Neutral Citation Number: [2010] EWHC 2771 (Ch)

Case No: HC08C03780 AND HC08C03781

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

04/11/2010

B e f o r e :

MR JUSTICE VOS

Between:

Case No: HC08C03780

(1) Littlewoods Retail Limited
(2) Shop Direct Home Shopping Limited (formerly Littlewoods Shop Direct Home Shopping Limited)
(3) Reality Group Limited
(4) Shop Direct Group (formerly Shop Direct Group Limited)
(5) Shop Direct Limited **Claimants**

- and -

The Commissioners for Her Majesty's Revenue and Customs **Defendants**

Case No: HC08C03781

And Between :

(1) Littlewoods Limited
(2) Brian Mills Limited
(3) Burlington Warehouses Limited
(4) Janet Frazer Limited
(3) John Moores Home Shopping Service Limited
(6) Littlewoods Warehouses Limited
(7) Peter Craig Limited
(8) Littlewoods Retail Limited **Claimants**

(9) Reality Group Limited
(10) Shop Direct Group
(11) Kay and Company Limited
(12) Abound Limited

- and -

The Commissioners for Her Majesty's Revenue and Customs **Defendants**

Mr David Anderson QC, Mr Laurence Rabinowitz QC, Mr Steven Elliott, Mr Richard Vallat (instructed by Weil, Gotshal & Manges) for the Claimants
Mr Jonathan Swift QC, Mr Andrew Macnab, Mr Peter Mantle, and Mr Imran Afzal (instructed by Solicitors for HM Revenue & Customs) for the Defendants

Hearing dates: 1-2 November 2010

HTML VERSION OF JUDGMENT

Mr Justice Vos:

1. I delivered my preliminary judgment in this matter on 19th May 2010 (the "Judgment") dealing with 5 issues, and directing that 5 questions (arising from issues 2, 3 and 4) be referred to the ECJ. In this judgment, I will use the same abbreviations and defined terms as are contained in the Judgment.

2. After the parties had had time to consider the Judgment in detail, they returned to argue the following points:-

   i) Which of the questions proposed in the Judgment should actually be referred?

   ii) The precise form of the reference.

   iii) Whether there should be an immediate declaration on issue 1, and whether Littlewoods should be granted permission to appeal issue 1.

   iv) Costs.

3. I have dealt with the question of costs in an ex tempore judgment, so I shall not consider it again here. In relation to the other matters, there was more consensus than had originally been supposed, so this judgment can be kept relatively brief.

4. I have settled the form of reference, having heard argument on a number of points from the parties. The reference as settled that will go to the ECJ (the "Reference") is attached to this judgment.

Which of the questions proposed in the Judgment should actually be referred?

5. The Commissioners have always maintained that my draft question 4 was unnecessary. They contend that the appropriate extent of the disapplication of national law restrictions to give effect to the EU law right is a question of national law. Littlewoods, on the other hand, proposed a question for the ECJ during the hearings that led to the Judgment. They then changed their stance after the Judgment and submitted a skeleton argument agreeing with the Commissioners that question 4 was unnecessary. When the hearing was brought on, however, Mr David Anderson QC, leading counsel for Littlewoods, softened his approach. Mr Anderson accepted that he might want to argue in the alternative, if it were held after the reference, or on appeal from the Judgment, that Littlewoods did not have the right, as a matter of English law, to choose which or both of the Woolwich and mistake based claims it could bring, that the EU law principle of effectiveness required the English court to disapply the restriction in sections 78 and 80 of VATA so as to allow Littlewoods to bring any remedy otherwise available to it, including its mistake-based claims.

6. In these circumstances, it seems to me that the reasons I gave for wanting to refer question 4 to the ECJ in paragraphs 93 and 94 of the Judgment hold good, and that question 4 should be referred. I have redrafted question 4 slightly to take account of the detailed submissions of the parties, as shown in the attached reference that I have now settled.

7. The position is different in relation to the draft question 5 concerning the change of position defence that I proposed at paragraph 140 of the Judgment. In relation to that question, based on the factual findings that I made in the Judgment, the parties agreed that a reference was not appropriate at this point, because my factual findings determined that a change of position defence was not available to the Commissioners. My thinking on this issue was set out at paragraphs 138 and 139 of the Judgment. I wanted to refer question 5 because I anticipated that the Commissioners might wish to appeal my factual findings at a later stage in these proceedings, and because the question of the availability of a change of position defence may be relevant to the nature of the EU law right established in answer to questions 1-3. That said, I accept the parties' submissions that the point does not strictly arise at this point, and that there may be a jurisdictional impediment to referring a question upon which the referring court does not need the views of the ECJ before it can decide the issues before it. I have been referred to authority on this point, but do not think I need to deal with it in this judgment. Suffice it to say that, whilst it might, as a matter of good case management, have been beneficial to be able to send all the possible questions that might arise for determination in future to the ECJ at one time, I accept the parties' submissions that this is not appropriate on this occasion, particularly because the parties would be put to considerable expense in preparing arguments on the change of position question, which either may never be relevant, or which the ECJ might decline to entertain. If the point does become relevant at a later stage in the proceedings, it can, of course, always be referred to the ECJ at that stage.

