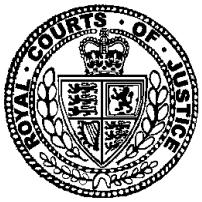

Neutral Citation Number: [2020] EWCA Civ 183

Case No: A4/2019/1337-1340

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2019] EWHC 1234 (Comm)

Rolls Building
Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 19/02/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE UNDERHILL, VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)
and
LORD JUSTICE SIMON

B E T W E E N :

VODAFONE LIMITED
TELEFÓNICA UK LIMITED
EE LIMITED
HUTCHISON 3G UK LIMITED

Claimants/Respondents

- and -

THE OFFICE OF COMMUNICATIONS

Defendant/Appellant

- -

Ms Monica Carss-Frisk QC and Ms Emily Neill (instructed by Towerhouse LLP) for Vodafone Ltd

Mr Tom de la Mare QC and Mr Tom Richards (instructed by DWF Law LLP) for Telefónica UK Ltd

Mr Daniel Cashman (instructed directly) for Hutchison 3G Ltd

Mr Steven Elliott QC and Mr Philip Woolfe (instructed by BT Legal) for EE Ltd

Mr Tom Weisselberg QC, Mr Ajay Ratan and Mr Andrew Trotter (instructed directly) for OFCOM

Hearing dates: 28th, 29th and 30th January 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. The issue before the court in this appeal is beguilingly simple. The 2015 Regulations[1] made by The Office of Communications, the defendant and appellant ("Ofcom"), were quashed by the Court of Appeal on 22nd November 2017 in *EE Ltd v. Office of Communications* [2017] EWCA Civ 1873, [2018] 1 WLR 1868 (the "JR decision"). As a result of the JR decision, it is common ground that 4 mobile network operators, the respondents (the "MNOs"), are entitled to recover, by way of restitution, some part of the payments they made to Ofcom towards annual licence fees ("ALFs") for licences issued under the Wireless Telegraphy Act 2006 (the "WTA 2006").[2] The issue is simply: what part of the ALFs can the MNOs recover as a matter of law?

2. Mr Adrian Beltrami QC, sitting as a deputy judge of the High Court ("the judge"), decided that the MNOs could recover the difference between the ALFs paid under the quashed 2015 Regulations and the amounts that were legitimately due to Ofcom under the existing and still valid 2011 Regulations.[3]

3. Ofcom submits that the MNOs are only entitled to recover the difference between what the MNOs paid under the quashed 2015 Regulations and the amounts that Ofcom would have charged the MNOs, had it acted lawfully by way of executive action, instead of implementing the ultra vires 2015 Regulations.

4. All the facts and the sums in issue were agreed before the judge, and are agreed before us. These sums are shown in the following table reproduced from the judge's judgment (the "judgment"):-

MNO	***Amounts paid under 2015 Regulations***	***Amounts payable under 2011 Regulations***	***Net sum***
Vodafone	£76,245,025·10	£21,865,536	£54,379,489·10
Telefónica	£76,245,025·05	£21,865,536	£54,379,489·05
Hutchison	£44,390,398·53	£17,463,600	£26,926,798·53
EE	£139,823,997	£57,380,400	£82,443,597

5. The legal arguments addressed to us were wide-ranging. In essence, however, Ofcom contended that the authorities demonstrate that a counterfactual approach is appropriate in this area of the law of restitution. The court can look at what fees Ofcom would have provided for under regulations it could and would have made under the existing primary legislation in order to determine the net sum that the MNOs are entitled to receive by way of restitution. Ofcom submits that the judge was

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1 The Wireless Telegraphy (Licence Charges for the 900 MHz frequency band and the 1800 MHz frequency band) (Amendment and Further Provisions) Regulations 2015 (SI 2015/1709).

2 The ALFs were set by Ofcom under the 2015 Regulations.

3 The Wireless Telegraphy (Licence Charges) Regulations 2011 (SI 2011/1128).

wrong to hold that there was no material distinction between primary and secondary legislation, so that the court could not consider a counterfactual based on any legislation that might have been made. The court was, therefore, wrong to identify a distinction between administrative steps that could have been taken "but for" the unlawful 2015 Regulations on the one hand and a statutory instrument that could have been made, on the other hand. In the alternative, the passing of the hypothetical regulations was, according to Ofcom, itself just an administrative step. In any event, Ofcom was not enriched by the MNOs' payments because their objective value to Ofcom was what it could and would have obtained in any event, had it exercised its statutory power lawfully, as explained by the Supreme Court in *Benedetti v. Sawiris* [2014] AC 938 ("*Benedetti*").[4] And if that were wrong, the monies received by Ofcom could and should be subjectively devalued because Ofcom would only have obtained that benefit for itself at a lower price or not at all.[5] Moreover, the MNOs had not suffered a relevant loss, the enrichment was not at the MNOs' expense or unjust because Ofcom could and would have lawfully levied the charges, and the full value of the benefit the MNOs had received in terms of access to the spectrum had, in any event, to be netted off against the loss involved in paying the unlawful ALFs.

