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Case No: HC08C03781

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

19/05/2010

B e f o r e :

MR JUSTICE VOS

Between:

Littlewoods Retail Limited
Shop Direct Home Shopping Limited (formerly Littlewoods Shop Direct Home Shopping Limited)
Reality Group Limited
Shop Direct Group (formerly Shop Direct Group Limited)
Shop Direct Limited **Claimants**

- and -

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

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: 20-23, and 26 April 2010

HTML VERSION OF JUDGMENT

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Mr Justice Vos:

Introduction

1. **In these two claims, a total of 15 claimants within the Littlewoods group of companies (together "Littlewoods") claim compound interest amounting to some £1 billion on overpayments of VAT made over more than 30 years between 1973 and 20th October 2004.**

2. **In this period, Littlewoods overpaid a total of some £241,001,426. The Commissioners for Her Majesty's Revenue and Customs (the "Commissioners") have already repaid some £204,774,763, although the balance of some £36,226,663 remains outstanding and is the subject of ongoing appeals to the First-tier Tribunal (the "Tribunal"). The repayments of principal have been made pursuant to section 80 of the Value Added Tax Act 1994 ("VATA 1994"). The Commissioners have also repaid simple interest of £268,159,135 on these principal sums at the statutory rates prescribed by section 78 of VATA 1994.**

3. **Littlewoods advance their claims to what they plead as the "*time value of the sums enjoyed by the Commissioners*", by way of compound interest, on two bases recently recognised by English law. First, they seek restitution on the principle enunciated by the House of Lords in Woolwich Equitable Building Society v. IRC [1993] AC 70 ("Woolwich"). Secondly, they seek restitution grounded on a mistake of law on the principle established by the House of Lords in Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349 ("Kleinwort Benson").**

4. **On 28th April 2009, Chief Master Weingarten directed that there should be a trial of "*all issues of liability in advance of and separately from all issues of quantum (including any related or associated issues of causation)*". On the same date, the claims in these proceedings that are the subject of the appeals to the Tribunal were stayed pending its decision. I need say no more about the quite separate issues that will arise before the Tribunal. This is the trial of the issues of liability directed to be tried by the Chief Master.**

5. **The parties have agreed that, if I were to decide that sections 78 and 80 of VATA 1994, as a matter of English law, provided a regime for the repayment of overpaid VAT and for the payment of interest on such overpayments, which**

excluded common law and equitable claims for compound interest (as Henderson J decided in F.J. Chalke Ltd. v. Revenue and Customs Commissioners [2009] STC 2027 ("Chalke Chancery") at paragraphs 57-75), I should refer certain questions of European Union ("EU") law that would then arise to the Court of Justice of the European Union (which I shall refer to by the commonly used abbreviation "ECJ").

6. **As will appear, I have decided that there should indeed be a reference to the ECJ. But I have nonetheless formed the view that I should decide the issues of liability that I can decide at this stage, and give my preliminary views, subject to the outcome of that reference, on those that I cannot yet decide. The parties have not, however, been able to agree the precise terms of the reference that I should make, so I will need to consider those terms in the course of this judgment. As will become apparent, whatever views as to EU law the ECJ expresses, the matter will have to return to this Court for final decisions to be reached in the light of the ECJ's ruling. In these circumstances, the trial of liability issues should not be regarded as having been in any way concluded by this judgment. It will only be so concluded when the parties have advanced whatever submissions are appropriate at that stage, and this Court has had the opportunity to consider the ECJ's ruling. As matters stand now, it seems to me that it may well be appropriate for any quantum issues that arise to be heard at the same time as the conclusion of this Court's trial of the liability issues, but that can be decided at a directions hearing once the ECJ's ruling is to hand.**

7. **The issues that need to be determined in this case have been the subject of an extraordinary number of recent decisions by courts and tribunals at all levels in recent years. In deciding this case, I have sought to avoid going over old ground or muddying already muddied waters. Instead, I have tried, wherever possible, to rely upon the formidable legal analysis that has already been undertaken, and only to add to it or depart from it where necessary for the decision of specific issues before me.**

The issues

8. **I invited the parties at an early stage to agree a list of issues that required to be decided, but they never quite succeeded in doing so. I take the view, however, that the following main issues arise for decision:-**

    i) Issue 1: Are the Woolwich claims and/or the mistake-based claims, as a matter of English law, and without reference to EU law, excluded by sections 78 and 80 of VATA 1994?

    ii) Issue 2: If the Woolwich claims and/or the mistake-based claims are excluded by sections 78 and 80 of VATA 1994, is that exclusion contrary to EU law?

    iii) Issue 3: If issue 2 is answered in the affirmative, 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 dis-applied so as to allow either (a) only the

Woolwich claims, or (b) both the Woolwich claims and the mistake-based claims?

iv) Issue 4: Is HMRC entitled to deploy a 'change of position' and/or an 'exhaustion of benefits' defence to (a) the Woolwich claims and/or (b) the mistake-based claims? If so, are these defences made out in fact and to what extent?

v) Issue 5: In principle, is the measure of recovery for the Woolwich claims and/or the mistake-based claims to be measured by reference to (a) a conventional rate of interest compounded, or (b) the actual benefit enjoyed by the Commissioners, or (c) a compound rate of interest reflecting the cost of national government borrowing, or in some other way? And is the measure limited to the lower of the value of (a) the use of which the Claimants have been deprived and (b) the value of the use which the Commissioners received?

9. **Before, however, dealing with these issues, I should consider, first, the factual and legal background to Littlewoods' claims, and secondly, the relevant provisions of VATA 1994, and thirdly, in chronological order, the recent decisions, to which I have already referred.**

Factual and legal background

10. **The Littlewoods group acquired Reality Group Limited, Shop Direct Group, Kay and Company Limited and Abound Limited (the "Legacy GUS Claimants") from GUS plc in May 2003.**

11. **On 11th April 1967, the Second Council Directive (67/228/EEC) provided that member states should introduce a common system of taxation on goods and services called value added tax. On 1st January 1978, the Sixth Council Directive (77/388/EEC) dated 17th May 1977 replaced the Second Council Directive as the relevant instrument concerning VAT. The detailed terms of these directives are not relevant to the issues which I have to decide.**

12. **VAT was introduced in the UK upon its accession to the European Economic Community by the Finance Act 1972. The current consolidating enactment relating to VAT is VATA 1994, and the parties have referred to the latest version of that legislation in relation to the issues that arise in these proceedings. I shall set out the most important provisions of VATA 1994 in due course.**

13. **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, involving sales being made through networks of agents. In relation to such sales, the agents earn commission, which is credited to a commission account, on (a) third party purchases and (b) purchases made by the agents for themselves ("Agents' Own Purchases"). The rate of commission, however, varied depending on whether it was taken in cash or in kind (i.e. by purchasing further goods from a Littlewoods group company). The commission was:-**

i) 10%, if paid in cash or (after 1st April 1991) by reducing the outstanding balance on the agent's trading account.

ii) 12.5%, if applied towards the purchase of further goods.

14. **The commissions (of 10% if taken in cash, or 12.5% if taken in yet further goods) earned in respect of Agents' Own Purchases have always been treated, for VAT purposes, as a discount from the price of goods rather than as consideration for services.**

15. **The commissions on third party purchases (of 10% if taken in cash, or 12.5% if taken in goods) were, until 2004, treated differently for VAT purposes:-**

    i) The 10% element (i.e. the whole of the commission if taken in cash, or 80% of the commission if taken in goods) was treated as consideration for services provided by the agent to the Littlewoods company, so that (a) where the commission was taken in cash, the commission did not reduce the taxable amount of the supply made by the Littlewoods company and (b) where the commission was taken in goods, the Littlewoods company accounted for VAT on that supply of further goods as if the 10% element were a cash payment towards the price of the goods.

    ii) Until 1997, where the commission was taken in goods, the 2.5% element (i.e. the balance of 20% of the commission) was treated as a discount from the price of those further goods, so that the Littlewoods company did not account for VAT on that element.

    iii) Between 1997 and 26th October 2001, the Commissioners tried to change the treatment of the 2.5% element so as to recover VAT upon it. Ultimately, however, on 26th October 2001, the Court of Appeal decided that VAT was not payable on it.

16. **The Commissioners admit that, until 20th October 2004, they adopted the public position (which they now accept to have been wrong) that the 10% element of commission in respect of third party purchases was properly to be characterised as consideration for services provided by the agent, so that the Littlewoods companies were obliged to account for VAT upon it in the way that I have described.**

17. **It is now also common ground that Littlewoods' payments of VAT on the 10% element of commissions paid on third party purchases were made under a mistake of law. The 10% element (i.e. the whole of the commission if taken in cash, or 80% of the commission if taken in goods) should have been taken as a discount on the value of the goods supplied so that (a) where the commission was taken in cash, the commission should have reduced the taxable amount of the supply made by the Littlewoods company and (b) where the commission was taken in goods, the Littlewoods company should have accounted for VAT as if the 10% element was a discount on the price of the goods. The 10% element was, therefore, over many years wrongly treated as consideration for services provided by the agent to the Littlewoods company, and Littlewoods overpaid**

VAT in respect of that 10% element until 20th October 2004, when the Commissioners changed their public position on the point.

18. **The manner in which the Commissioners came to the realisation that their public position had been wrong is not of great relevance to this case. In the broadest outline, however, the most relevant events can be summarised as follows:-**

    i) On 16th May 1997, the Commissioners wrote to Littlewoods Limited saying that it should account for supplies on the basis of the catalogue selling price without deducting the 2.5% element that agents received when they applied their commission to the purchase of further goods.

    ii) On 19th October 1999, Littlewoods Limited's appeal against an assessment for VAT on the 2.5% element was allowed by the VAT and Duties Tribunal.

    iii) On 20th June 2000, Lightman J reversed the VAT and Duties Tribunal's decision, holding that VAT was payable on the 2.5% element.

    iv) On 26th October 2001, the Court of Appeal (Chadwick LJ delivering the judgment of the Court) allowed the appeal against Lightman J's decision, reinstating the decision of the VAT and Duties Tribunal to the effect that VAT was not payable on the 2.5% element.

    v) On 22nd January 2002, Littlewoods' representatives met the Commissioners' representatives and suggested (on the basis of Chadwick LJ's decision) that Littlewoods was entitled to seek repayment of VAT overpaid in relation to the 10% element.

    vi) On 24th January 2002, the lawfulness of the three-year limitation period in relation to the recovery of overpayments of VAT under section 80 of VATA 1994 was called into question by the opinion of the Advocate General in Marks & Spencer plc v. Customs and Excise Commissioners [2003] QB 866 at page 869, and by the ECJ at page 890 ("Marks & Spencer").

    vii) On 5th February 2002, Littlewoods claimed repayments of VAT for the three year period from 1999 to 2001 under section 80 of VATA 1994.

    viii) On 18th February 2002, the Commissioners informed Littlewoods Limited that Chadwick LJ's decision "*should not be extended to circumstances which were beyond the boundaries of the original appeal*", meaning the 10% element.

    ix) On 19th March 2002, Littlewoods Limited appealed against the Commissioners' decision to the VAT and Duties Tribunal.

    x) On 25th June 2002, Littlewoods claimed repayment of VAT for the period of more than 25 years between 1973 to 1999 (mainly in respect of

the years prior to the 3 year limitation period), relying on the decision of the ECJ in Marks & Spencer.

xi) On 27th May 2003, Littlewoods group agreed to acquire the Legacy GUS Claimants.

xii) On 24th June 2003, Littlewoods claimed repayment of VAT for the GUS Legacy Claimants for the period from 1973 to 2001.

xiii) On 20th October 2004, the Commissioners wrote to Littlewoods' solicitors saying they were withdrawing their decision to reject the 5th February 2002 repayment claim in respect of the 10% element. This withdrawal was two weeks before the hearing of the appeal. It finally resolved the question of whether or not VAT was properly payable on the 10% element. From 20th October 2004 onwards, Littlewoods have accounted for VAT on the correct basis, namely by treating the 10% element of commission on third party purchases as a discount on goods supplied.

19. **On 13th March 2007, the claim form in what became Case No. HC08C03780 (the "First Action") was issued, and on 5th October 2007, the claim form in what became Case No. HC08C03781 (the "Second Action") was issued.**

20. **On 6th May 2008, the three companies that were at various stages the representative members of the GUS VAT Group numbered 145 8990 25 assigned their claims by deeds under section 136 of the Law of Property Act 1925 to Shop Direct Group, the 10th Claimant in the Second Action.**

21. **The Commissioners indicated on 19th April 2010, the day before the trial began, that they accepted, first that the overpayments of VAT made by Littlewoods were all made under a mistake of law and, secondly, that Littlewoods could not have discovered this mistake until, at the earliest, the decision of Chadwick LJ on 26th October 2001.**

22. **It is common ground that all the correct claimants are before the Court, and that, where a representative member company actually paid the tax in question, that company is the correct claimant. Since there is no dispute about the identity of the correct claimants, I do not propose to set out further details of their precise claims in this judgment. The issue will become of greater significance when (and if) the quantum of the claims falls to be considered.**

Sections 78, 80 and 85A of VATA 1994

23. **The parties are agreed that, despite substantial amendments to these sections over the years, the changes have not affected any of the issues that the Court has to decide in this case.**

24. **Section 78 of VATA 1994 provides in its current form 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".

25. Section 80 of VATA 1994 provides in its current form 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

(b) an amount of input tax allowable under section 26 not being brought into account,

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. …

(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.…

(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".

26. Section 85A (previously section 84(8)) of VATA 1994 provides in its current form as follows:-

"85A Payment of tax on determination of appeal

(1) This section applies where the tribunal has determined an appeal under section 83.

(2) Where on the appeal the tribunal has determined that-

(a) the whole or part of any disputed amount paid or deposited is not due, or

(b) the whole or part of any VAT credit due to the appellant has not been paid,

so much of that amount, or of that credit, as the tribunal determines not to be due or not to have been paid shall be paid or repaid with interest at the rate applicable under section 197 of the Finance Act 1996".