The precise form of the reference

8. As I have said, I have now settled the form of Reference. I shall not spend time in this judgment dealing with each and every minor point of drafting that was argued before me. Perhaps the only major issue that developed was as to whether it should be made clear in the Reference and the questions that Littlewoods' claim was for compound interest. Mr Anderson argued, on this point, that it was not Littlewoods' case that, in every case, there was an EU law right to compound interest, only that EU law required in this case that Littlewoods should recover compound interest as representing the use value of the overpaid tax in the hands of the Member State. It seems to me that the fact that Littlewoods are seeking compound interest in this case should be made clear in both the questions, and, up front, in the Reference, and I have made the appropriate drafting changes to achieve this.

Whether there should be an immediate declaration on issue 1, and whether Littlewoods should be granted permission to appeal issue 1?

9. This issue turned out to be less controversial than it initially appeared. Mr Lawrence Rabinowitz QC argued this point for Littlewoods. He submitted that what his clients really wanted was to ensure that the Court of Appeal hearing the appeal from the Upper Tribunal in the case of John Wilkins (Motor Engineers) Limited v. HMRC [2009] STC 2485 and [2010] STC 2418 could, if it wished, hear argument on an appeal on issue 1 in this case at the same time as it dealt with related issues in the John Wilkins case.

10. It seems to me that there are a number of significant case management disadvantages in allowing an appeal from issue 1 to proceed at the same time as the Reference and before I have reached final conclusions on the remaining issues in this case. Whilst I have indeed reached a final decision on issue 1, I have not reached any final decisions on most of the other issues. The final decisions I reach may be affected by the ECJ's ruling on the Reference. It is possible, for example, that my ruling on issue 1 may become academic in the light of the ECJ's decision on issues 2 and 3 (questions 1-4), because Littlewoods may establish that it has an EU law right to compound interest, and an EU law right to choose to bring its mistake-based claims for compound interest. If that were to happen, an appeal on issue 1 might be rendered unnecessary in this case. There are also, as acknowledged by Littlewoods, multiple timing issues, since it is not yet known whether the procedural part of the appeal in John Wilkins (which has already been determined by the Court of Appeal) will be going to the Supreme Court. If it is, it is unlikely that the substantive appeal in John Wilkins will proceed in the Court of Appeal until after the Supreme Court has ruled. At that stage, it might be touch and go whether, if issue 1 were to be heard with the appeal in John Wilkins in the Court of Appeal, it would be heard before or after conclusion of the Reference, or before or after the resumed hearing of the trial in this case.

11. It seems far preferable to me, on pure trial management grounds, for Littlewoods to be required to wait until all the issues have been decided by this court before pursuing its application for permission to appeal issue 1. I shall, nonetheless, make the declaration that reflects my judgment on issue 1, since that is a final decision, and it will not be affected by the result of the Reference. But I shall adjourn Littlewoods' application for

permission to appeal the declaration made in respect of issue 1 until after judgment in this action.

12. I shall, however, allow the parties liberty to apply on the question of permission to appeal issue 1, notwithstanding the general stay of these proceedings pending the decision of the ECJ on the reference. I allow that liberty so as to permit the Court of Appeal maximum flexibility. Nothing I have said thus far should be construed as wishing to tie the hands of the Court of Appeal if it reaches the conclusion that it would be desirable for it to hear argument on an appeal from my determination of issue 1 alongside the appeal in John Wilkins. In that event, Littlewoods could apply under the liberty that I shall reserve for permission to appeal, and I would re-consider that application in the light of any ruling or indication given by the Court of Appeal at that stage.

Conclusion

13. For the above reasons, I shall make the order and the Reference below.

ORDER FOR REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

UPON these actions being called on for trial

AND UPON HEARING Leading and Junior Counsel for the Claimants and Leading and Junior Counsel for the Defendants

IT IS DECLARED that that Claimants' claims are, as a matter of English law and without reference to EU law, excluded by sections 78 and 80 of the Value Added Tax Act 1994.