6. The MNOs, on the other hand, submitted that the authorities on which Ofcom relied provided no warrant for a counterfactual approach. A claim based on the House of Lords' decision in *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] AC 70 ("*Woolwich*") was founded on the principle of legality[6] and the principle of parity.[7] The judge had been wrong to accept that a counterfactual analysis could be adopted. Charges levied without lawful warrant had to be repaid unless there was an existing power allowing Ofcom to make regulations retrospectively, which it was accepted in this case there was not. Even if, as a matter of domestic law, the full sum was not recoverable, charges levied in breach of EU law had to be repaid in full, unless there was a defence of passing on, which was not asserted in this case.[8]

7. The case raises a fundamental question in the law of unjust enrichment as to the scope of a *Woolwich* claim. Mr Tom Weisselberg QC, leading counsel for Ofcom, submitted that, whilst the factor making the payee's enrichment unjust was rooted in public law, the right to restitution and the obligation to make restitution were part of the private law of obligations.[9] He submitted that that was important, because it was

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4 See Lord Clarke at [17].

5 See Lord Clarke in *Benedetti* at [18].

6 The judge recorded the MNOs' description of the principle of legality at [43] by saying that the right of recovery in unjust enrichment on the *Woolwich* basis "rests on a principled rule of law rationale, namely that a public authority cannot retain a tax or duty or levy which it has collected without lawful authority".

7 The principle of parity is described in the MNOs' skeleton as a principle that there should be symmetry between the positions of (a) a person who has paid under protest and brings an action, and (b) a person who has refused to pay and defends an action.

8 *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* (Case 199/82) [1983] ECR 3595 at [11]-[14] ("*San Giorgio*"), and *Lady & Kid A/S v. Skatteministeriet* (Case C- 398/09) [2012] 1 CMLR 14 at [16]-[26] ("*Lady & Kid*").

9 Beatson LJ at [138] in *R (Hemming (trading as Simply Pleasure Ltd)) v. Westminster City Council* [2013] EWCA Civ 591; [2013] PTSR 1377; [2013] LGR 593 ("*Hemming*").

common ground that restitution should be given, and the only question here was the extent of that restitution, which was a private law question. The usual private law approach in unjust enrichment was to apply a 'but for' causation test at the unjust factor stage.[10] Accordingly, there was nothing surprising in the conclusion that the court should look at what Ofcom could and would have done had they known the 2015 Regulations were unlawful.

8. The court put to Mr Weisselberg in the course of his reply submissions that his argument depreciated the principle of legality enunciated in *Woolwich*. An authority with statutory power to make regulations could avoid repaying unlawfully levied charges by saying that it could and would have made lawful regulations. Moreover, there would cease to be much point in overcharged entities challenging the unlawfulness of such regulations, because the counterfactual would always prevent substantial recovery. Mr Weisselberg's answer to these points was to submit that his contentions were putting *Woolwich* into its proper place as part of the law of unjust enrichment. It was making sure that public authorities were not deprived of revenue on the basis of technicalities. He did not, however, shy away from the fact that his argument undermined the breadth of the *Woolwich* principle.

9. The central question for the court in this appeal is whether a proper understanding of the authorities requires, or at least points towards, the need for a counterfactual analysis in determining the extent of restitution in a *Woolwich* case.

10. Before addressing the authorities and this central question, I will briefly summarise the factual and statutory background, and summarise the judge's approach and the grounds of appeal.

Factual and statutory background

11. Like the judge, I can take the factual and statutory background mainly from the agreed statement of facts.

12. Ofcom is the body responsible for managing and licensing radio spectrum in the United Kingdom, including collecting ALFs. The MNOs operate networks of base stations through which they provide mobile communications services on a retail basis to subscribers and on a wholesale basis to Mobile Virtual Network Operators. Mobile devices transmit and receive voice calls and data via radio signals sent to and received by antennae on those base stations. Radio spectrum is therefore an essential input into the MNOs' businesses. Spectrum in the UK has generally been assigned after spectrum auctions since 2000. This case, however, concerns the 900 and 1800 MHz bands, which were allocated administratively rather than being assigned at auction. Four specific licences are in issue in this case, namely licence number 0249664 held by Vodafone, licence number 0249663 held by Telefónica, licence number 0931984 held by Three, and licence number 0249666 held by EE. In the case of each of these licences, an ALF was payable as provided in section 12 of the WTA 2006 and the regulations made thereunder.

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[10] Burrows, The Law of Restitution, 3rd edition (2011), at page 91.