A chronology of relevant previous decisions

27. In order to understand the relevant previous decisions, their chronology is important, because, as one would expect, they were all decided on the basis of the state of the law as it was at the time they were decided. There have been such changes to the law in this area, however, that it is dangerous to assume that any particular decision is of direct application or relevance without seeing where precisely it fits in to the chronology.

28. On 9th November 1983, the ECJ delivered its decision in Amministrazione delle Finanze dello Stato v. SpA San Giorgio: Case 199/82 ("San Giorgio"). It held that, where a member state has received taxes and duties in breach of EU law, it must repay them. This is the San Giorgio principle, which is most clearly expressed in paragraph 12 of the judgment of the ECJ as follows:-

"In that connection it must be pointed out in the first place that entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and 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*".**

29. **On 24th May 1984, the House of Lords reaffirmed in President of India v. La Pintada Cia Navigacion SA [1985] AC 104 ("President of India") the principle of English law that there was no power to award interest on debts already paid before proceedings were commenced.**

30. **On 20th July 1992, the House of Lords decided as a matter of English law in Woolwich that overpayments of tax made pursuant to an *ultra vires* demand could be reclaimed in restitution together with simple interest under section 35A of the Supreme Court Act 1981.**

31. **On 29th October 1998, the House of Lords decided in Kleinwort Benson that the English law rule precluding recovery of money paid under a mistake of law could no longer be maintained, and recognised such claims in restitution subject to the defences available in the law of restitution.**

32. **On 8th March 2001, the ECJ delivered its judgment in Metallgesellschaft Ltd v. Inland Revenue Commissioners and Hoechst v. Inland Revenue Commissioners [2001] 1 Ch 620, Joined Cases C-397/98 and C-410/98 ("Metallgesellschaft"). The ECJ held that the rules relating to the requirement to pay advanced corporation tax ("ACT") on dividends paid to non-resident parent companies, but not on dividends paid to resident parent companies, breached article 52 of the EC Treaty ("Article 52"), so that the claim for payment of interest covering the cost of the loss of the use of the sums paid by way of ACT was not ancillary, but was the very object of the claim. Accordingly, even though it was not for the ECJ to assign the legal classification of actions brought before a national court, or to settle ancillary questions concerning the reimbursement of charges improperly levied such as the payment of interest, the principles of equivalence and effectiveness required an award of interest representing reimbursement of that which was improperly paid, in the circumstances of that case, where the breach of EU law arose, not from the payment of the tax itself, but from it being levied prematurely. In the result, the rule of English law in President of India that interest could not be recovered on sums that had been repaid (in that case by way of set off against mainstream corporation tax ("MCT")) could not be given effect.**

33. **On 12th April 2005, the Court of Appeal decided Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners [2006] QB 37 ("Sempra CA"). It decided that, as a result of Metallgesellschaft, the national court had to provide a remedy, whether by restitution or compensation, in respect of the breach of EU law, even though there was no remedy in domestic law. That remedy had to be a full remedy to restore equality of treatment under Article 52, which had, therefore, to include compound interest. The Court of Appeal, in effect, simply dis-applied the rule in President of India, but did not consider whether one or both of two available restitution remedies should be made available to satisfy the EU law right. This was hardly surprising since the**

House of Lords had yet to decide in the DMG case infra, 6 months later, that the principle in Kleinwort Benson applied to repayments of tax.

34. **On 25th October 2006, the House of Lords decided Deutsche Morgan Grenfell Group plc v. Inland Revenue Commissioners [2007] 1 AC 558 ("DMG"). The House of Lords resolved three issues, in the context of the overpayment of ACT on dividends in breach of EU law: first, that a taxpayer who wrongly paid tax under a mistake of law was entitled to a restitution remedy (contrary to the way in which the Commissioners had interpreted Kleinwort Benson); secondly, that section 33 of the Taxes Management Act 1970 ("Section 33") did not provide an exhaustive regime for the recovery of taxes paid by mistake, so as to exclude the common law restitution claim; and thirdly, that the fact that a taxpayer had a Woolwich claim (with a shorter limitation period) did not prevent it from bringing a mistake-based claim (with the benefit of an extended limitation period). It is important to understand that this last point was decided as a matter of English law, since Section 33 had been held not to constitute an exhaustive regime excluding common law remedies. The House was not considering what might happen if Section 33 had constituted an exclusive regime, and it had been necessary, so as to satisfy the EU law principle of effectiveness, to dis-apply that exclusive regime so as to allow one or both of two common law remedies that would otherwise have been unavailable in English law. Both Lord Hoffmann (at paragraph 5) and Lord Walker (at paragraphs 135-6) made this point clear, when they explained that all that the ECJ in Metallgesellschaft had said was that the domestic court must provide a remedy despite the principle reaffirmed by the House of Lords in President of India to the effect that interest is not due if the capital has been repaid. In Lord Walker's words: "*In other respects, DMG's claim relies on ordinary domestic principles*".**

35. **The Advocate General (L.A. Geelhoed) published his opinion in Test Claimants in Franked Investment Income Group Litigation v. Inland Revenue Commissioners [2007] STC 326 ("FII") on 6th April 2006, and the ECJ delivered its decision on 12th December 2006:-**

> **i) The case again concerned claims to recover premature payments and overpayments of ACT, which had been levied on dividends, discriminating between those paid and received by resident and non-resident companies in breach of articles 43 (the replacement for Article 52, which has now become article 49 of the Treaty on the Functioning of the EU) and 56 of the EC Treaty.**
>
> **ii) One of the main arguments in FII concerned whether the claims for repayment should be classified as a restitutionary claim or a claim for damages, subject to the restrictions laid down by the ECJ in Brasserie du Pêcheur SA v. Germany; R v. Secretary of State for Transport, ex p. Factortame Ltd (No 4) [1996] QB 404 ("Factortame"). The ECJ reiterated at paragraph 201 that it was not for it to assign a legal classification to the actions brought before the national court, but it was for the claimants to do so subject to the supervision of the national court.**

iii) The ECJ re-stated the San Giorgio principle in paragraph 202 as "*[t]he member state is therefore required in principle to repay charges levied in breach of Community law*", and having explained what was decided in Metallgesellschaft in paragraph 204, said in paragraph 205: "*It follows from that case law [i.e. Metallgesellschaft] 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. As the court held in paras 87 and 88 of Metallgesellschaft, that also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely*" (emphasis added).

iv) The more recent case of Chalke Chancery has identified a distinction between that language used by the ECJ and the language used by the Advocate General, which is relevant to the question of whether the ECJ in FII carried the entitlement to interest in EU law beyond what it had decided in Metallgesellschaft. Advocate General Geelhoed described the underlying principle in paragraph 132 of his opinion as: "*that the UK should not profit and companies (or groups of companies) which have been required to pay the unlawful charge must not suffer loss as a result of the imposition of the charge. As such, in order that the remedy provided to the test Claimants should be effective in obtaining reimbursement for reparation of the financial loss which they had sustained and from which the authorities of the member state concerned had benefited, this relief should in my view extend to all direct consequences of the unlawful levying of tax. This includes to my mind: (1) repayment of unlawfully levied corporation tax . . .; (2) the restoration of any relief applied against such unlawfully levied corporation tax . . .; (3) the restoration of reliefs foregone in order to set off unlawfully levied corporation tax . . .; (4) loss of use of money in so far as corporation tax was, due to the breach of Community law, paid earlier than it would otherwise have been . . .* " (emphasis added).

36. **It is worth noting in passing as a matter of chronology that, on 13th March 2007, the ECJ decided another ACT case in Test Claimants in the Thin Cap Group Litigation v. Inland Revenue Commissioners (Case C-524/04) [2007] STC 906 (Thin Cap). The issues and the relevant parts of both Advocate General Geelhoed's opinion and the ECJ's decision were remarkably similar to those in FII, and I shall, therefore, say no more about the Thin Cap case at this stage.**

37. **On 18th July 2007, the House of Lords decided Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners [2008] 1 AC 561 ("Sempra HL"). The House decided (over-ruling President of India) that, in English common law, the Court had jurisdiction to award compound interest where the claimant was seeking restitution of money paid under a mistake, and that such an award should be calculated on the basis of the rates at which the defendant might have borrowed. Again, as Mr Laurence Rabinowitz QC, counsel for Littlewoods, argued, interest was "*in play*" as a result of the San Giorgio right, but again, as in DMG, the House was not considering how to dis-apply an exclusionary statutory regime which prevented any common law claims for interest so as to give effect to the EU principle of effectiveness. Instead, the**

House decided, as a matter of English law, that there was no such restriction on claims for compound interest as the President of India had previously laid down, let alone any exclusionary statutory regime preventing such a remedy in English law.

38. **The FII case [2009] STC 254 ("FII Chancery") returned to Henderson J in July 2008, and he delivered his judgment on 27th November 2008. Henderson J decided a large number of issues, many of which are not strictly relevant to the present case. At paragraph 231, Henderson J made clear his view that the ECJ in FII had not disagreed in principle with the Advocate General's clearly stated views as to the width of the San Giorgio principle. Henderson J then discussed the availability of two possible restitutionary claims, namely the Woolwich claim, and mistake of law claims. At that time, Woolwich claims were thought to require an unlawful demand (as had been recently re-affirmed in the CA in NEC Semi-Conductors Ltd v. Inland Revenue Commissioners [2006] STC 606). Since there was no unlawful demand in the case of the payment of ACT, it is not surprising that Henderson J concluded at paragraph 260 that the Woolwich principle alone did not provide a sufficient (or any) UK remedy for claims which, as a matter of EU law, fell under the San Giorgio principle, and that the mistake-based restitution claim was also required to provide an effective UK remedy for many San Giorgio claims. Henderson J also dealt in detail with the change of position defence raised by the Commissioners, and decided at paragraphs 339 and 340 that no change of position defence was available to a Woolwich claim, since that claim was founded on an unlawful levying of tax and therefore on the commission of a legal wrong, and the right to recover unlawfully levied tax should as a matter of principle be unfettered. Henderson J held at paragraph 341 that the defence of change of position was, however, available to the Commissioners in respect of the mistake-based claims, where the claimants sought to take advantage of a potentially extended limitation period provided by 32(1)(c) of the Limitation Act 1980. Henderson J then held that section 320 of the Finance Act 2003 ("Section 320") and section 107 of the Finance Act 2007 ("Section 107") (which reduced the limitation period for mistake-based claims for overpaid direct taxes to a fixed period of 6 years from the date on which the tax was paid, and then retrospectively applied that limitation to claims brought before 8th September 2003) had been introduced without any or any adequate transitional arrangements, breached EU law and had to be dis-applied, since the mistake-based remedy was needed to give effect to the EU San Giorgio right. Finally, Henderson J held that Section 33 did not exclude other remedies outside the scope of the section, and was anyway overridden by the EU law right to an effective domestic remedy to vindicate the San Giorgio claims.**

39. **Henderson J's first instance decision in Chalke Chancery followed hard on the heels of his decision in FII, the argument taking place in February 2009 and the decision being delivered on 8th May 2009. The claimants claimed VAT that had been overpaid since 1973 on car manufacturers' bonus payments and on demonstrator cars, contrary to provisions of the Sixth Directive. In that case, as in this, once it was established by the ECJ in Marks & Spencer that the introduction of a three year limitation period retrospectively to bar existing claims for repayments of VAT, without an adequate transitional period, was unlawful, the Commissioners repaid principal and simple interest under sections**

78 and 80 of VATA 1994, back to 1973. But the claimants claimed compound interest, in addition to the simple interest paid. Henderson J decided that:-

> **i) As a matter of English law, sections 78 and 80 of VATA 1994 provided an exclusive and exhaustive regime for the repayment of overpaid VAT and interest thereon, excluding all other claims to interest at common law, except those founded in statute (paragraphs 72-4).**
>
> **ii) The ECJ's reasoning in FII had been in all material respects the same as that of the Advocate General (paragraph 105).**
>
> **iii) The ECJ's decision in FII represented a significant advance on Metallgesellschaft, so that the San Giorgio principle must now be regarded as entitling a claimant who has overpaid tax levied in breach of EU law to repayment of the tax and to reimbursement of all directly related benefits retained by the member state as a consequence of the unlawful charge, so that the member state should not profit from the imposition of the unlawful charge (paragraph 107). The claimant would, therefore normally be entitled to compound interest, and that interest claim would not be regarded as ancillary, but as an integral part of the San Giorgio claim, and there was no sensible distinction between tax paid prematurely as in Metallgesellschaft, and overpaid tax as in that (and this) case (paragraphs 108 and 255(2)). Henderson J declined to refer this point to the ECJ on the grounds that the ECJ decision in FII was clear, and there was a possibility of an appeal from his decision (paragraph 125).**
>
> **iv) The mistake-based claims in restitution were time-barred since 6 years had elapsed by the time the proceedings were commenced from the date when the mistakes were discovered (the starting date provided in section 32(1)(c) of the Limitation Act 1980).**
>
> **v) If he were wrong about the applicability of the time bar defence, he held that a defence of change of position was not available to the Commissioners to defeat the claimants' mistake-based compound interest claims that would fall within the San Giorgio principle (paragraph 177).**

It may be noted that Chalke Chancery focused on the mistake-based restitutionary claims, because at that time it was thought that Woolwich based claims were not available in respect of VAT overpayments, because of the absence of any unlawful demand. Moreover, Woolwich based claims would (as in this case) anyway have been statute barred insofar as they arose more than 6 years before the commencement of the proceedings, and the claimants (as in this case) sought compound interest on overpayments back to 1973.

