test Claimants in the FII Group Litigation v HMRC* [2014] EWHC 4302 (Ch), which would also have to be taken into account.

208. We have not been taken in argument to the underlying expert evidence of the eminent economists which it is said would have caused Vos J to make his finding. We do not, however, consider that we should ourselves go further into the question whether the finding of Vos J should be set aside. HMRC base their case on the later reasoning of Henderson J. Our short answer is that this type of appeal is not open to HMRC. HMRC seek to ride on the coattails of the judge rather than follow the normal process of adversarial litigation. They should have adduced the evidence, which persuaded Henderson J, at the earlier hearing before Vos J or have applied on this appeal to adduce that evidence now and/or appealed the finding of Vos J at a much earlier stage. HMRC has taken none of those steps. We do not see why HMRC should have a second bite of this particular cherry at this late stage in this unprecedented way simply because of some helpful comments made by Henderson J at the later hearing. This is not a permissible shortcut. In any event, in considering the strength of his reasoning, now adopted by HMRC as part of their reasoning, we would have to take into account Henderson J's further observations in *FII*. We therefore answer this

issue as framed by the parties that this issue is not one which can be raised on this appeal.

Conclusion and disposition

209. We are not persuaded that Henderson J fell into any error on any of the issues which we have been asked to decide. For all the above reasons, therefore, we dismiss HMRC's appeal and Littlewoods' cross-appeal.