IT IS ORDERED

1. that the questions set out in the Schedule to this Order concerning the interpretation of European Union law be referred to the Court of Justice of the European Union for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union;

2. that the Senior Master do, without waiting for time to expire under CPR 68.3(3), transmit to the Register of the Court of Justice of the European Union, in bundles to be supplied by the Claimants' solicitors:

    (a) this Order and the accompanying Schedule

    (b) the statements of case filed by all parties in claims HC08C03780 and HC08C03781;

    (c) the judgment handed down on 19 May 2010; and

(d) a bundle of the relevant national legislation referred to in the Schedule hereto, as currently in force;

3. that the Claimants' application for permission to appeal the aforesaid declaration be adjourned pursuant to CPR 52 PD4.3B until after final judgment in these actions, with liberty to restore, and the period within which the Claimants must file any appellants' notice at the Court of Appeal is extended pursuant to CPR 52.4(2)(a) until further order;

4. that, save as aforesaid, all further proceedings in these claims be stayed until the Court of Justice of the European Union has given its ruling on the said questions or until further order;

5. that the Claimants' application made by Application Notice dated 16th June 2010 for an order that the Defendant should pay the costs of:

   (a) the issue whether the payments alleged to have been made by mistake were indeed so made;

   (b) the issue whether the mistake claims were time barred; and

   (c) the issues whether the Defendants were entitled to defences of change of position and exhaustion of benefits;

   be stood over to be dealt with after final judgment in these actions.

6. that the costs of the hearing of this action incurred up to the date of this order shall be reserved until after final judgment in these actions.

SCHEDULE
REQUEST FOR PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION BY THE HIGH COURT OF ENGLAND AND WALES, CHANCERY DIVISION

INTRODUCTION

1. The High Court of Justice of England and Wales, Chancery Division, ("the High Court") seeks a preliminary ruling from the Court of Justice of the European Union ("the Court of Justice") pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU") on the 4 questions set out below. Those questions concern the requirements of European Union ("EU") law in relation to the refund to a taxable person of overpaid value added tax ("VAT") collected from that person by the Member State contrary to the requirements of EU law, and thus unlawfully, in circumstances where it is not contended that the conditions for state liability for damages for breach of EU law[1] are met.

2. Most importantly, the Court of Justice is asked to provide a ruling on whether the EU law right to repayment where VAT has been overpaid contrary to provisions of EU law that confer directly effective rights includes a right to repayment of the full benefit which the Member State has obtained through the use value of the money

(represented in this case by compound interest), between the dates of payment and repayment (as contended by the Claimants), or whether all questions concerning the payment of interest on that principal sum (including payment of compound interest) remain ancillary questions to be settled by national law, subject only to compliance with the EU law principles of equivalence and effectiveness (as contended by the Defendants).

3. The present case does not concern the repayment of the principal sum overpaid (which has been repaid). The issue in this case only concerns the use value of the sum overpaid and whether the Claimants have an entitlement under EU law to recover more than the simple interest they have received under the relevant national legislation.

QUESTIONS

4. The High Court seeks the preliminary ruling of the Court of Justice on the following questions.

Question 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 Value Added Tax Act 1994?

Question 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?

Question 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?

Question 4:

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 sections 78 and 80 of the Value Added Tax Act 1994) 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's answer to the first 3 questions, or can the principle of effectiveness be satisfied if the national court disapplies such restrictions only in respect of one of these domestic claims or remedies?

What other principles should guide the national court in giving effect to this EU law right so as to accord with the EU law principle of effectiveness?

THE PARTIES

5. The Claimants are all currently members of the Littlewoods corporate group. Each Claimant was a taxable person, either (1) registered for VAT as a member of a VAT group[2] and/or (2) registered for VAT under an individual VAT registration and/or (3) the assignee of the rights of an individual VAT registered person or representative member of a VAT group. The Claimants either paid VAT to the Defendants or have the benefit of the rights of those who did so. The Claimants are referred to collectively as "Littlewoods".

6. The Defendants (and their predecessors, the Commissioners of Customs and Excise) were at all material times, and remain, responsible for the collection and management of VAT in the United Kingdom. The Defendants are referred to as "the Commissioners".

RELEVANT FACTS

7. Since the introduction of VAT in the UK in 1973, all the Claimants (except the holding company, Littlewoods Limited) have, at one time or another, carried on catalogue-based home shopping businesses. Those businesses involved Littlewoods distributing catalogues and selling the goods shown in those catalogues through networks of persons known as "agents". The agents earned commission on sales made by or through them ("third party purchases"), which commission might be taken in cash, applied in respect of past purchases made by the agents themselves or (at an enhanced rate) applied towards future purchases.

8. From 1973 until October 2004, commission on third party purchases was mistakenly treated as consideration for services provided by the agent to Littlewoods. It should properly have been treated (as a matter of both EU and national law) as a discount against the consideration for past purchases (if taken in cash or applied in respect of those purchases) or future purchases (if applied at the enhanced rate towards future purchases). Littlewoods therefore overpaid VAT in respect of certain supplies because the taxable amount of goods supplied by it was mistakenly taken to be greater than it was.

9. The sums overpaid were not lawfully due as VAT pursuant to the requirements of Article 8 and Annex A(13) of the Second Directive 67/228/EEC (in respect of periods before 1978) and Articles 11A(3)(b) and 11C(1) of the Sixth Directive (from 1978), and the Commissioners collected VAT from Littlewoods in breach of the directly effective rights conferred on Littlewoods by those provisions.