40. **On 15th September 2009, the Upper Tribunal (Tax and Chancery) (Warren J (P) and Judge Bishopp) decided John Wilkins (Motor Engineers) Ltd. v. Revenue and Customs Commissioners [2009] STC 2485 ("John Wilkins"). The claimants sought compound interest on overpaid VAT, on the basis that the Tribunal should construe section 78 of VATA 1994 so as to allow payment of compound**

interest to which they were entitled under EU law. The Tribunal held that the appeals were out of time, and that no extension of time should be granted. In addition, the Tribunal declined to construe section 78 of VATA 1994 so as to read "*interest*" as meaning "*compound interest*", and agreed with Henderson J's view in Chalke that section 78 provided an exhaustive regime for the recovery of interest. Whilst acknowledging the claimants' EU right to compound interest, the Tribunal declined to construe VATA 1994, under the principle in Marleasing SA v. La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] ECR 1-4135, as providing for compound interest, whether or not the Sixth Directive provided for compound interest, which it did not (paragraph 106). The Tribunal also held that the payment of compound interest went against the grain of the statutory scheme for repayment of overpaid VAT and simple interest in VATA 1994 (paragraph 120). It was, therefore, held that the statutory scheme could be dis-applied, to the extent necessary to give effect to the claimants' EU rights, but that did not mean that the claim for compound interest could be enforced in the Tribunal. An appeal to the Court of Appeal is pending from this decision.

41. **On 17th November 2009, Henderson J delivered his judgment in Thin Cap [2010] STC 301 ("Thin Cap Chancery"), although the argument had largely preceded that in Chalke Chancery. Henderson J reached substantially the same conclusions on the limitation issues that he had reached in FII. The part of Henderson J's judgment in Thin Cap Chancery that is most relevant to the issues here, and that is different from FII Chancery, is that contained in paragraphs 219-226, where Henderson J rejected the Commissioners' attempt to argue (again) that Woolwich based claims were sufficient to satisfy the claimants' San Giorgio rights. He held that it was wrong in principle to treat the EU law principle of effectiveness as a limiting one, and to look for the minimum remedies in UK law needed to satisfy it. Rather, he held that where domestic law goes further than strictly necessary to give effect to EU law rights, EU law requires the full range of domestic remedies to be made available (paragraph 223). In addition, he relied on DMG as having held that, in English law, the claimant can normally choose between available remedies, and held (again) that the Woolwich claim was inadequate to satisfy the EU law right, because of the requirement for an unlawful demand (paragraph 225).**

42. **On 23rd February 2010, Arden LJ delivered the judgment of the Court of Appeal in FII [2010] EWCA Civ 103 ("FII CA"). She suggested at paragraph 6 that a court referring a question to the ECJ should, where possible, briefly express its views on the answers to the questions it is posing. I have sought, in this judgment, to comply with that suggestion. Issues 11-23 concerned remedies and are most relevant. On the issues of importance to this case, the Court of Appeal decided:-**

    i) Contrary to Henderson J's view, that the Advocate General in FII was applying a much broader test in paragraph 132 of his opinion than the ECJ expressed in paragraphs 205 and 207.

    ii) In paragraphs 152-173, that a Woolwich based restitutionary claim applied to any case in which tax had been unlawfully exacted from a person by virtue of a legislative requirement, including compulsory self-

assessment (without the need for a formal demand), so that the Woolwich claims in FII did provide an effective remedy for all the claimants' EU law San Giorgio claims (without the need for the mistake-based restitutionary claims that Henderson J had held were necessary).

iii) In paragraph 174, that even if the Court was wrong about its extension of Woolwich based claims, and since neither Woolwich based claims (because of the requirement for a demand) nor mistake-based claims (because of the need for a mistake) would satisfy the San Giorgio rights, the claimants' EU law rights would require an effective remedy, which would be the Woolwich based claim without the requirement for a demand.

iv) In relation to change of position, the Court of Appeal noted that the Commissioners were not arguing such a defence in relation to the Woolwich based claims, and so held that there was no need to say any more about it (paragraphs 191-2).

v) Since the Court of Appeal held that the Woolwich claims provided an effective remedy for all the claimants' San Giorgio claims, they held also that the restriction of the mistake-based cause of action by Sections 320 and 107 was not precluded by EU law (paragraph 229). Had the mistake-based claims, however, been required to satisfy the claimants' San Giorgio rights, they agreed with Henderson J that Sections 320 and 107 were incompatible with EU law for want of any transitional provision (paragraph 227).

vi) The Court of Appeal held that Section 33 could be construed so as to conform with EU law in line with the grain of the legislation, but that it was an exclusive remedy in respect of those (non ACT) claims in FII to which Section 33(1) applied.

I was told that an application has been made for permission to appeal FII CA to the Supreme Court, although the outcome of that application is unknown.

43. **Most recently, on 25th March 2010, the Court of Appeal delivered judgment in Chalke [2010] EWCA Civ 313 (Chalke CA). Etherton LJ (with whom Mummery and Patten LJJ agreed) dealt first with the claimants' alleged EU right to compound interest. Etherton LJ set out Henderson J's reasoning for concluding that such a right existed following the "*significant advance in the jurisprudence of the ECJ*" in FII, and the claimants' different approach, before explaining the Commissioners' submissions that: (a) the San Giorgio principle only extends to repayment of charges levied in breach of EU law, (b) the national authorities must settle all ancillary questions relating to such reimbursement including all questions concerning interest, (c) the cases show that the EU law principle of effectiveness requires that the remedy matches the nature of the breach, which is why there is a difference between the EU law requirements for overpayments, as opposed to premature levying (as in Metallgesellschaft), of tax (paragraph 38-9), (d) Henderson J was wrong to think that FII established any new principles governing the award of interest, and anyway the ECJ had adopted a narrower**

test in paragraph 205 than the Advocate General had done in paragraph 132 (as the Court of Appeal had held in FII CA), and (e) that the decision conflicted with the EU principle (in Weber's Wine World Handels-GmbH v. Abgabenberufungskommission Wien (Case C-147/01) [2003] ECR 1-11365 ("Weber's Wine World") at paragraph 94) that a member state need not reimburse tax where the trader has passed the burden of it on (paragraph 39). Etherton LJ then decided at paragraphs 40-1 that:-

> **i) The issue is one of great importance carrying enormous financial consequences for the UK and other member states.**
>
> **ii) The answer is not clear.**
>
> **iii) There was considerable cogency in the argument that, at least until FII, the settled jurisprudence of the ECJ was that, save in the Metallgesellschaft kind of case concerning premature levying of tax, all matters concerned with interest (including the right to any interest at all) were ancillary matters to be dealt with in accordance with national law.**
>
> **iv) It is striking that there is no clear statement by the ECJ that the former settled jurisprudence has been changed so that, in cases of overpayment of tax, the San Giorgio principle requires the recipient to pay compensation for the time value of the wrongfully retained tax when it was not lawfully due.**
>
> **v) On the other hand, paragraph 205 in FII can be read as broad enough to include claims for the time value of overpayment of VAT, and it is hard to see a logical basis for distinguishing between premature levying and overpayments of tax.**
>
> **vi) It is desirable for there to be a reference to the ECJ for a preliminary ruling on this issue, but there could not be one in Chalke as it was not necessary to enable judgment to be given. A reference should be made when a proper opportunity arises.**

The Court of Appeal held substantively that the claimants' claims to compound interest were barred by lapse of time under the Limitation Act 1980, and that the EU law principle of effectiveness did not prevent the application of that time limit in that case.

44. I turn now to deal with the issues I identified above.

Issue 1: Are the Woolwich claims and/or the mistake-based claims for restitution made by Littlewoods, as a matter of English law, and without reference to EU law, excluded by sections 78 and 80 of VATA 1994?

45. Henderson J dealt with this point in Chalke at paragraphs 57 to 75. He concluded that "*as a matter of domestic law, the statutory scheme for the recovery of overpaid VAT in s. 80 of VATA 1994 is an exhaustive one, and that interest may only be recovered on a repayment of overpaid VAT by the Commissioners if it is*

***awarded by the tribunal or pursuant to s.78. The exclusion in s. 80(7) of any liability to repay overpaid VAT save as provided for by s.80 necessarily prevents the recovery of any interest on the overpaid VAT, except where s. 78 or some other statutory provision provides an entitlement to such interest*".**

46. Mr Rabinowitz has argued that the Chalke decision was reached without proper regard to the exclusionary words in section 78(1): "*then, if and to the extent that [the Commissioners] would not be liable to do so apart from this section, they shall pay interest…*", and without three important authorities being cited to Henderson J.

47. First, Mr Rabinowitz says that the correct test was established by Lord Mance in Revenue and Customs Commissioners v. Total Network SL [2008] 1 AC 1174. In that case, the taxpayer was arguing that the statutory VAT scheme prevented the Commissioners from recovering damages for conspiracy in the amount of the VAT that had been lost as a result of carousel frauds. The House of Lords rejected the argument. Lord Mance (with whom Lord Scott agreed expressly and Lord Walker agreed as to the result) explained the reason as follows at paragraph 130: "*The critical question, in my view, is whether the statutory scheme supersedes and displaces the common law rights and remedies which the commissioners would otherwise have: see Deutsche Morgan Grenfell Group plc v. Inland Revenue Comrs [2007] 1 AC 558, per Lord Walker of Gestingthorpe, at para 135. For this to be the case, it seems to me that the statute must positively be shown to be inconsistent with the continuation of the ordinary common law remedy otherwise available…*" (emphasis added). Mr Rabinowitz submits that VATA 1994 is not in this case shown to be positively inconsistent with the making of claims for compound interest.

48. Secondly, in R (on the application of Elite Mobile plc) v. Customs and Excise Commissioners [2005] STC 275, Lindsay J expressly decided at paragraph 33 that section 78 did not create an all embracing code as to the payment of interest because of the exclusionary words in section 78(1): "*if and to the extent that they would not be liable to do so apart from this section*". In that case, the taxpayer had reclaimed overpaid VAT, and sought interest under section 35A of the Supreme Court Act 1981 at higher rates than those prescribed under section 78. The taxpayer could, plainly, not have achieved that objective if section 78 was an exhaustive regime excluding all other methods of claiming interest, although it could (at least on one analysis) have succeeded on Henderson J's formulation in Chalke, since he expressly allowed for "*other statutory provisions*" permitting interest to be recovered. It may be noted that, in the result, Lindsay J refused to award interest, even under section 35A, at higher rates than those prescribed under section 78.

49. In R (on the application of Mobile Export 365 Ltd and another) v. Revenue and Customs Commissioners [2006] STC 1069, Collins J applied Lindsay J's decision, which was also agreed to be applicable by both counsel.

50. Against this background, Mr Rabinowitz also accepts the test most recently adumbrated by the Court of Appeal in Monro v. Revenue and Customs Commissioners [2009] Ch 69, where they held that Mr Monro's common law

claims for mistake were excluded by the express statutory right in Section 33. Arden LJ said at paragraph 22: "*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*" (emphasis added). It is perhaps useful to note Sir Andrew Morritt C's approach ([2007] EWHC 114 (Ch)) at paragraph 31 of the judgment upheld by the Court of Appeal in Monro, where he made clear, after a comprehensive review of the authorities, that "*[t]hat sub-section [Section 33(2A)], as is admitted, precludes relief in circumstances such as those of this case. It would be inconsistent with [Section 33] to recognise a common law remedy in precisely the circumstances postulated by subsection (1) but free of the limitation contained in sub-s (2A)*".

51. **The question that has to be answered then is whether the right to interest under section 78 is "*inconsistent*" with the common law right to compound interest, in the sense of that word used by Arden LJ and Lord Mance. Mr Rabinowitz submits that this cannot possibly be the case because Parliament has expressly alluded to other liabilities for interest within section 78(1) itself. Moreover, he says that the types of other liability for interest to which the exclusionary words in section 78 refer are not confined to '*some other statutory provision*' as Henderson J suggested, and that Henderson J placed too much reliance on section 80(7), which has nothing whatever to do with interest, and relates only to the repayment of a principal sum ("*an amount paid to them by way of VAT*").**

52. **Before expressing my view on this difficult question, I should mention that I have firmly in mind the dictum of Arden LJ in paragraph 3 of her judgment in Monro to the effect that, although Parliament's ignorance about the common law may in some cases throw light on the meaning of a provision, the Court cannot rewrite a scheme or a provision just because the common law has developed since the statute was enacted.**

53. **I also have in mind Mr Rabinowitz's submission that the Courts have repeatedly held that statutes have not excluded common law rights:-**

    i) In Woolwich itself, the Revenue argued that Section 33 excluded the claim for interest on the tax that Woolwich had paid under protest. The House of Lords rejected that contention on the grounds that Section 33 did not cover the situation, because it only dealt with tax paid pursuant to a lawful assessment which was excessive by reason of some error or mistake (see Lord Goff at pages 169G to 170D, and Lord Slynn at pages 199H-200E).

    ii) In DMG, Lord Hoffmann at paragraph 19, Lord Hope at paragraphs 52-55, and Lord Walker at paragraph 135 held that Section 33 did not provide an exclusive statutory regime for the recovery of all payments made under a mistake. Section 33 only provided for one category of mistaken payments namely "*when the assessment was excessive by reason*

***of some error or mistake in a return*". Since ACT was payable without an assessment, Section 33 did not apply to it, and the House held that Parliament could not be taken to have established an exclusive regime. As Lord Hoffmann put the matter: "*When a special or qualified statutory remedy is provided, it may well be inferred that Parliament intended to exclude any common law remedy which would or might have arisen on the same facts, That was the case in Marcic v. Thames Water Utilities [2004] 2 AC 42 … But I see no reason to infer that Parliament intended to exclude a common law remedy in all cases of mistake (whether of fact or of law) in which the revenue was unjustly enriched but did not fall within section 33*".**

iii) In Sempra HL, the House decided that section 35A (then of the Supreme Court Act 1981) did not constitute an exhaustive code. Lord Nicholls explained at paragraphs 98 and 99, however, that that was because (a) section 35A(4) excluded the section's application "*for a period during which, for whatever reason, interest on the debt already runs*", (b) courts of equity had long exercised a jurisdiction to award interest, including compound interest, and (c) section 35A was concerned only with interest on debt and damages, and said nothing about the principles to be applied when the amount of damages are assessed.

54. These authorities, summarised in Monro and relied upon by Mr Rabinowitz, seem to me to be no more than examples of cases in which a statute dealing with one specific situation will not normally be taken to exclude common law relief available in another situation (DMG and Sempra HL being classic examples). Equally, there will be cases where Parliament's provision for one specific situation must be seen as inconsistent with common law remedies surviving in other related situations.