13. Article 13 of Directive 2002/20/EC of 7th March 2002 on the authorisation of electronic communications networks and services (the "Authorisation Directive")[11] provided that Member States could allow "the relevant authority [Ofcom, in the case of the UK] to impose fees for the rights of use for radio frequencies"… "which reflect the need to ensure the optimal use of these resources", and that "Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of Directive 2002/21/EC (Framework Directive)". Those article 8 objectives included competition, the development of the internal market, and the promotion of the interests of the citizens of the EU.[12]

14. Ofcom's statutory powers and duties in relation to licence fees are to be found in the Communications Act 2003 and the WTA 2006. Sections 5 and 6 of the WTA 2006 allowed the Secretary of State by order, after consulting Ofcom, to give general or specific directions to Ofcom about the carrying out of its radio spectrum functions, including those in sections 12-14.

15. Section 12(1) of the WTA 2006 provided that "[a] person to whom a wireless telegraphy licence is granted must pay" to Ofcom "(b) if regulations made by [Ofcom] so provide … the sums described in subsection (2)". Section 12(2) of the WTA 2006 provided that the sums are "(a) such sums as [Ofcom] may prescribe by regulations, or (b) if regulations made by [Ofcom] so provide, such sums … as [Ofcom] may determine in the particular case".

16. Section 13 of the WTA 2006 allowed Ofcom to prescribe sums payable in respect of licences greater than those necessary to recover costs if it thought fit "in the light (in particular) of the matters to which [it] must have regard under section 3". Those matters included the extent of available spectrum, the demand for it, and competition and efficient management.

17. Section 122(2) of the WTA 2006 provided that Ofcom's powers to make regulations under the WTA 2006 were exercisable by statutory instrument, and that the Statutory Instruments Act 1946 was to apply in relation to those powers as if Ofcom were a Minister. Section 122(4) provided that Ofcom should, before making any regulation, give notice to those likely to be affected and consider any representations made to it.

18. Ofcom exercised its power under section 12 of the WTA 2006 to make the 2011 regulations, which came into force on 3rd May 2011. The 2011 regulations specified the ALFs that the MNOs were required to pay for their use of spectrum at the same level as they had been since 1999. The ALFs were paid, in accordance with the 2011 Regulations, against invoices and payment schedules provided by Ofcom.

19. The Secretary of State, in exercise of his power under section 5 of the WTA 2006, made the Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 (SI 2010/3024) (the "2010 direction"). Article 6 of the 2010 direction provided that Ofcom should revise the sums prescribed by regulations under section 12 of the WTA 2006 for the licences "so that they reflect the full market value of the frequencies in

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11 As amended by Directive 2009/104/EC.

12 See article 8(2)-(4) of the Framework Directive.

those bands", and that Ofcom should, in doing so, "have particular regard to the sums bid for licences" in the auction in early 2013 for spectrum in the 800 and 2600 MHz bands for 4G use.

20. After a consultation process, on 24th September 2015, Ofcom published a statement announcing decisions on revisions to ALFs that it said gave effect to the 2010 direction (the "2015 statement").

21. Ofcom exercised its power under section 12 of the WTA 2006 to make the 2015 regulations, which were made on 23rd September 2015 and came into force on 15th October 2015. The 2015 regulations did not repeal and replace the 2011 Regulations. They amended the 2011 Regulations so as significantly to increase the level of licence fees payable by the MNOs, and to align payment dates.[13]

22. The MNOs contended in the consultation process that, when implementing the 2010 direction, Ofcom was required to have regard to its statutory duties under applicable EU and domestic legislation. Ofcom rejected that argument on the basis that it had no discretion under the 2010 direction as to whether to revise the fees to reflect full market value. EE, later supported by the other MNOs, issued its judicial review application on 11th December 2015. Cranston J dismissed that application on 26th August 2016.[14] On 22nd November 2017, the Court of Appeal made an order quashing the decisions as to the amount of the ALFs announced in the 2015 statement and also quashing the 2015 Regulations. The Court of Appeal granted permission to appeal, but Ofcom did not pursue that appeal.

23. It is and was common ground that the MNOs' only statutory obligation to pay ALFs in the period between 15th October 2015 and 22nd November 2017 was at the rates set by the 2011 Regulations, and that Ofcom had no statutory power under section 12 of the WTA 2006 or otherwise to set ALFs with retrospective effect.

24. Ofcom issued the MNOs with revised invoices and payment schedules for the year from 31st October 2017, requiring payment of ALFs at the rates set by the unamended 2011 Regulations. Ofcom then consulted, and issued a final decision, on a new revision to the licence fees to give effect to the 2010 direction interpreted in accordance with the decision of the Court of Appeal. On 14th December 2018, Ofcom made the 2018 Regulations.[15] The 2018 Regulations revised the licence fees payable with effect from 31st January 2019.