10. Littlewoods submitted claims to the Commissioners for repayment of the overpaid VAT. Since October 2004, the Commissioners have repaid overpaid VAT of some £204,774,763 to Littlewoods. The repayments of principal have been made pursuant to section 80 of the Value Added Tax Act 1994 ("VATA 1994").

11. The Commissioners have also paid interest of £268,159,135 on these principal sums. The interest was paid in accordance with the provisions of section 78 of VATA 1994, which identifies both the period in respect of which interest is payable, and the rate of interest. Section 78 provides for the payment of simple interest.

PROVISIONS OF NATIONAL LAW

12. VATA 1994 contains national legislative provisions relating to the administration, collection and enforcement of VAT and for appeals to a specialist tribunal. The statutory scheme includes provision for assessments by the Commissioners to recover VAT which is due, but has not been paid by a taxable person, for taxable persons to recover sums paid by way of VAT which are not due and for interest on sums due from taxable persons to the Commissioners and on sums due from the Commissioners to taxable persons.

13. If a taxable person overpays VAT, section 80 of VATA 1994 enables the taxable person to make a claim to the Commissioners to recover the amount overpaid. So far as material, section 80 of VATA 1994 provides as follows.

> *"80 Credit for, or repayment of, overstated or overpaid VAT*
>
> *(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*
>
> *(…)*
>
> *(1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of-*
>
> *(a) an amount that was not output tax due being brought into account as output tax, or*
>
> *…*
>
> *the Commissioners shall be liable to repay to that person the amount so paid.*
>
> *(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose. …*
>
> *(2A) Where—*
>
> *(a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and*
>
> *(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,*
>
> *the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.*
>
> *(…)*

(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".

14. Where a claim under section 80 of VATA 1994 is successful, the taxable person may also be entitled to interest on the sum overpaid calculated in accordance with the provisions of section 78 of VATA 1994. Section 78 provides as follows.

> "*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*
>
> *(b) failed to claim credit under section 25 for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him, or*
>
> *(c) (otherwise than in a case falling within paragraph (a) or (b) above) paid them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, or*
>
> *(d) suffered delay in receiving payment of an amount due to him from them in connection with VAT,*
>
> *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 . . .*"

15. Interest under section 78 of VATA 1994 is computed by reference to section 197 of the Finance Act 1996 and the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998, SI 1998 No. 1461. The broad effect of the provisions is that, since 1998, for the purposes of section 78, rates are fixed by a formula referable to the average base lending rates of six clearing banks, which is called the "reference rate". For periods between 1973 and 1998, the rates are specified in Table 7 to the 1998 Regulations. The interest rate applicable under section 78 is the reference rate minus 1%. Section 78 defines the "applicable period" for which interest is payable. In the circumstances of the main proceedings it begins with the date on which the Commissioners received the overpayment and ends on the date on which the Commissioners authorise payment of the amount on which interest is payable. It is common ground for the purposes of these proceedings that (a) interest under section 78 is to be calculated on a simple basis and (b) section 78 cannot be construed as providing for compound interest .

PROVISIONS OF EU LAW WHICH THE COURT OF JUSTICE IS REQUESTED TO INTERPRET

16. The Court of Justice is asked to provide a ruling on whether EU law gives a taxable person a directly effective EU law right to payment of compound interest where VAT

has been overpaid contrary to Article 8 and Annex A(13) of the Second VAT Directive or Articles 11A(3)(b) and 11C(1) of the Sixth VAT Directive.

17. As stated above, the present case does not concern the right to reclaim the sum that has been overpaid. The issue in this case only concerns the use value of the sum overpaid and whether Littlewoods has an entitlement under EU law to recover more than the simple interest it has received under the relevant national legislation. This issue arises in the context of the EU law provisions contrary to which VAT was overpaid, with reference to the Court of Justice's case law on reimbursement of charges levied in breach of the requirements of EU law and the principles of equivalence and effectiveness.

THE NATIONAL PROCEEDINGS

18. It is common ground that:

(a) Between 1973 and October 2004 the Commissioners collected VAT in breach of EU (and national) law.

(b) Littlewoods therefore had a right to repayment of that overpaid VAT as a matter of EU (and national) law, these amounts having now been paid as set out above.

(c) Littlewoods has also been paid simple interest pursuant to and calculated in accordance with the relevant national statutory provisions (set out above).

(d) The conditions for State liability for damages for breach of EU law are not met.

19. In the claims presently before the High Court, Littlewoods claim further sums amounting to some £1 billion in aggregate. Those sums are said by Littlewoods to be the benefit the United Kingdom received through the use of the principal amounts of tax overpaid. They are said by Littlewoods to be calculated by reference to the compounded rates of interest applicable to United Kingdom government borrowing from time to time over the period in question. The figure claimed makes allowance for the simple interest that has already been paid. The referring court has yet to rule on the quantification of the claim.