55. It seems to me that, in this case, the process of statutory interpretation should start from the words used by Parliament. Sections 80 and 78, though enacted at different times, must be read, so far as possible, as a coherent whole, since they were intended to operate together after section 78 came into force. And undoubtedly sections 80(2) and 80(7) shows that Parliament did intend to exclude other remedies for the repayment of principal sums claimed by way of overpaid VAT. And, as Mr Rabinowitz conceded, VATA 1994 could not be construed so as to allow recovery of interest where no capital was repaid for some reason provided for in section 80 (for example the unjust enrichment defence in section 80(3)).

56. The real nub of this problem, however, is in my judgment, to attribute an appropriate meaning to the exclusionary words in section 78(1). To do so, one must have regard to the overall intentions of Parliament. As Henderson J thought, these words could undoubtedly refer to the only other interest provision within VATA 1994, namely section 85A. The ultimate question is whether they should be taken to refer also (a) to other provisions allowing interest outside the VATA regime, and/or (b) to common law rights to interest outside the VATA regime.

57. In my view, in introducing section 80, and subsequently section 78, Parliament was providing a closely regulated regime for repayments of overstated and overpaid VAT, and for interest to be paid in cases of error by the Commissioners. There is a regime providing for how claims are to be made, and for the rates of interest to be payable back to 1973. The expectation of the whole regime seems to be that it would be applicable in most cases. Parliament would, however, have known that, within the context of legal proceedings, section 35A already provided for interest to be paid, and, as Lindsay J held in Elite Mobile (consistently with Henderson J's decision), the exclusionary words seem likely to have been intended to refer, at least in part, to that provision. Section 85A is, likewise, only applicable in some cases – namely where there is an appeal under section 83. It seems to me that Parliament must have contemplated a wider interest provision than that which was available in cases before the Tribunal, or in cases before the court, possibly because those would not represent the normal run of the mill situation in which repayments were claimed and made administratively without undue delay. The common law remedies that Littlewoods seek to assert are, however, unlike sections 35A or section 85A, *prima facie* applicable in every case.

58. Moreover, and perhaps even more importantly, in this case, like in Monro, sections 78 and 80 of VATA 1994 provide precisely for the situation in this case. Section 80(1) provides expressly for repayments to be made "*[w]here a person has paid an amount to the Commissioners by way of VAT which was not VAT due to them*". That is admitted to be the case here. Section 78(1) provides expressly for interest under that section to be paid "*[w]here, due to an error on the part of the Commissioners, a person has … accounted to them for an amount by way of output tax which was not output tax due from him [or] paid to them by way of VAT an amount that was not VAT due*". Again that is admitted to be the case here.

59. In these circumstances, it seems to me, subject to the proper interpretation of the exclusionary words, that Parliament has legislated for this particular case. In that situation, none of the authorities relied upon suggest that there can be room for two regimes: the statutory one providing for precise rates of interest and periods over which interest must be paid, and a common law regime entirely outside the statute and providing for much higher amounts of interest to be paid in every case covered by the statute.

60. What then is the proper construction of the exclusionary words? It seems to me that, despite their generality, they must be taken to be referring only to other statutory provisions under which the Commissioners would be liable to pay interest. Any other construction would make a nonsense of the provision. Parliament must have been saying that, in cases covered by sections 80 and 78, this is the only regime that applies (see subsections 80(2) and 80(7)), but insofar as interest is concerned, other statutory provisions still subsist in the case, for example, of legal proceedings (section 35A) or tribunal proceedings (section 85A). If the exclusionary words in section 78(1) were construed as referring to any common law restitutionary claims, they would, in the words of the tests expounded by Lord Mance and Arden LJ, be "*inconsistent*" with the core provisions in section 78 and 80. I realise that I have turned the test around, but inconsistency works the same both ways. The type of inconsistency involved is

precisely that referred to by Arden LJ, namely 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*". Here the restriction in the statute is the limitation to the claims delineated by section 80 and 78; so far as interest is concerned, that is a restriction to simple interest and at the applicable rates and for the applicable periods. The limitation does indeed reflect the policy of the statute which was to limit claimants to the interest specified, at the least in the circumstances specifically mentioned in the statute.

61. I would not wish to say anything about whether or not the VATA 1994 creates an exhaustive code for the payment of interest where the words of the statute are not directly applicable to the situation in issue. That question can be dealt with when it arises. In this case, as in Chalke Chancery, the statute did apply directly to the claims made by the respective claimants. In the way that I, like Henderson J, have construed sections 78 and 80, the exclusionary words are limited to other statutory provisions for interest for good reason, because Parliament must have intended that to be the case when the new regime specifically applied.

62. My answer to issue 1 is, therefore, that the Woolwich claims and the mistake-based claims for restitution made by Littlewoods are, as a matter of English law, and without reference to EU law, excluded by sections 78 and 80 of VATA 1994.

Issue 2: If the Woolwich claims and/or the mistake-based claims are excluded by sections 78 and 80 of VATA 1994, is that exclusion contrary to EU law?

63. In the light of my decision on issue 1, it is common ground between the parties that this issue 2 should be referred to the ECJ. This is hardly surprising, considering the views as to the need for a reference expressed by Etherton LJ in paragraphs 40 and 41 of Chalke CA. I am conscious, however, of two injunctions: that the responsibility for the terms of a reference lies with the court (CPR 68PD.1), and that the court should, where possible, briefly express its views on the answers to the questions it is posing (paragraph 6 of FII CA). The parties have not, in fact, agreed the questions that should be referred to the ECJ, so I will need to determine what they should be. It seems to me that the questions should be drawn in the way that will most assist this Court in concluding the trial of the issues between the parties. I will, however, deal with this issue as briefly as possible, since ultimately it cannot be decided until the ECJ delivers its decision.

64. Several courts have set out the history of the San Giorgio right as a matter of EU law, and I would not wish to repeat that analysis. That is why I have already set out the chronology of decisions as they affect this case. What that chronology shows, to my mind, is a genuine difference of opinion between two quite simple views:-

> **i) The first view is that the San Giorgio principle establishes an EU law right to reimbursement of improperly levied tax charges, and that all ancillary questions relating to reimbursement of these charges, including all questions relating to the requirement to pay interest, the type of interest to be paid, and the rates of interest, are matters to be determined**

by national law, provided that the EU law principles of equivalence and effectiveness are not violated.

ii) The second view is that the ECJ has already laid down in FII that the San Giorgio principle requires that the member state must not profit from the receipt of tax charges improperly levied, so that national courts must, in accordance with the EU law principle of effectiveness, provide for a claimant to recover not only the tax charges improperly levied but also compound interest reflecting the use value of the money gained by the member state.

I am conscious that I have expressed the second view as relating to "compound interest reflecting the use value of money gained by the member state". There have been numerous formulations of the right that Metallgesellschaft and FII are said to provide for. I am conscious too of Lord Scott's interesting analysis in Sempra HL at paragraphs 133-141 concerning the confusions of expression. It seems to me that the question of whether the right is to be measured by what the claimant has lost or in relation to what the recipient has gained may depend on whether one is talking about claims for damages on the one hand, or restitutionary claims on the other hand. The ECJ has repeatedly made clear it is not interested in what domestic causes of action may be engaged to vindicate the right. But for descriptive purposes, I have had to describe the right specifically. I have chosen the way I have simply because it seems to me to reflect the way that Henderson J interpreted the EU jurisprudence in Chalke Chancery. In the result, the precise formulation that I adopt will not be the last word, because the question is to be referred to the ECJ for its ruling.

65. **The second view depends to an extent on whether or not the ECJ 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. Those cases primarily concerned claims for premature payment of ACT, where most (if not all) of what was paid was actually due at some later stage by way of MCT, so that, as the ECJ put the matter in paragraph 87 of Metallgesellschaft: "*In the main proceedings, however, the claim for payment of interest covering the cost of loss of the use of the sums paid by way of advance corporation tax is not ancillary, but is the very objective sought by the plaintiffs' actions in the main proceedings. 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 art 52 of the Treaty*".**

66. **Etherton LJ in FII CA said at paragraph 40 that he found it difficult to see any logical basis for distinguishing between the premature levying and payment of tax and the overpayment of tax. But it seems to me that such a basis may exist in EU law 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 fourthly, that the principle of effectiveness requires that national law shall not render practically impossible or excessively difficult the exercise of EU law rights.**

67. On my analysis, it is the extent of the second and third of those 4 principles that are truly in doubt. Must the reimbursement include the use value of the money, or not? And if so, what then is left for the national courts to determine? It is this latter point that has led me to incline towards the view that the ECJ may not have intended in FII to make the "*significant advance*" in jurisprudence that Henderson J referred to in paragraph 107 of Chalke Chancery. If EU law were to lay down that, in all cases, reimbursement of improperly levied taxes must include the use value of the money (including compound interest) it would be creating something that crosses previously established boundaries:-

> **i) It would call into the question the line of ECJ cases in which it has been made clear that all ancillary questions, beyond repayment itself, is for the national law to settle (including Société Roquette Frères v. EC Commission *(Case 26/74)* [1976] ECR 677 at paragraphs 11 and 12, Express Dairy Foods Ltd v. Intervention Board for Agricultural Produce (Case 130/79) [1980] ECR 1887 at paragraphs 16 and 17, and Metallgesellschaft at paragraph 86).**
>
> **ii) It would be surprising if EU law was concerned with the detail of interest claims that should be available for tax repayment claims, but not other kinds of claims against member states.**
>
> **iii) The ancillary matters that would be left to national courts would thereby be significantly attenuated. As the ECJ said in Metallgesellschaft at paragraph 81: "*It must be stressed that it is not for the [ECJ] to assign a legal classification to the actions brought by the claimants before the national courts*". But if the value of the use of the money had to be awarded in every case (even if that value might be differently assessed on a case by case basis), EU law would be delineating the precise way in which the EU right was to be vindicated in national law. On one analysis, this could be said to be over-stepping the mark between EU rights on the one hand, and the domestic causes of action by which they can be vindicated on the other.**
>
> **iv) The ECJ has already acknowledged exceptions to the need to repay VAT (and, therefore, presumably interest also), for example, in Weber's Wine World at paragraph 94, where the taxpayer would itself be unjustly enriched by such an outcome, as where the trader has passed the burden of VAT on to third parties.**
>
> **v) It would be creating an EU right that would require much more detailed exposition in EU law than might perhaps be appropriate. EU law would need to explain how the loss of use value of the money was to be calculated – at what rates and with what rests: otherwise, the principle of effectiveness could not properly be implemented, because national courts would not know the precise extent and limits of the EU right.**

68. This discussion leaves outstanding, of course, the question of whether there is, indeed, a logical distinction between claims in relation to prematurely paid, as opposed to overpaid, tax. To return to the four principles, I set out in paragraph

66 above, if the second principle requires only reimbursement, with the third principle leaving interest to national law, then the repayment of the use value of an unlawfully levied ACT pre-payment could be regarded as the reimbursement itself. This seems to be the way it was viewed in paragraph 87 of Metallgesellschaft as the "*very objective sought by the claimants' actions*".

69. The parties have not been able to agree the questions that should be referred to the ECJ. In these circumstances, I have considered carefully the drafts provided by the parties and have determined that three questions along the following lines would most closely reflect the problem that I have described under this issue 2:-

> **i) Question 1: Where a taxable person has overpaid VAT contrary to the requirements of EU VAT legislation, does the remedy provided by a member state accord with EU law if that remedy allows for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums, in accordance with national legislation, such as sections 80 and 78 of VATA 1994?**
>
> **ii) Question 2: If not, does EU law require that the remedy provided by a member state should allow for (a) reimbursement of the principal sums overpaid, and (b) the use value of the overpayment in the hands of the member state and/or the loss of the use value of the money in the hands of the taxpayer?**
>
> **iii) 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?**

70. The parties are agreed that the EU VAT legislation referred to in Question 1 is (a) in respect of periods before 1978, article 8 and Annex A(13) of Council Directive 67/228/EEC and (b) in respect of subsequent periods, articles 11(A)(3)(b) and 11C(1) of Council Directive 77/388/EEC.

71. I will hear counsel on the precise questions that are to be referred to the ECJ after I have delivered this judgment. I cannot, of course, answer issue 2 until the matter has been referred. As I have indicated above, however, my preliminary view is that the answer to issue 2 is that the exclusion of Littlewoods' Woolwich claims and mistake-based restitutionary claims would not be contrary to EU law. This would indicate that the answer to Question 1 would be affirmative, so that the answers to Questions 2 and 3 would not arise.

Issue 3: If issue 2 is answered in the affirmative, 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 dis-applied so as to allow either (a) only the Woolwich claims, or (b) both the Woolwich claims and the mistake-based claims?

72. If my preliminary views on issue 2 are endorsed by the ECJ, this issue will not arise. Accordingly, I will deal briefly with issue 3 at this stage, since the matter

will come back to this Court after the outcome of the reference is known, and will, whatever happens, need to be reconsidered in the light of the ECJ's ruling.

73. **This issue is primarily a matter for English law in the sense that EU law will have determined the extent of the San Giorgio right, and it will be a matter for English law to provide a suitable remedy to give effect to the right. It is tolerably clear (subject to the questions I have raised above) that EU law will not be concerned with the precise nature of the national law remedy by which means this is achieved, so long as the EU law principles of equivalence and effectiveness are satisfied. Thus, if the ECJ holds that the taxpayer who has overpaid tax in breach of EU law is entitled to recover the use value of the money until the principal is reimbursed, it will not be concerned with whether that is achieved by means of a damages claim or a Woolwich or a mistake-based restitutionary claim, just so long as there is nothing in the domestic provision of those remedies which makes it either practically impossible or excessively difficult for the taxpayer to vindicate its EU rights.**

74. **Section 2 of the European Communities Act 1972 requires English legislation "*to be construed and have effect subject to*" EU rights. It is also clear, as a matter of English law, that English statutes must be construed in such a way as to accord with EU law if at all possible, and that, only if that is impossible, will they need to be dis-applied to allow EU rights to be given effect. Greater latitude is allowed in statutory construction where legislation giving effect to EU rights is concerned (see, for example, Lord Oliver in Litster v. Forth Dry Dock Co. Ltd. [1990] 1 AC 546 at page 576D). The principles to be observed in looking for a conforming interpretation were succinctly summarised in paragraphs 37-8 of Sir Andrew Morritt C's recent judgment in Vodafone 2 v. Revenue and Customs Commissioners [2010] 2 WLR 288 at pages 301-2. 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.**

75. **Mr Rabinowitz raised a new argument in this case, somewhat ingeniously it might be said, bearing in mind the numerous occasions upon which these issues have been rehearsed. He submitted that section 78(1) could easily be interpreted in a way that conformed to the putative EU right to the use value of money, by simply reading the exclusionary words in section 78(1) as carving out restitutionary claims for interest as well as statutory ones. This interpretation did no violence to the words used and, so to speak, 'ticked all the boxes' of the principles I have mentioned.**

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 John Wilkins, and as Arden LJ gave in Monro, 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).

77. **The question then arises as to how section 78 should be dis-applied. Mr Jonathan Swift QC, counsel for the Commissioners, argues, on the basis that I have decided issue 1 in his favour, that, since the proper English law construction of sections 78 and 80 is that Woolwich and mistake-based restitutionary claims cannot be brought, and it is only (putatively) the EU right that must be given effect, the curtain should only be lifted to the minimum extent necessary to comply with the principle of effectiveness.**

78. **Conversely, Mr Rabinowitz says there is clear English law authority in DMG that it is for the claimant to choose whichever remedy he wants from those available. If needs be, he relies also on EU law authority in paragraph 81 of Metallgesellschaft, where the ECJ said "*[i]n the circumstances it is for the claimants to specify the nature and the basis of their actions (whether they are actions for restitution or actions for compensation for damage) subject to the supervision of the national court*".**

79. **As I pointed out in my summary of the House of Lords' decision in DMG at paragraph 34 above, the decision that the taxpayer had a mistake-based claim as well as a Woolwich claim was made on the basis that Section 33 had been held not to exclude common law remedies. Here, however, I have already decided that sections 78 and 80 do, as a matter of English law, exclude common law remedies, at least in Littlewoods' situation, which is covered directly by the express terms of the statute. Thus, in my judgment, DMG, which simply decided, as a matter of pure English law that, whenever two remedies are available, the claimant may advance any or all of them, does not provide the answer to the present problem.**

80. **Mr Swift contends that the national court should dis-apply sections 78 and 80 only so far as to allow Littlewoods a Woolwich claim, because that gives full effect to the EU right, without dis-applying the will of the UK legislature more than it is necessary to do. He relies on the fact that the mistake-based claims will not be available in every case (because a mistake is a necessary element in the cause of action), whereas, after FII CA, the Woolwich claims will be available in every case, now that an unlawful demand is no longer an essential element in the cause of action. Moreover, Mr Swift says that the fact that the Woolwich based claims are affected by an immutable 6 year limitation period, whilst the mistake-based restitution claims are not (because of the extension to that period available under section 32(1)(c) of the Limitation Act 1980), is nothing to the point, since the ECJ has made it clear that reasonable limitation periods are not inconsistent with the principle of effectiveness, so long as they are not retrospective and have reasonable transitional provisions (see Marks & Spencer *supra* and paragraph**

218 of FII CA summarising the principles). And it is not suggested here that the 6-year limitation period affecting Littlewoods' Woolwich claims would contravene these principles.

81. Mr Swift acknowledged that this argument would not have been available to the Commissioners before the dictum of Arden LJ at paragraph 174 of FII CA, in which she held that, if she were wrong about Woolwich based claims not requiring a demand, the claimants' EU law rights would require an effective remedy, which would be the Woolwich based claim without the requirement for a demand. Mr Swift submits that, if that dictum is right, it implies that, as a matter of English law, an EU right to the use value of the pre-payment or overpayment of tax can be satisfied by allowing a Woolwich based claim alone and to the exclusion of any mistake-based claim.

82. I am not sure that the true position in this case is quite as simple as either side suggests. Here, the basic parameters of the assumptions upon which I am considering this issue 3 are as follows:-

> **i) Sections 78 and 80 are to be construed in English law as excluding both Littlewoods' Woolwich based and mistake-based restitutionary claims to the use value of the overpayments.**
>
> **ii) Littlewoods have recovered the principal of their overpayments on the basis in section 80(1), namely that they have "*paid an amount to the Commissioners by way of VAT which was not VAT due to them*".**
>
> **iii) Littlewoods have recovered simple interest on their overpayments on the basis in section 78(1) that "*due to an error on the part of the Commissioners*", they have either "*accounted to [the Commissioners] for an amount by way of output tax which was not output tax due*" or *"was not VAT due*". This remedy was obviously, in one sense at least, "mistake-based".**
>
> **iv) Littlewoods have an EU law San Giorgio right to recover the use value of the overpayments, insofar as that use value exceeds the simple interest already paid under section 78(1).**
>
> **v) The principle of effectiveness requires that this Court shall not render practically impossible or excessively difficult the exercise of Littlewoods' EU law right.**
>
> **vi) According to the ECJ in FII, it is for the claimants to "*specify the nature and the basis of their actions … subject to the supervision of the national court*" (paragraph 201 applying paragraph 81 in Metallgesellschaft).**

83. It will be recalled that, in FII Chancery, Henderson J had originally held that a mistake-based restitution remedy was required to give effect to the San Giorgio right in that case, and that Sections 320 and 107 breached EU law and were to be dis-applied. He did so, of course, because he held that he was bound to hold that

the Woolwich based restitution claim required an unlawful demand, which had not been made in that case. In Thin Cap Chancery, Henderson J said at paragraph 223 that if English law provided two alternative causes of action, it was no part of the principle of effectiveness to say that only the more restrictive cause of action was needed. But, in FII CA, the Court of Appeal decided expressly that there was no need to dis-apply Sections 320 and 107, because the Woolwich cause of action "*provides an effective cause of action for all the Claimants' San Giorgio claims*" (paragraph 225), so that no mistake-based restitution claim was necessary.

84. **Against this background, it seems to me that Mr Swift's case is rather compelling. In FII CA, the Court of Appeal expressly favoured the Woolwich based restitutionary claim, and held that it was sufficient to give effect to the claimants' EU law San Giorgio rights. The Court of Appeal could have chosen to dis-apply Sections 320 and 107, and allow the claimants a mistake-based restitutionary claim in addition to the Woolwich based claim that they held was available, but they decided that it was unnecessary to do so. In the alternative, the Court of Appeal held, in effect, that they would, in preference to dis-applying Sections 320 and 107, so as to allow a mistake-based claim, they would have dis-applied the need for a demand to allow a Woolwich based claim, even if they were wrong about a demand not being required.**

85. **In summary, therefore, 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.**

86. **Applying these principles here, it seems to me that Littlewoods' putative San Giorgio right can be given full effect, in accordance with the principle of effectiveness, by dis-applying the provisions of sections 78 and 80 so as to allow either a Woolwich claim or a mistake-based claim to be brought. Where FII CA does not help very much is in laying down the principles upon the basis of which the national court can choose between two otherwise available claims in these circumstances. Mr Rabinowitz, of course, submits that sections 78 and 80 should be dis-applied so as allow both claims, relying on the passages I have referred to in Metallgesellschaft (paragraph 81) and FII (paragraph 201), which indicate that the claimant can choose the nature and basis of its claims. I should say at once, however, that I do not think these passages mandate the national court to allow multiple claims to vindicate a San Giorgio right, certainly where dis-application of a domestic rule is required to do so. That much is clear from the caveat entered by the ECJ in both Metallgesellschaft and FII to the effect that the process is subject to the supervision of the national court.**

87. **Very little argument was addressed to the question of the principles upon which the national court should choose between national law claims and remedies in these circumstances, but applying FII CA, it seems to me that choose I must.**

88. **The principles that I apply should, in my judgment, be applicable in any case of this kind – even if cases with these dramatic consequences may not often occur in future. The starting point is that the national court is required by EU law to give effect to the San Giorgio right, and not to render it practically impossible or excessively difficult for Littlewoods to exercise that right. The San Giorgio right in question has yet to be defined, but on the assumptions that I am making at this stage, it will be the right to recover in respect of the use value of the overpayments of tax between payment and repayment. To allow such a right to the Claimants, some rule of English law must be dis-applied. In this case, the rule is the same for both restitution based claims – namely that section 78 and 80 exclude both those claims. But it will not always be thus. For example, in FII CA itself, the domestic law rules that presented themselves as candidates for dis-application were different: the need for a demand in relation to the Woolwich claims, and the new limitation periods in Sections 320 and 107 in relation to the mistake-based restitutionary claims. The principles applicable must balance the need to enforce the San Giorgio right on the one hand, against the need to dis-apply domestic law on the other hand. In addition, I think that the nature of the available causes of action is relevant – the cause of action most naturally and comprehensively giving effect to the San Giorgio right must be preferable to one that will only vindicate the right in limited circumstances.**

89. **In this context, I bear in mind that, if there had been no mistake by the Commissioners, section 78(1) would not have applied at all. The question would then have arisen as to whether that meant, as Henderson J held in Chalke Chancery, that there was an exhaustive regime in sections 78 and 80 that excluded all restitutionary claims, presumably whether or not section 78(1) was actually applicable to the case in point, so as to allow simple interest. I have been reluctant to decide that question, but if Henderson J is right, it would mean that there can be no special magic in the section 78(1) right to simple interest being based on a mistake, since the effect of sections 78 and 80 would be to exclude from all interest cases where the Commissioners had not made a relevant mistake. And it may be noted that the mistake in question under section 78(1) may not be the same person's or the same type of mistake as would found a mistake-based restitutionary claim (as to which see paragraph 261 in FII Chancery and the cases there cited).**

90. **Taking all these factors together, it seems to me that the cause of action that most naturally and comprehensively gives effect to Littlewoods' San Giorgio right to the use value of the repayments is the Woolwich claim, which is applicable, as we now know it to be, to all cases where the government has exacted tax, which was not lawfully due, whether or not a demand has been made. The mistake-based restitutionary claims would only vindicate the San Giorgio right to the use value of money in some circumstances – namely where an appropriate mistake had been made. Such a claim would, therefore, be of less general application than the Woolwich claims. The rules to be dis-applied are the same in this case, so that factor is neutral, but one would generally want to lean in favour of the minimum possible dis-application of domestic law.**

91. **The Woolwich claims here will be subject to an (EU law compliant) 6-year limitation period which will reduce Littlewoods' claims for compound interest to**

a relatively small amount. On the other hand, if the mistake-based restitutionary claims were to be allowed, it is common ground that the limitation period must be extended under section 32(1)(c) so as to allow the full extent of Littlewoods' claims. It might be suggested, therefore, that the approach that I have adopted is driven by a desire to protect the Commissioners from the major part of the claims to compound interest in this case. I should make it clear that I have ignored that factor, which seems to me, as a matter of law, to be entirely irrelevant.

92. For the reasons I have given, therefore, and on the assumptions that I have adopted above, I would provisionally answer the two questions in issue 3 as follows:-

> **i) Sections 78 and 80 of VATA 1994 cannot properly be construed so as to conform with EU law; and**
>
> **ii) To give effect to Littlewoods' putative San Giorgio right to the use value of the overpayment of tax, sections 78 and 80 of VATA 1994 must be dis-applied so as to allow only the Woolwich claims.**

93. The next question that arises is whether there is any need to refer this issue to the ECJ. The Commissioners say that there is not, since they contend that the question is purely one of how domestic law should apply the EU law San Giorgio right in accordance with the EU law principle of effectiveness. Littlewoods, however, suggest a question asking whether it is contrary to EU law for a domestic court to dis-apply sections 78 and 80 so as to limit the claimant to pursuing what they describe as the "*least favourable remedy*".

94. It seems to me that, depending on how the ECJ answers the first three questions that I have posed, its guidance on this issue might be extremely valuable in reaching a final decision at this trial. The decision I have indicated above is obviously provisional, because it may change depending on the precise nature and extent of the San Giorgio right that the ECJ identifies. It would be particularly helpful to the domestic court to know whether the approach that I have outlined above is consistent with EU law. The real question, as it seems to me is not the one that the Claimants sought to formulate, but rather as to the detailed application of the EU law principle of effectiveness. It is one thing to say that the national court must not make the exercise of the EU law right practically impossible or excessively difficult. It is another thing to know whether the national court has been successful in that exercise in any particular case. It seems to me, at least, that the ECJ might want to say something about the principles upon which national courts should decide how to implement San Giorgio rights by application of the principle of effectiveness. The ECJ will plainly not descend to a consideration, for example, of the relative merits of compensation claims versus restitution based claims in national law, or indeed as to the actual choice between two available remedies. But the ECJ may wish to comment on whether the principle of effectiveness requires national law to dis-apply restrictions on all available causes of action or simply the one that most effectively allows the San Giorgio right in question to be vindicated. The ECJ's

views on this point will, as I have said, be most useful to this Court when it comes to takes its final decision after the reference is decided.

95. In my view, therefore, it would be appropriate to frame a Question 4 for the ECJ as follows: "Does the EU law principle of effectiveness require a member state to dis-apply the domestic restrictions (such as sections 78 and 80 of the VATA 1994) on all the domestic claims or remedies that would otherwise be available to the taxable person to vindicate the San Giorgio right established in the ECJ's answer to the first 3 questions, or can the national court choose to dis-apply such restrictions only on the claim or remedy that most effectively allows that right to be vindicated? What other principles should guide the national court in giving effect to this San Giorgio right so as to accord with the EU law principle of effectiveness?".

96. Again, I will hear counsel on the precise form of this question, since it has not been the subject of detailed argument in the course of the hearing thus far. It is clear from what I have said above how I would be inclined to answer this question.