20. In the national proceedings Littlewoods rely on two national law causes of action.

(a) The first is a claim for restitution of tax unlawfully collected. This cause of action is commonly referred to as the "Woolwich claim".

(b) The second claim is for restitution of money paid pursuant to a mistake of law (the "mistake-based claim").

21. For the purposes of the domestic law causes of action it is common ground–

(a) that the limitation period applicable to a Woolwich claim is 6 years, running from the date on which the tax was overpaid;

(b) the limitation period for any mistake-based restitutionary claim is 6 years running from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it; and

(c) that those domestic law limitation periods conform with the requirements of EU law.

22. The trial of all issues of liability took place between 20 and 26 April 2010. On 19 May 2010, the High Court handed down judgment ("the Judgment").[3]

23. The High Court decided that as a matter of national law, and without reference to EU law, each of the causes of action relied upon by Littlewoods was unavailable to it (see Judgment ¶62). The Court concluded that as a matter of national law: (a) overpaid VAT could be recovered only by way of a claim under section 80 VATA 1994 (set out above); (b) the only basis on which Littlewoods could recover interest was under section 78 VATA 1994 and (c) the claims made by Littlewoods were therefore, as a matter of national law, and without reference to EU law, excluded by sections 78 and 80 VATA 1994.

24. The High Court identified several further issues including the following:

(a) Was the exclusion of the claims by sections 78 and 80 of VATA 1994 contrary to EU law? Questions 1 to 3 above relate to this issue.

(b) If so, could sections 78 and 80 of VATA 1994 be interpreted so as to conform with EU law (and if so, how), or did they have to be disapplied so as to allow either (a) only the Woolwich claims, or (b) both the Woolwich claims and the mistake-based claims? Question 4 above relates to this issue.

(c) Were the Commissioners entitled in principle as a matter of national law and of EU law to deploy a 'change of position' defence and/or an 'exhaustion of benefits' defence to (a) the Woolwich claims and/or (b) the mistake-based claims? If so, were these defences made out in fact and to what extent? The High Court originally considered that a question should be referred on this issue, but the parties submitted that such a question should not be referred at this stage of the proceedings, and the High Court accepted that the proposed question was academic at this point.

SUMMARY OF RELEVANT CONTENTIONS OF THE PARTIES

Littlewoods' Contentions

Questions 1 to 3

25. Littlewoods contend that the right to repayment of overpaid VAT that arises as a matter of EU law includes not only the principal amount of tax unlawfully levied but also the full use value of that amount over the period between payment and repayment (i.e. interest). This is an adjunct to the EU law right only to pay VAT in accordance with the relevant directive. Full restitution, including restitution of the full use value of the money overpaid, is required to protect that right.

26. This follows from the principles applied by the Court of Justice in Joined Cases C-397/98 and C-410/98 Metallgesellschaft v Commissioners of Inland Revenue [2001] ECR I-1727 ("Metallgesellschaft") at ¶¶87-88 (and the Advocate General's opinion at ¶45); Case C-446/04 Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue [2006] ECR I-11753 ("FII") at ¶205 (and the Advocate General's opinion at ¶¶ 125-139 and ¶132 in particular); and in Case C-524/04 Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue [2007] ECR I-2107 at ¶112 (and the Advocate General's Opinion at ¶107).

27. In particular, the use value of the principal amount in question is an enrichment accruing to the Member State in question. In practice this is the opportunity of the Member State to use the money in reduction of its borrowing costs. Restitution of the full amount of this enrichment is necessary if the status quo is to be restored and the claimant's EU rights protected. Otherwise Member States would retain financial advantages resulting from violations of EU law. See Case T-171/99 Corus UK v Commission [2001] ECR II-02967 at ¶¶55-56 (see also ¶64), and Case T-459/93 Siemens v Commission [1995] ECR II-1675 at ¶¶97-102.

28. If repayment were only made of the nominal amount unlawfully levied, then the real value of the repayment would be less than the real value of the original payment by reason of the effluxion of time. See Case C-271/91 Marshall v Southampton and South-West Hampshire Area Health Authority [1993] ECR I-04367 at ¶31. That case involved a claim seeking compensation for losses suffered by the claimant. The principle in Marshall applies a fortiori in the present case because it also involves the reversal of financial advantages unlawfully obtained by the defendant.

29. No principled distinction can be drawn (as the Commissioners seek to do) between a case such as Metallgesellschaft in which tax is levied prematurely in breach of EU law and a case such as the present in which tax is levied when not due at all. Specifically:

    (a) As in Metallgesellschaft (at ¶87), the recovery sought by the Littlewoods claimants of a sum representing the use value of the amounts unlawfully levied is the very objective of their actions and the only relief claimed. Full reimbursement, including amounts representing the use value of which the United Kingdom has benefitted, is essential to restoring the status quo.

    (b) In Metallgesellschaft the deprivation was merely temporary in that the only breach was in requiring that amounts which would eventually fall due be paid early. In the present case the deprivation was absolute rather than merely temporary in that the amounts were never due at all. The entitlement of Littlewoods to full reimbursement is, if anything, greater.

    (c) That Metallgesellschaft involved an infringement of article 52 of the EC Treaty (now article 49 of the TFEU) is a distinction without a difference.

30. Simple interest is an artificial and necessarily depressed measure of the value of the use of money over time. Borrowing and lending in the marketplace, including borrowing by the United Kingdom government, is almost invariably at compound rates of interest or rates calculated to reflect the effect of compounding. Accordingly,

the true value of the use of money is in most cases (including the present case) measured by reference to a compound rate of interest.

31. This has been recognised in the national courts. The English House of Lords has recently recognised that simple interest necessarily under-compensates a claimant or falls short of the true value of the enrichment a state may have received, and that only compound interest "reflects economic reality". See Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners [2007] UKHL 34 at ¶41 (Lord Hope), ¶52, ¶112 (Lord Nicholls), ¶183 (Lord Walker).

32. This has also been recognised in the Commission's communication on the calculation of interest when aid granted unlawfully is being recovered: "... the use of compound interest appears necessary to ensure that the financial advantages resulting from this situation are fully neutralised." See 2003/C 110/08. This is said to be "in accordance with general financial practice" in paragraph 14 of the preamble to Commission Regulation (EC) 794/2004 of 21 April 2004.

33. The quantification of the benefit which the Member State has had through use of the principal sum is an ancillary matter for the national court to determine in accordance with its procedures, but any national rules applied may not render ineffective the claimants' rights under EU law. A partial remedy would be an ineffective remedy. A national rule which imposes an arbitrary cap preventing the national court from awarding a sum which fully neutralises the Member State's benefit, and which therefore restores the status quo, would be contrary to EU law.

34. It follows that a provision of national law such as section 78 of the VATA 1994 contravenes the EU principle of effectiveness insofar as it provides that upon the repayment of principal amounts of overpaid VAT, the claimant should receive only simple interest at specified rates where this may represent less than the true value of the use of which the Member State has had the benefit. It should be disapplied so that the referring court is free to quantify and award the full extent of the benefit the United Kingdom has gained through the infringement of Littlewoods' EU rights.

Question 4

35. To the extent that this is a matter of EU law, Littlewoods consider that the answer to the question is clear as a matter of the settled jurisprudence of the Court of Justice: the identification of the claim in vindication of the EU law right is a matter for the claimant, subject to the supervision of the national court: see Metallgesellschaft at ¶81.

The Commissioners' Contentions

Questions 1 to 3

36. The Commissioners contend that the High Court's provisional conclusions on the issues raised by questions 1 to 3 are correct (see ¶¶63-71 of the Judgment and see paragraphs 50-57 below).

37. The issues raised by questions 1 to 3 are addressed by well-established principles of EU law (see, Metallgesellschaft ¶¶84-86, above).

38. First, as a matter of EU law, a taxable person has a right to recover amounts of overpaid VAT collected by a Member State in breach of the rules of a directly effective EU law right. That right to a refund of VAT levied or collected by a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by the directly effective EU provisions which were breached. See Metallgesellschaft ¶84 and cases cited.

39. Second, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. These matters are not governed by EU law rules save (a) that such rules are not less favourable than those governing similar national actions (principle of equivalence); and (b) that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). See Metallgesellschaft ¶85.

40. Third, all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated, are matters for the law of the Member State. See Metallgesellschaft ¶86.

41. The judgment in Metallgesellschaft does not depart from the above well-established approach to cases in which a tax, such as VAT, has been wrongly levied or collected contrary to a provision or requirement of EU law (such as article 11 of the Sixth Directive, defining the taxable amount for the purposes of the tax).

42. The requirement of EU law identified in Metallgesellschaft at ¶87 is a specific response to circumstances where the breach of EU law comprises a requirement to pay tax prematurely (on the facts of that case, contrary to Article 52 of the Treaty). In such circumstances, a requirement merely that the tax is repaid would not serve to remedy the breach of EU law. Repayment, if claimed and made before the proper date, would only serve to bring the breach of EU law to an end. It would not afford a remedy for the breach of EU law (since on the proper date, the sum paid prematurely will, lawfully, be due for payment). Thus cases where the breach of EU law is the premature payment are fundamentally different from ones where the breach of EU law is overpayment.