Issue 4: Is HMRC entitled to deploy a 'change of position' and/or an 'exhaustion of benefits' defence to (a) the Woolwich claims and/or (b) the mistake-based claims? If so, are these defences made out in fact and to what extent?

97. The Commissioners have rather 'lumped together' their two defences of (a) change of position and (b) exhaustion of benefits, even though, in my judgment, they are, if connected, legally and factually distinct. It is perhaps useful at the outset to state briefly what they are:-

> **i) The change of position defence asserts that it would be inequitable for the Commissioners to be forced to repay the use value of the overpayment of tax, because they changed their position by irretrievably spending those payments within each fiscal year.**
>
> **ii) The exhaustion of benefits defence asserts that the government's annual budget procedures mean that tax receipts are used up in each fiscal year, and no benefit is derived by the government from those receipts thereafter. For that reason, the claimants' measure of recovery should be limited to the benefit of the use of the principal sums for a single fiscal year. This argument seems to me to relate as much to the assessment of the benefit obtained by the Commissioners from the use of the overpayment as it does to a properly so-called change of position defence. I will nonetheless deal with it under this issue, as that is how the parties have argued it.**

98. Again, if my preliminary views on issue 2 are endorsed by the ECJ, these issues will not arise at all. In addition, if the ECJ finds in favour of a San Giorgio right to the use value of the overpaid tax, the matter will come back to this Court, and the applicability of these defences will need to be reconsidered in the light of the ECJ's decision.

99. Nonetheless, both parties have agreed that I need to deal with the English law aspects of these defences, so as to provide an appropriate foundation for the reference to the ECJ. I think I also need to deal with the EU law question of whether change of position defences can, in principle, be available in answer to San Giorgio claims, since this, as it seems to me, is part and parcel of the proper approach to the principle of effectiveness.

100. The issues break down broadly as follows, and I shall deal briefly with each in turn:-

i) Issue 4A: Is a change of position defence available in English law to (a) a Woolwich claim, and/or (b) a mistake-based restitutionary claim?

ii) Issue 4B: Is an exhaustion of benefits defence available in English law to (a) a Woolwich claim, and/or (b) a mistake-based restitutionary claim?

iii) Issue 4C: Have the Commissioners made their change of position defence good on the facts to (a) the Woolwich claims, and/or (b) the mistake-based restitutionary claims?

iv) Issue 4D: Have the Commissioners made their exhaustion of benefits defence good on the facts to (a) the Woolwich claims, and/or (b) the mistake-based restitutionary claims?

v) Issue 4E: Assuming a change of position defence is available and has been made good on the facts, can it be given effect as a matter of EU law in answer to San Giorgio claims for the use value of overpayments of tax?

vi) Issue 4F: Assuming an exhaustion of benefits defence is available and has been made good on the facts, can it be given effect as a matter of EU law in answer to San Giorgio claims for the use value of overpayments of tax?

Issue 4A: Is a change of position defence available in English law to (a) a Woolwich claim, and/or (b) a mistake-based restitutionary claim?

101. In FII Chancery, Henderson J decided (paragraphs 336-340) that a change of position defence was not available to a Woolwich restitution claim, because (a) the claim is based on the unlawful levying of tax and therefore on the commission of a legal wrong and (b) the right of a private citizen to recover tax which has been unlawfully levied by the executive arm of government should, as a matter of principle, be unfettered. This specific issue was not considered in FII CA.

102. Also in FII Chancery, Henderson J decided that a defence of change of position was available in English law to a mistake-based restitution claim, particularly where the claimant's motive in bringing it was "*to take advantage of a more generous limitation period*" (paragraph 341). He held expressly in paragraph 342 that it was not appropriate to regard the Commissioners as wrongdoers in relation to such a claim, and that there was no logic or justice in

holding that the unlawfulness which lies at the heart of the Woolwich claims should infect the mistake claims as well. The Court of Appeal in FII CA did not consider the substance of this holding, but did comment that all Henderson J had really been doing was to decide that there was nothing to stop the Commissioners raising the defence at trial.

103. **As I understood Mr Rabinowitz's submissions, he accepted for the purposes of this hearing what Henderson J had held in FII Chancery, but wanted to reserve his position in any higher court, as to whether change of position should ever be available in relation to claims concerning repayment of tax.**

104. **Mr Swift, on the other hand, sought to argue that a change of position defence should be available to a Woolwich restitutionary claim, as well as to a mistake-based claim. He raised three main points:-**

> **i) First, that following the decision in FII CA that an unlawful demand was not a necessary element of the Woolwich restitutionary claim, there was no basis for the rejection of a change of position defence on the ground that the claim was based on the unlawful levying of tax and therefore on the commission of a legal wrong.**
>
> **ii) Secondly, that recognising a change of position defence to the use value element of a Woolwich tax overpayment claim would be consistent with the evolution of the restitutionary claim itself in Sempra HL, and with the kind of evolution that Lord Goff had in mind in Lipkin Gorman v. Karpnale [1991] 2 AC 548 at pages 579-580.**
>
> **iii) Thirdly, that recognising the change of position defence only to the use value element of the claim would avoid the suggestion that there could be a conflict with the constitutional principle to which Henderson J alluded at paragraph 340 in FII Chancery.**

105. **I do not think it is necessary for me to set out the legal background to these points, when that exercise has been undertaken so comprehensively and so recently by Henderson J in FII Chancery. I gratefully adopt Henderson J's scholarly summary of the authorities at paragraphs 311-334. The essence of the argument is, however, in Mr Swift's first point. Does there remain a sufficient element of wrongdoing in a Woolwich restitutionary claim to deprive the Commissioners of a change of position defence, now that the Court of Appeal has decided in FII CA that no unlawful demand is necessary? I can say at once that, in my judgment, there does. I say this because the reasoning adopted by Arden LJ in deciding that no demand was necessary left the element of unlawfulness, and therefore of wrongdoing, intact.**

106. **Arden LJ expressed her reasoning in FII CA in the following short passages:-**

> **i) "*[T]he underlying principle is that the Revenue should repay tax that has been exacted without legal justification*" (paragraph 158).**

ii) "*Lord Goff, at the very outset of his speech in Woolwich, poses the question in terms of "exaction of tax" at page 163C: "The question which lies at the heart of the appeal is whether money exacted as taxes from a citizen by the Revenue ultra vires is recoverable by the citizen as of right*"" (paragraph 160).

iii) "*What is important is that the taxpayer pays "pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and of the holding out of such validity by the legislature" (in the words of Wilson J)*" (paragraph 164, which referred to the dissenting judgment of Wilson J in Air Canada v. British Columbia 59 DLR (4th) 161).

iv) "*The language used by the majority of the House of Lords in Woolwich, and the principles and policy endorsed by them, point away from such a limitation and support the application of Woolwich to any case where tax has been unlawfully exacted from a person by virtue of a legislative requirement, including compulsory self-assessment*" (paragraph 173).

107. Thus, it seems to me that, even after FII CA, the Woolwich restitutionary claim is still based on unlawfulness in the form of unlawful exaction of taxes from the citizen. Therefore, Mr Swift is wrong to suggest that the Woolwich claim is no longer "*based on the unlawful levying of tax*". That remains its foundation. All that Arden LJ said in FII CA was that a demand was not a necessary element in the claim.

108. Mr Swift's second and third points might be persuasive if his first point had been correct, but in my judgment, they cannot succeed without the first point. As Lord Goff made clear at page 580E in Lipkin Gorman, "*it is commonly accepted that the [change of position] defence should not be open to a wrongdoer*". In my judgment, wrongdoing in the form of unlawful exaction of taxes remains at the heart of the Woolwich claim for unjust enrichment, so that, as the law presently stands (at first instance at least), it is not possible to allow the development in the law which Mr Swift seeks, since it would cut across one of the basic principles of the defence. Mr Swift's suggestions that limiting the defence to the use value element of the claim might provide a desirable incremental development of the defence and circumvent the constitutional objections to its availability, are attractive, but will need, it seems to me, to be advanced in a higher court, where the availability of the defence in a case of wrongdoing can be reconsidered.

109. Accordingly, in my judgment, a change of position defence is available in English law to a mistake-based restitutionary claim, but not to a Woolwich based claim.

Issue 4B: Is an exhaustion of benefits defence available in English law to (a) a Woolwich claim, and/or (b) a mistake-based restitutionary claim?

110. Insofar as an exhaustion of benefits defence can properly be regarded as a true plea of change of position, it is obvious that its availability as a matter of

English law is governed by the same principles as those that I have set out under issue 4A above. As I have already indicated, I have some doubt as to whether this defence, as the Commissioners have advanced it in this case, is really a defence as such at all. It seems to me to be more an argument as to how the benefit that has accrued to the Commissioners should be calculated for the purposes of assessing the enrichment that is to be the subject of an order for restitution.

111. For present purposes, however, I can say that, insofar as an exhaustion of benefits defence is a species of change of position, it is, as a matter of English law, available to a mistake-based restitutionary claim, but not to a Woolwich based claim.

Issue 4C: Have the Commissioners made their change of position defence good on the facts to (a) the Woolwich claims, and/or (b) the mistake-based restitutionary claims?

112. The factual issues would, I think, be the same whether the defence was available to a mistake-based or a Woolwich based restitutionary claim. I am, however, now only considering the mistake-based claims, which I have provisionally decided under issue 3, are not actually available to Littlewoods. I make this point, because it explains why I have tried to keep my findings within a short compass.

113. The pleaded defence is, as I have said, that the overpayments of tax were irretrievably spent by the government within each fiscal year. Littlewoods' main answer to the Commissioners was to rely upon the requirement for causation exemplified by Lord Goff at page 580 in Lipkin Gorman, where he said: "*I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things*" (and see Scottish Equitable plc v. Derby [2001] 3 All ER 818 at paragraphs 29-37 per Robert Walker LJ). In other words, the person enriched has to show, not only that he has spent the money, but also that he would not have spent the money, but for the enrichment.

114. Littlewoods contended that it was common ground on the evidence that the government had not changed its spending decisions in any of the relevant fiscal years, in reliance on the VAT that it had received or was expecting to receive from Littlewoods. Professor John Kay, the distinguished economist who gave evidence for Littlewoods, concluded at paragraph 51 of his first report that "*It is my opinion that the sums at issue in the present case are not material in the context of United Kingdom government budgeting and spending over the period 1973-2004. That is to say, if there had not been an expectation of receiving these sums in future years, I do not believe that this would have changed budgetary and spending decisions*". The Commissioners called Mr Mark Neale, who was at HM Treasury from 1995-1998 and from 2005-2009. His reply report said at paragraph 5 that he did not disagree with Professor Kay's overall conclusions.

115. Faced with this evidential problem, the Commissioners changed tack in the cross-examination of Professor Kay, by seeking to allege that, even if the

individual annual payments of VAT made by Littlewoods were not material to government expenditure year by year, the overall obligation to repay the accumulated liability for overpayments and compound interest amounting to more than £1 billion would have been material. Professor Kay accepted that a current liability of £1 billion would indeed be material, but argued that one could not properly compare the accumulated liability of 30 years with a current year's income and expenditure account. He said that the £1 billion should properly be compared to the government's balance sheet – i.e. to its net assets, not to its annual budget. I accept that evidence.

116. Mr Rabinowitz objected to the Commissioners advancing this argument, which he said was unpleaded and, therefore, not open to them. In my judgment, however, there was no reason why Mr Swift could not advance this slightly different way of putting his argument and I am content that it should be dealt with. Mr Rabinowitz was able to adduce Professor Kay's evidence to rebut it, which he duly did.

117. Mr Swift next relies on Henderson J's approach to the facts in FII Chancery. I need to set out a relatively lengthy section of his reasoning so that the Commissioners' position can be properly understood. But, in reality, this part of Henderson J's judgment goes to the issue of materiality with which I have already dealt. He said the following at paragraphs 344-347:-

> ***"[344] To state the obvious, taxation is not imposed for its own sake, but in order to fund government expenditure. It is one of the two main ways in which public expenditure is funded, the other being public sector borrowing. One would expect government spending decisions, at a policy level, to be reached at least in part on the basis of the tax revenues which it has received in the past, and which it expects to receive in the future. Even if tax revenues are not spent immediately, common sense suggests that they will be used up over a fairly short period, and that it is probably safe to assume that tax receipts which predated the claims in the present case by more than six years, and therefore fell outside the scope of a Woolwich claim with its six-year limitation period, will have been exhausted well before the commencement of the action. As a matter of causation, no precise link can be demonstrated between particular receipts and particular items of government expenditure, but common sense again suggests that planned government expenditure would not have taken place at the level which it did but for the availability of the tax receipts which were taken into account in fixing departmental budgets. If all concerned, both the government and the taxpayers, proceeded on the footing that the tax was validly levied, I ask myself what is wrong with the argument that it would now be inequitable to require the Revenue to make restitution for the tax which was paid by mistake, because the money in question has long ago been spent in the public interest, and everybody assumed in good faith that it had been validly levied? I confess that, once the question is stated in these terms, the answer to it seems to me to be obvious. It would in my judgment be inequitable to require repayment in such circumstances, always bearing in mind that the claimants have a perfectly good separate San Giorgio claim for repayment of the unlawfully levied tax itself, free from any change of position defence.***

[345] It may be objected to my analysis that the necessary causal link is not made out, because it would always have been open to the government to raise the necessary money in a different way (for example by borrowing, or by an increase in tax rates, or by a corresponding cut in expenditure elsewhere, or by a combination of those methods) if the mistakenly paid tax had not been available to it. However, although this argument has superficial attractions, it seems to me to miss the point. What matters is the existence of a causal link between the tax revenues which were in fact received and the expenditure which was actually made. The fact that the money could have been raised in a different way is, in my judgment, neither here nor there.

[346] A related objection is that, once departmental spending policy has been fixed and budgeted for, the various items or heads of expenditure should be regarded as commitments which have to be honoured, and are thus analogous with debts which have to be paid off in one way or another, rather like the mortgage in Scottish Equitable v Derby. In my view the answer to this point is again the same. Departmental spending plans are themselves likely to be predicated in part on the receipt of identifiable tax revenues, and (if so) they cannot be treated as purely extraneous obligations which the government would anyway be under an obligation to fund.