43. There is nothing in the subsequent case law of the Court of Justice, (for example, its judgment in FII) that indicates any wider application of the specific response required in the circumstances of a case such as Metallgesellschaft. In fact, the position is to the contrary: see, for example, Case C-197/03 Commission v Italian Republic (judgment of 11 May 2006) at §43, approving statements made by the Court of Justice in its judgment in Joined Cases C-279/96, C-280/96 and C-281/96 Ansaldo Energia SpA v Marine Insurance Consultants Srl [1998] ECR I-5025 at §§29 – 30.

44. Thus, in circumstances such as those of the present case where the breach of directly effective EU law consists of an overpayment of VAT, repayment of the principal sum

that has been overpaid is the remedy required by EU law. The rules concerning the payment of interest, the period in respect of which interest is payable, the rate of interest and whether interest payable is simple interest or compound interest are ancillary matters. They are governed by national law, subject to the application of the EU law principles of equivalence and effectiveness. Under English law, section 78 VATA provides for interest on those principal sums.

45. Any conclusion that the rules concerning the payment of interest, the period in respect of which interest is payable, the rate of interest and whether interest payable is simple interest or compound interest fell within the scope of EU competence would represent a significant re-balancing of the respective competencies of EU law and the law of Member States. On these matters, the role played by EU law is properly defined by the principles of effectiveness and equivalence. In the present case, it is common ground that no equivalence issue arises. As to the principle of effectiveness, all that is required is that, overall, the law of the Member State provides an effective remedy for the EU law right to recover VAT overpaid contrary to the requirements of EU law. Thus Member States may ensure compliance with the principle of effectiveness by balancing a range of factors, e.g. rates of interest and the length of limitation periods.

46. The Commissioners' submission on the facts of the present case may be summarised as follows.

    (1) Section 80 of VATA 1994, which requires repayment of overpaid VAT, effectively addresses the breach of EU law which has occurred.

    (2) Whether interest is to be paid on the overpaid VAT, and if so in respect of what period, at what rate, and on what basis, is a matter for English law subject to the principles of effectiveness and equivalence.

    (3) On the facts of the present case it is common ground that the applicable provisions of English law satisfy the principle of equivalence.

    (4) The simple interest that is payable under section 78 of VATA 1994 complies with the principle of effectiveness.

47. The correctness of the conclusion above is underscored if the full extent of the remedy available under sections 80 and 78 of VATA 1994 is considered. The sole criterion for repayment under section 80 is that the amount in question was not in fact due to the Commissioners as VAT. There is no requirement that the amount should have been paid by mistake, nor is there any exclusion for voluntary payments, or for payments made under a mistake of law. At present, a claim to recover overpaid VAT can be made up to 4 years after the payment has been made. (In the present case, Littlewoods was able to make claims to recover overpaid VAT going back to 1973. This was the consequence of the judgment of the Court of Justice in Case C-62/00 Marks & Spencer plc v Commissioners of Customs & Excise [2002] ECR I-6325.) The rate of interest prescribed for claims under section 78 is significant (see paragraph 15 above). As is demonstrated by the interest payments actually made in the present case (see paragraph 11 above), interest at the rates required under section 78 VATA provides a valuable remedy for the taxable person.

48. Moreover, the same conclusion is also consistent with balance struck in English law between the obligations of the Commissioners when VAT is overpaid, and the obligations of the taxable person when VAT is not paid on time. If a taxable person delays paying VAT that is due, the taxable person is only required to pay simple interest on the sum that is paid late (between the date payment was due, and the date payment was actually received by the Commissioners).

Question 4

49. The Commissioners submission is that a ruling of the Court of Justice is not necessary on this question. The means by which EU law rights are given effect to in national law is a matter of national law provided that there is compliance with the principles of effectiveness and equivalence. In the present case it is not disputed that each of the causes of action that exist within national law satisfies the principles of effectiveness and equivalence. In these circumstances no question of EU law arises, and the matter is one to be determined by the national court.

50. The judgment of the Court in Metallgesellschaft is not (as suggested by Littlewoods) authority for the proposition that "the identification of the claim in vindication of the EU law right is a matter for the claimant, subject to the supervision of the national court". The material parts of the judgment in Metallgesellschaft are ¶¶81 and 85. These go no further than stating that it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, subject to the principles of equivalence and effectiveness, and that it is not for the Court of Justice to assign a legal classification to claims brought by the claimants before national courts.

51. The only applicable principle of EU law is the principle that where a party is able to invoke a directly effective EU law right, the conflicting national provision is to be disapplied to the extent necessary to give an effective remedy to safeguard that party's enforceable EU law right, but no further: see Joined Cases C 10/97 to C 22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl* [1998] ECR I 6307, ¶¶ 18-21; Case 264/96 *ICI v Colmer (Inspector of Taxes)* [1998] ECR I-4695, ¶34. On the facts of the present case, there is no doubt that the availability of the *Woolwich* cause of action meets this principle.