***[347] I must also clear away one major misconception which, as it seems to me, has bedevilled much of the pleading and evidence on this issue. Most of the Revenue's pleaded case in support of its change of position defence is directed to establishing the proposition that it would now cost an enormous amount, and would severely disrupt public finances, if the Revenue had to pay the claimants' claims in full: see the particulars which I have quoted at [310] above. Similarly, much of the evidence of Mr Ramsden (to which I will come in the next section of this judgment), and most of his cross-examination by Mr Aaronson, was devoted to that aspect of the matter. But the relevant question is not what it would now cost the Revenue to meet a judgment, or how it could reasonably expect to do so. The relevant question is whether the Revenue has in the past changed its position, on the strength of the receipts paid under a mistake, in such a way that it would now be inequitable to require the Revenue to make restitution. That question is correctly pleaded in para 31 of the amended defence, and is reflected in the simple and (to my mind) compelling point made in para 32, namely that the sums in question formed part of the UK's tax revenue for the years in which they were paid, and have since been irretrievably spent, in some cases decades ago* (emphasis added)."**

118. This passage is useful for two reasons. First, it makes clear in the highlighted passage in paragraph 347, in my judgment correctly, that Mr Swift's new point is untenable. It does not matter that the gross accumulated repayment might have been material, the question is only whether the overpayment of VAT in each year was material to government spending in that year. Secondly, it explains why Henderson J reached a somewhat different conclusion on the evidence before him, from the one that I have reached.

119. **Henderson J heard the evidence of a Mr David Ramsden for the Commissioners, which seems to have been quite similar to the evidence that I heard from Mr Neale, whose first statement concluded by saying: "*[s]o tax receipts that are already in the Government's baseline fiscal forecast can be considered to have been spent in the sense that the Government's tax and spending decisions are made on the basis that these funds are available*".**

120. **Henderson J appears, however, to have heard no evidence equivalent to that of Professor Kay, to which I have already referred. Professor Kay concluded, as I have said that the VAT overpayments in this case were well below the level of materiality to government budgeting and spending between 1973 and 2004. Most vividly, he explained that the VAT revenues we are concerned with were equivalent, in Government terms to 3 pence per week or £1.50 per year, as compared to a household income of £30,000 per year. He concluded, therefore, that had the Government not expected to receive these sums by way of VAT, it would not have changed its budgetary or spending decisions. In his second report, he explained that the overpayments of VAT represented only a tiny fraction of the expected error of the fiscal forecasts on which budget decisions are made.**

121. **In oral evidence, Professor Kay explained that spending decisions were not affected by the anticipated receipt or non-receipt of the overpayments, and that "*the necessary corollary is that indebtedness was and remained at lower levels, than would have obtained if the overpayments had not occurred*". That element of benefit to the government from the overpayments was much challenged in cross-examination, but in my view, only partially successfully. Professor Kay's conclusion was that, because one does not know whether any particular receipts were spent, the probability, but not the certainty, is that they went to reducing Government indebtedness (T1/96/23-4). I accept that evidence. Indeed it seems obvious to me that the fact that the Government receives a particular receipt that has not itself caused any additional expenditure must enhance the Government's overall financial position by reducing its overall debt. Thus, it is impossible for the immaterial receipts we are concerned with in this case to have been "*irretrievably spent*", in the sense that the Commissioners would use the expression, at the end of the fiscal year in question. Of course, the payments are not specifically noticed in terms of the government's overall wealth, but that does not mean that the government has not been enriched by them at the end of the relevant fiscal year. It is not like the situation of a Lloyd's syndicate that can close its year of account (normally after it has remained 'open' for 3 years). Governments do not do that, or at least there was no evidence that they did in the periods relevant to this case.**

122. **In short, I do not accept that VAT receipts of the level of those made by Littlewoods in each fiscal year since 1973 were material to government expenditure. There was simply no evidence before me on which I could conclude, as Henderson J did that "*departmental spending plans are themselves likely to be predicated in part on the receipt of [these] identifiable tax revenues*". Quite the reverse, the evidence was that these VAT revenues were immaterial to government expenditure plans, and went ultimately to reducing government borrowing at the end of each fiscal year. There was a suggestion from Mr Neale**

that, insofar as the receipts created a surplus, the government might benefit from lower interest rates on Government debt, but he explained that the precise relationship between interest rates and debt was unclear. Recent events in Greece demonstrate clearly that, at an extreme level, the more a government borrows internationally, the higher rates of interest it can expect to pay. Any benefit the government did receive by way of lower borrowing rates (which I doubt would be discernible) could, if appropriate be taken into account in the assessment of quantum, which I am not undertaking at this stage.

123. **On the facts that I have found, therefore, the overpayments were not material to government spending decisions in each fiscal year. And, at the end of each year, government borrowing was most probably reduced by the amount of the overpayments in that year. This does not, however, answer the crucial question, namely whether future government borrowing was affected by the overpayments beyond the end of each fiscal year. This depends on the evidence about how the government sets the level of its borrowing, which was somewhat exiguous. But doing the best I can on the basis of Mr Neale's evidence, it seems to me that the benefit that the government actually derived requires an assessment of the quantum of the claim. This will take place (if it is ultimately required) on the basis of the exhaustion of benefits defence, which as I have already said, I regard as more an argument about the quantum of the claim.**

124. **In my judgment, the change of position defence cannot succeed, because at the end of the fiscal year, the government has prima facie received a benefit in that its borrowing has been reduced by the amount of the VAT overpayment in that year. That benefit may or may not be carried forward, but the change of position defence fails because the Commissioners have failed to prove, the burden being on them, that they increased their spending in any way on the basis of the expectation or the happening of the overpayment, even if they can show that they either spent or used the overpayment to reduce borrowing.**

125. **My answer to this issue is, therefore, that the Commissioners have not made out their change of position defence on the facts in respect of the mistake-based restitutionary claims (if Littlewoods have such claims). Had such a defence been available to the Commissioners as a matter of law to the Woolwich based claims, that too would not have been made out.**

Issue 4D: Have the Commissioners made their exhaustion of benefits defence good on the facts to (a) the Woolwich claims, and/or (b) the mistake-based restitutionary claims?

126. **Again under this issue, I think the factual issues would be the same whether I was considering a mistake-based or a Woolwich based restitutionary claim.**

127. **In substance, the Commissioners are asserting, as it seems to me, that as a matter of the measurement of the benefit that the government actually received from the overpayments, that benefit ceased after the fiscal year in question. This is presumably because government borrowing levels are held at particular levels (in normal economic times) irrespective of any specific overpayments made in**

past years. Mr Neale explained in outline the way in which government sets its spending and budgetary limits in his first witness statement. I accept his evidence on these points but do not need to deal in detail with them at this stage, because the real relevance of what he has said will be in relation to the assessment of quantum when and if there is a need for that assessment to be made.

128. Mr Swift directed my attention to a series of passages in Sempra HL, in which their Lordships made clear that the remedy for unjust enrichment was flexible, and although a conventional government borrowing rate had been appropriate in that case, it might not be appropriate in every case, since the starting point was that the process was "*one of subtraction, not compensation*" (see Lord Hope at paragraph 31, and at paragraphs 46-8, and Lord Nicholls at paragraphs 118-9, and Lord Walker at paragraphs 184 and 187, and Lord Mance at paragraphs 233-5). In essence, the point is that, if the recipient can show that it has not benefited from the overpayment, it will only be made to repay the amount by which it has actually benefited in fact.

129. I have not, at this stage, heard enough by way of evidence to determine finally whether, and if so by how much, the government has benefited from the receipt of the overpayments from Littlewoods between 1973 and 2004. It may be that, when quantum is assessed, the government will be able to show that a conventional rate is not appropriate in this case precisely because it has not benefited to that extent from the overpayment. I have already found that the government benefited from the full amount of the overpayment at the end of each of the fiscal years in which that overpayment was made. But whether or not the government was still benefiting from any particular overpayment made in a previous year will depend on the specific borrowing and budgeting decisions made from year to year. If the government is able to show on a quantum hearing that it did not in fact benefit from an overpayment in a conventional rate of interest, because the borrowing/deficit decisions would have been the same with or without that overpayment, then the Commissioners may establish that the benefit received by government from the overpayments is not properly represented by an award of compound interest in a conventional rate as it was in Sempra HL. If, for example, the true position was that, in 1980/1981, Littlewoods overpaid VAT in the sum of £1 million, so that as at 5th April 1981, the government's borrowing was £1m less than it would otherwise have been, but that, when borrowing limits were set, they were set at the same levels as they would have been anyway, so that the government had to borrow less as a result of the overpayment, and perhaps had an extra £1 million to spend, the interest payments that the government makes after the fiscal year in question could have been the same with or without the overpayment. This is, of course, the change of position defence by another name, but so regarded, the special requirement of showing that a particular expenditure would not have occurred but for the overpayment is abrogated. All the government has to show, as a matter of quantum, is that it has not actually benefited from the overpayment in subsequent years as a result, because the budget deficit would have been set at the same level with or without it. The government still, of course, has the additional capital, but it will either have spent it or used it to reduce borrowing. It may well not have incurred any greater borrowing year on year or any saving of interest in subsequent years, even if the overpayment is thereby notionally

spent in the subsequent year, because, on my example, the government has an extra £1 million at its disposal for the same level of borrowing.

130. **I have, however, now to consider whether this could be consistent with the findings I have made under issue 4C above. In other words, is it consistent to say, on the one hand, that there has been no change of position because the overpayments must be taken to have decreased government borrowing in the fiscal year in question, and on the other hand that it is open to the Commissioners to prove that government has not benefited in fact from the overpayments after the fiscal year in which they were paid. There is, I think, no inconsistency here. The difference is between a defence of change of position, properly so called, which requires it to be shown that a spending decision has been taken in reliance on the overpayment, and a quantum assessment which enables the recipient to show that it has, in fact, not benefited beyond the capital payment because, in this case, of the special government mechanisms for setting its budgets, its borrowing limits and its expenditure.**

131. **My conclusion to this issue is that, whilst the Commissioners have not made any change of position defence good on the facts, whether framed as an exhaustion of benefits defence or not, it is open to the Commissioners to argue on the assessment of quantum in answer to the Woolwich based claims, and to the mistake-based claims (if they were available), that the government has not benefited from the money after the first fiscal year, so that no use value of the money should thereafter be awarded to Littlewoods. This will require further evidence if it is to be established when the quantum element of the trial of this claim takes place. I understand that this approach could be construed as allowing something analogous to a change of position defence to Woolwich claims, when I have already held that no such defence is available in English law; but, as it seems to me, the assessment of the quantum of a restitutionary claim is juridically separate from the applicability of a true change of position defence, and different principles can properly be applied to each.**

Issue 4E: Assuming a change of position defence is available and has been made good on the facts, can it be given effect as a matter of EU law in answer to San Giorgio claims for the use value of overpayments of tax?

132. **I have held then that a change of position defence is available to the mistake-based claims, but has not been made good on the facts. Accordingly, this issue appears to be academic. I have considered, however, whether I should nonetheless answer it provisionally, so that the ECJ can be asked, if it feels it appropriate, to comment upon it. Such a course would prevent the need for a subsequent reference if I were later held to be wrong:-**

> **i) On an appeal to the Court of Appeal or Supreme Court, as a matter of domestic law, about the non-availability of the defence to the Woolwich claims, or about the defence of change of position having been made good on the facts; or**

ii) By the ECJ, in the way I have answered issue 3 above, and on a domestic appeal as to the facts concerning the change of position defence to the mistake-based claims.

133. **In FII Chancery, Henderson J held that a change of position defence was not available in answer to San Giorgio claims for the repayment of overpaid tax together with the use value of the money (paragraph 304). The Commissioners had conceded that to be the case in relation to Woolwich claims alone, but Henderson J held that the same position applied to the mistake-based restitutionary claims. He relied on the decisions of the ECJ in Marks & Spencer (allowing reasonable limitation periods), Weber's Wine World (allowing a defence based on the burden of the tax having been passed on to a third party), Metallgesellschaft (refusing to allow the President of India defence to claims for interest on sums already repaid), and Fantask A/S e.a v. Industriministriet (Erhvervministeriet) (Case C-188/95) [1997] ECR 1-6783 ("Fantask") (refusing to allow a settled law defence otherwise available in Danish law). Henderson J reached the same conclusions in Chalke Chancery (paragraphs 173-177), where the Revenue withdrew its previous concession that change of position defences were unavailable in answer to San Giorgio claims. In that case, Henderson J placed special reliance on the fact that the ECJ had described the 'passing on' defence in paragraph 91 of its judgment in Weber's Wine World as the only exception to the obligation to make repayment according to case law.**

134. **Mr Swift's argument before me was rather different from his unsuccessful argument in Chalke Chancery. He put the matter as follows:-**

i) There is no direct ECJ authority rejecting the change of position defence in answer to San Giorgio claims, and Fantask is far from conclusive, as a settled law defence is, in principle, quite different from a change of position defence.

ii) If the extent of the San Giorgio right has indeed been significantly extended to cover the use value of money, as well as the repayment of the principal, there is no reason why a defence of change of position could never be advanced in answer to that extended claim. Reasons might include the fact that very large liabilities can be generated against member states, and the claimant not being required to prove any loss, and the claimant not being required to meet the conditions of a Factortame claim for damages.