THE VIEW OF THE REFERRING COURT (AND OTHER NATIONAL COURTS) ON THE QUESTIONS REFERRED

Questions 1 to 3

52. The High Court's provisional conclusions on these questions are set out in ¶¶63-71 of the Judgment. In short, its provisional conclusion is that EU law does not give a taxable person a right to payment of compound interest representing the use value of the money in cases where VAT has been overpaid contrary to EU law (¶¶64-67).

53. The case-law reveals a basic difference of opinion on whether or not the principle derived from the Court of Justice's judgment in Case 199/82 San Giorgio [1983] ECR

requires that Member States should not profit from the receipt of improperly levied tax, and thus that national courts must allow recovery of compound interest. (¶64)

54. The answer depends on whether the Court of Justice intended in Metallgesellshaft and/or in FII to limit what it said to cases where the interest on the improperly levied tax was, in effect, the principal claim. (¶65)

55. There may be a basis for distinguishing between claims for interest on prematurely-levied tax (such as Metallgesellshaft and FII) and on overpaid tax (such as the present case) if the governing principles are: first, that taxes shall be levied only in accordance with EU law; secondly, that, when they are levied in breach of EU law, they must be reimbursed; thirdly, that all questions affecting the payment of interest are indeed matters for national law; and fourth, that the principle of effectiveness requires that national law shall not render practically impossible or excessively difficult the exercise of EU law rights (¶66).

56. The third of these principles in particular suggests that the principle in Metallgesellshaft and/or in FII is indeed limited. If it were required, in all cases, that reimbursement of improperly levied taxes must include the use value of the money (including compound interest), there would be no questions relating to interest for the national court to determine. (¶67)

57. More generally, such a requirement would be contrary both to the principle that all ancillary questions, beyond repayment itself, are for national law to settle (see Case 26/74 Société Roquette Frères v. Commission [1976] ECR 677 at ¶¶11-12, Case 130/79 Express Dairy Foods Ltd v. Intervention Board for Agricultural Produce [1980] ECR 1887 at ¶¶16-17 and Metallgesellschaft at ¶86) and to the principle that "it is not for the [Court of Justice] to assign a legal classification to the actions brought by the national courts." (Metallgesellschaft ¶81.) (¶67)

58. The logical difficulty inherent in distinguishing claims for interest on prematurely-levied tax and on overpaid tax may be overcome if the repayment of the use value of the former is held itself to be the reimbursement. This seems to be the way it was viewed at ¶87 of Metallgesellschaft, where it was described as "the very objective sought by the claimants' actions." (¶68)

59. The same issue has previously been considered by the High Court and by the Court of Appeal in FJ Chalke Ltd v HMRC. The High Court there concluded that, in light of the Court of Justice's judgment in FII, the EU law right extended to requiring payment of compound interest (¶¶108 and 255(2)); the Court of Appeal held that the question was finely balanced and, in its view, unclear as a matter of EU law (¶¶40-41). Each court held that the claims in that case were time-barred, however, so that an answer to the question was not necessary for determination of those claims. In consequence no reference was made to the Court of Justice in that case for a preliminary ruling on the issue. The Court of Appeal observed (at ¶41) that the question should be referred when the proper opportunity arose.

Question 4

60. The High Court's provisional conclusion on question 4 is set out in ¶¶77 to 95 of the Judgment. This is that if there were an EU law right to compound interest that required the disapplication of the exclusion in sections 78 and 80 VATA 1994, then national law would provide an effective remedy for that right if it permitted a Woolwich claim to be pursued (¶92). The High Court considers that EU law does not require domestic law to make available multiple causes of action to vindicate an EU law right, certainly where disapplication of a national rule is required to do so (¶86). The principle applicable is that the national court is required to give effect to the EU law right (as defined by the Court of Justice) and not to render it practically impossible or excessively difficult for the taxable person to exercise the right (¶88).

61. The High Court's provisional conclusion is that the nature of the available national causes of action is relevant in deciding what national law must permit. A cause of action most naturally and comprehensively giving effect to the EU law right in question must be preferable to one that will only vindicate the right in limited circumstances (¶88). In the present case the Woolwich cause of action would most naturally and comprehensively give effect to the putative EU law right, since it would be available in all cases of unlawfully collected tax, whereas mistake-based restitutionary claims would not, due to the essential requirement of a mistake (¶90).

62. The High Court's provisional conclusion is that the fact that different limitation periods are applicable to the causes of action is irrelevant since both limitation periods comply with the requirements of EU law (¶¶90-92).

Note 1 Namely the conditions established in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany* and *R v Secretary of State for Transport ex parte Factortame Ltd (No 4)* [1996] ECR I-1029. [Back]

Note 2 Pursuant to the powers conferred by Directive 67/228/EEC, Article 4, Annexe A; Directive 77/388, Article 4(4); Directive 2006/112/EC, Article 11. [Back]

Note 3 The official transcript of the Judgment is available online [2010] EWHC 1071 (Ch) [Back]