135. **Mr Swift's contentions on both these points seem to me to be, at least, arguable. If the ECJ has already recognised (contrary to my provisional view), or were in the future to recognise, a broadly based EU San Giorgio right to what is, in effect, compound interest on overpayments of tax, it might consider that circumstances could arise in which a change of position defence would not conflict with the principle of effectiveness.**

136. **The problem here, in my judgment, is that the nuances of the developing change of position defence are pre-eminently matters of national law. And the ECJ has emphasised time and again that the way in which San Giorgio rights are**

to be implemented is a matter for national law, provided the principle of effectiveness is not compromised. If the ECJ were to descend into the detail of the English law change of position defence, it would be doing precisely what it has hitherto set its face against. The easiest and clearest solution is, therefore, that indicated by Henderson J in both FII Chancery and Chalke Chancery, namely that no change of position defence can ever be raised to claims or remedies required to give effect to San Giorgio rights. That solution does not, however, allow for the degree of flexibility in the EU principle of effectiveness which existing case law has shown. Would it really be in accordance with the EU principle of effectiveness for a taxpayer to recover compound interest on overpaid tax, if the Commissioners had indeed expended the overpayment in good faith specifically in reliance on its having been due? And would that result accord with the existing case law, which suggests that the principle of effectiveness does not require reimbursement if the taxpayer has not, in fact, suffered any loss and would be unjustly enriched by the repayment?

137. In addition, as I mentioned in the course of argument, the availability of a change of position defence in national law systems is obviously relevant to the primary question of whether or not the San Giorgio right should include a claim to the use value of the overpayments of tax. The Commissioners have not raised before me the 'fiscal chaos' argument to the effect that, if they are forced to repay compound interest on massive tax overpayments over many years, it would have a serious adverse effect on the government's fiscal policies. But it does seem to me to be, at least arguably, relevant to the question of whether such an extensive San Giorgio right should be recognised at all, to consider the defences that might be available to member states if such claims are brought. It is perhaps obvious that a 'settled law' defence would not avail a member state as an answer to a San Giorgio claim. But the 'passing on' defence recognised in Weber's Wine World is of a different order, looking as it does to the justice (or injustice) of the reimbursement. The change of position defence likewise looks to the injustice of the reimbursement, and could be held, as the Commissioners contend it should, to be available only in respect of claims to the use value of the overpayments, rather than the overpayments themselves.

138. Ultimately, it seems to me that the outcome should depend on the true extent of the principle of effectiveness which requires that national law shall not render practically impossible or excessively difficult the exercise of EU law rights. Since reasonable limitation periods do not infringe the principle, and a justice-based 'passing on' defence does not do so either, it seems to me that it would be inconsistent for it to be held that the existence of a change of position defence based on established legal principles, rather than discretion, contravened the principle of effectiveness. I do not, however, regard the point as free from doubt, and I think that it is appropriate that it should be the subject of a question to the ECJ.

139. My provisional answer to this issue is, therefore, that, assuming a change of position defence is available in national law, and has been made good on the facts, it should be given effect as a matter of EU law in answer to San Giorgio claims for the use value of overpayments of tax. The question does not arise immediately, however, because I have decided under issue 3 that only

Littlewoods' Woolwich restitutionary claims are necessary to satisfy their San Giorgio rights, and that, as a matter of English law, a change of position defence would not be available to those claims. A change of position defence would, in theory be available to Littlewoods' mistake-based claims, but my provisional view is that these claims are not available to Littlewoods.

140. **The question that I would refer to the ECJ on this issue mentions also the exhaustion of benefits defence, with which I deal next. It is as follows: "Question 5: Does the EU law principle of effectiveness require a member state to disallow to a taxation authority a change of position and/or an exhaustion of benefits defence, otherwise available in national law, in answer to a taxable person's restitutionary claims brought to give effect to its San Giorgio rights established in the ECJ's answer to the first 3 questions? What other principles should guide the national court in allowing change of position or exhaustion of benefit defences to be raised in answer to these San Giorgio rights so as to accord with the EU law principle of effectiveness?"**

Issue 4F: Assuming an exhaustion of benefits defence is available and has been made good on the facts, can it be given effect as a matter of EU law in answer to San Giorgio claims for the use value of overpayments of tax?

141. **Insofar as the exhaustion of benefits defence is properly to be regarded as a change of position defence, my answer to this issue is the same as it is above for the change of position defence itself. Insofar as the exhaustion of benefits defence is truly a question of quantum, I deal with it below.**

Issue 5: In principle, is the measure of recovery for the Woolwich claims and/or the mistake-based claims to be measured by reference to (a) a conventional rate of interest compounded, or (b) the actual benefit enjoyed by the Commissioners, or (c) a compound rate of interest reflecting the cost of national government borrowing, or in some other way? And is the measure limited to the lower of the value of (a) the use of which the Claimants have been deprived and (b) the value of the use which the Commissioners received?

142. **It is common ground that, if Littlewoods succeed in either of their restitutionary claims, the measure of their loss is to be decided in accordance with the principles enunciated in Sempra HL. As I have already indicated, the House of Lords decided there that the claimant should recover a compound rate of interest reflecting the cost of national government borrowing, but that it should be open to the Commissioners in an appropriate case to show that they had benefited to a lesser extent, so that they should only be liable for the actual benefit enjoyed by them. That, therefore, is the answer to the first part of this issue.**

143. **I have already made clear (paragraph 112) that if my provisional views are endorsed by the ECJ's ruling, I would allow the Commissioners to argue its exhaustion of benefits defence on the quantum trial in answer to Littlewoods' Woolwich claims. If the mistake-based restitutionary claims are also available to Littlewoods (contrary to my present view), I would also allow the Commissioners to argue at the quantum hearing, that they have not benefited from the**

overpayments in fiscal years after the year of payment. To support that argument, however, further evidence will, it seems to me, need to be adduced along the lines I have indicated.

144. Mr Rabinowitz has objected to this approach, effectively contending that the Commissioners have had their chance to advance their exhaustion of benefits defence and cannot do so again at the quantum hearing. This point is, in my judgment, misconceived, since the trial here has been in two parts, and even this first part has reached no final conclusion, except on the liability issues unaffected by EU law. The remaining issues have been referred, because they are not clear, and because this Court needs the guidance of the ECJ before it can finally decide them. In the result, if my provisional decisions stand in their entirety, there will be no need for any change of position defence at all. If they do not, I will have to reconsider my provisional views in the light of the ECJ's ruling. If I have to reconsider the change of position defence, it will, as I have said, probably be most convenient to do so alongside a determination of the quantum of the claim or claims that are to be allowed. It would be wrong, in my view, to decide any of these points finally in advance of the ECJ's ruling. I would certainly not want to deprive either side of the right to adduce further evidence at the quantum hearing in the light of the judgments of this Court and of the ECJ.

145. The final part of this issue does indeed raise an entirely new point. The Commissioners contend that there should be a check on the restitutionary claim, so that a claimant should only recover the full extent of the use value of the overpayments, in the amounts by which the recipient has benefited, or at government borrowing rates, provided it can show that it has suffered loss to that or a greater extent. As Mr Rabinowitz has submitted, this argument flies directly in the face of the foundation of the law of restitution, which looks to the unjust enrichment of the recipient, rather than to the loss sustained by the claimant. Numerous authorities have expressly rejected the proposition, including Sempra HL itself (Lord Hope at paragraph 28, Lord Nicholls at paragraphs 116-7, Lord Scott at paragraph 144, and Lord Mance at paragraph 231), and the Court of Appeal in Kleinwort Benson [1997] QB 380 (Saville LJ at pages 394-5, and Morritt LJ at page 399).

146. On a practical level, the need to prove not only what benefit the recipient received, but also what loss the claimant sustained would make the restitutionary remedy cumbersome and unwieldy. In addition, it is nearly always the case that governments can borrow at lower rates than commercial or domestic taxpayers, so the enquiry would only infrequently affect the outcome.

147. In my judgment, the Revenue's contention is contrary to principle as a matter of English law and, therefore, wrong, and should be rejected. The loss of use of which the claimant has been deprived is, in my judgment, irrelevant to the assessment of the quantum of claims for both Woolwich based and mistake-based restitutionary claims. The ECJ will not have anything to say on the question of English law, but I have formulated question 2 for the ECJ on the basis that it may wish to comment on whether, if the San Giorgio right includes a right to the use value of the overpayment, that use value should be calculated by reference to either its value in the hands of the member state or to the loss of the

use value of the money in the hands of the taxpayer. I will not, therefore, refer a specific question concerning this issue to the ECJ.

Questions for the ECJ

148. **It might be useful at this juncture to summarise the questions that need to be referred to the ECJ for a preliminary ruling, before this Court can finally decide those issues that are not purely ones of English law:-**

i) Question 1: Where a taxable person has overpaid VAT contrary to the requirements of EU VAT legislation, does the remedy provided by a member state accord with EU law if that remedy allows for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums in accordance with national legislation, such as sections 78 of VATA 1994?

ii) Question 2: If not, does EU law require that the remedy provided by a member state should allow for (a) reimbursement of the principal sums overpaid, and (b) the use value of the overpayment in the hands of the member state and/or the loss of the use value of the money in the hands of the taxpayer?

iii) 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?

iv) Question 4: Does the EU law principle of effectiveness require a member state to dis-apply the domestic restrictions (such as sections 78 and 80 of the VATA 1994) on all the domestic claims or remedies that would otherwise be available to the taxable person to vindicate the San Giorgio right established in the ECJ's answer to the first 3 questions, or can the national court choose to dis-apply such restrictions only on the claim or remedy that most effectively allows that right to be vindicated? What other principles should guide the national court in giving effect to this San Giorgio right so as to accord with the EU law principle of effectiveness?

v) Question 5: Does the EU law principle of effectiveness require a member state to disallow to a taxation authority a change of position and/or an exhaustion of benefits defence, otherwise available in national law, in answer to a taxable person's restitutionary claims brought to give effect to its San Giorgio rights established in the ECJ's answer to the first 3 questions? What other principles should guide the national court in allowing change of position or exhaustion of benefits defences to be raised in answer to these San Giorgio rights so as to accord with the EU law principle of effectiveness?

Conclusions

149. **Subject to a reconsideration of the issues of EU law that I have decided provisionally and subject to a reference to the ECJ, my conclusions on the issues are as follows:-**

i) Issue 1: The Woolwich claims and mistake-based claims for restitution made by Littlewoods are, as a matter of English law, and without reference to EU law, excluded by sections 78 and 80 of VATA 1994.

ii) Issue 2: Subject to the reference to the ECJ, my provisional view is that the exclusion of Littlewoods' Woolwich claims and mistake-based claims would not be contrary to EU law.

iii) Issue 3: Subject to the reference to the ECJ, and if my provisional view on issue 2 is wrong, my provisional view is that (a) sections 78 and 80 of VATA 1994 cannot properly be construed so as to conform with EU law, and (b) to give effect to Littlewoods' putative San Giorgio right to the use value of the overpayment of tax, sections 78 and 80 of VATA 1994 must be dis-applied so as to allow only the Woolwich claims, and not the mistake-based restitutionary claims.

iv) Issue 4A: A change of position defence is available in English law to a mistake-based restitutionary claim, but not to a Woolwich based claim.

v) Issue 4B: Insofar as an exhaustion of benefits defence is a species of change of position, it is, as a matter of English law, available to a mistake-based restitutionary claim, but not to a Woolwich based claim.

vi) Issue 4C: The Commissioners' change of position defence to the mistake-based restitutionary claims (if the claims were available in law) and to the Woolwich based claims (if the defence was available in law) could not succeed on the facts, because the Commissioners have failed to prove that the government increased its spending on the basis of the expectation or the happening of the overpayments, even though they have shown that they either spent or used the overpayments to reduce government borrowings.

vii) Issue 4D: Whilst the Commissioners have not made any change of position defence good on the facts, whether framed as an exhaustion of benefits defence or not, it is open to the Commissioners to argue on the assessment of quantum in answer to either or both of the Woolwich based and the mistake-based claims (if such were available) that the government has not benefited from the money after the first fiscal year, so that no use value of the overpayments should be awarded to Littlewoods in respect of a subsequent period.

viii) Issue 4E: Assuming a change of position defence is available in national law, and has been made good on the facts, my provisional view is that such a defence should be given effect as a matter of EU law in answer to San Giorgio claims for the use value of overpayments of tax.

ix) Issue 4F: Insofar as the exhaustion of benefits defence is properly to be regarded as a change of position defence, my answer to this issue is the same as it is above for the change of position defence itself.

x) Issue 5:

a) The measure of Littlewoods' Woolwich claim and its mistake-based claim (if one were available) for the use value of the overpayments of VAT is a compound rate of interest reflecting the cost of national government borrowing, but it is open to the Commissioners to show at the quantum hearing that that they have benefited to a lesser extent so that they should only be liable for the actual benefit enjoyed by them.

b) This measure of Littlewoods' claims is not limited to the lower of the value of (a) the use of which they have been deprived and (b) the value of the use which the Commissioners received.

150. The outcome of the trial, on the assumption that my provisional views are endorsed by the ECJ, would be that the Claimants would fail on all their claims for the use value of the overpayments, having been already paid what is due to them under section 78 of VATA 1994.

151. If I were wrong on issue 2, so that the exclusion of Littlewoods' restitutionary claims was contrary to EU law, but right on issue 3 so that Woolwich claims were sufficient to give effect to Littlewoods' San Giorgio rights, Littlewoods' Woolwich claims would succeed for the use value of the overpayments of VAT made in the 6 years prior to the issue of these proceedings (i.e. between 13th March 2001 and 20th October 2004 in the First Action, and between 5th October 2001 and 20th October 2004 in the Second Action). No change of position defence would be available in English law or on the facts. The use value would be assessed by reference to the actual benefit obtained from the overpayments by the Commissioners, either as assessed on the evidence at a quantum hearing, or by reference to a compound rate of interest reflecting the cost of national government borrowing.

152. If I were wrong on issue 2 and on issue 3, Littlewoods' mistake-based restitutionary claims would succeed in respect of the use value of the overpayments of VAT made for the entirety of the period from 1973 to 20th October 2004. A change of position defence would be available in English law, but is not made out on the facts. The use value would be assessed by reference to the actual benefit obtained from the overpayments by the Commissioners, either as assessed on the evidence at a quantum hearing, or by reference to a compound rate of interest reflecting the cost of national government borrowing.

153. It is unnecessary, I think, to deal with any other possible permutations of the decision that may arise following the ECJ's preliminary rulings.

154. I will hear counsel on the precise questions for the ECJ and the drafting of the terms of the reference under CPR Part 68.