The judge's judgment

25. The judge started his substantive treatment of the point of principle by reciting at [31] that it was well known that there are four questions which a court must ask when faced with a claim for unjust enrichment: (1) has the defendant been enriched; (2) was the enrichment at the claimant's expense; (3) was the enrichment unjust; and (4) are

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13 The 2015 Regulations were amended by the Wireless Telegraphy (Licence Charges for the 900 MHz frequency band) (Amendment and Further Provisions) (Amendment) Regulations 2016 (SI 2016/794).

14 R (EE Limited) v. Office of Communications [2016] EWHC 2134, (Admin) [2017] 1 CMLR 23.

15 The Wireless Telegraphy (Licence Charges for the 900 MHz Frequency Band and the 1800 MHz Frequency Band) Regulations 2018 (SI 2018/1368).

there any defences available to the defendant.[16] The four questions were, however, no more than broad headings for ease of exposition, they did not have statutory force, and there may be considerable overlap between the first three.[17] It was necessary to consider each in turn as part of a structured approach.[18]

26. Next, the judge clarified the reason why the MNOs could not claim the gross ALFs, notwithstanding demands made under the invalid 2015 regulation. The answer was either (i) that there was no enrichment because the payment was made for consideration, or (ii) because any enrichment was not unjust because it was made in satisfaction of a legal entitlement, or (iii) because any enrichment was not sensibly at the expense of the MNOs as fees paid under the 2011 Regulations were paid in return for the licences.[19] The claims for the recovery of the net sums were analytically different because those sums were not paid for consideration, did not satisfy a legal entitlement and, for as long as the sums were not due, could not be said to have been paid in return for the licences. The model advanced by Ofcom in response was what it had termed the "counterfactual principle".

27. The judge then said that he agreed that there was only one law of unjust enrichment so that the same analysis ought to carry through whether or not the defendant was a public authority.[20] He was, nevertheless focused on the facts of this case, which involved the valid 2011 Regulations, being the 'law of the land'. The judge also recorded that Ofcom had accepted that it had no claim for counter-restitution in respect of the use of the licences, a concession that he regarded as rightly made. Any claim for counter-restitution by Ofcom would "undermine the legally binding arrangements by which the parties defined and thereby restricted their mutual obligations". To that extent there was an equivalence with the contractual analysis explained by Etherton LJ in *MacDonald Dickens & Macklin v. Costello* [2012] QB 244 at [23].[21]

28. The judge then noted at [41] the overall position to the effect that Ofcom accepted that it had no claim for ALFs beyond those due under the 2011 Regulations, yet it claimed a right to retain the overpaid fees, whilst accepting that if a MNO had refused to pay the excess, it would have had no claim for it. These outcomes suggested an "incoherence in Ofcom's approach, which [was] likely to be inimical to a principled scheme".

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16 He referred to *Benedetti* at [10] per Lord Clarke.

17 See *Menelaou v. Bank of Cyprus UK Ltd* [2016] AC 176 at [19] per Lord Clarke.

18 See *Investment Trust Companies v. Revenue and Customs Commissioners* [2018] AC 275 ("*ITC*") at [41] per Lord Reed.

19 See *DD Growth Premium 2X Fund v. RMF Market Neutral Strategies (Master) Ltd* [2018] Bus LR 1595 ("*DD Growth*") at [62] per Lord Sumption.

20 Implying that there was no difference of substance between claims in unjust enrichment against a public authority brought under *Woolwich* principles, against a public authority on the basis of a mistake of law, and against an individual or private company.

21 Even though the licences were public law instruments, not contracts: *R (Data Broadcasting International Ltd) v Office of Communications* [2010] ACD 77.

29. At [42]-[59], the judge dealt with a series of older cases referred to by the MNOs (and cited also to this court) in support of the principle of legality to be extracted from *Woolwich*, and of the MNOs' 'principle of parity'.[22] The judge commented that there was nothing in those cases to support the suggestion that, in a claim for restitution on the grounds that a public authority has been unjustly enriched by the receipt of unlawfully demanded fees, the amount of the claim should be reduced in order to accommodate the probability that the authority might have been able to demand additional fees by a lawful route.[23]

30. The judge concluded at [59] that *Woolwich* provided emphatic support for the underlying principle of legality, which was also apparent in the earlier cases, but he remained doubtful about a principle of parity at least in any formal sense. The underlying facts in *Woolwich* had a resonance for this case, since no counterfactual argument was raised by the Revenue as a defence in that case; it was hard to imagine that such a defence "would have fared well".

31. In dealing with the counterfactual principle advanced by Ofcom, the judge first noted the immediate and possibly insuperable difficulty of lack of definition. He pointed out that hypothesising different primary legislation would subvert the principle of legality.[24] As between Ofcom's contention that regulations under section 12 of the WTA 2006 were a pretty weak form of legislative instrument,[25] and the MNOs' argument that secondary legislation was as much the law of the land as primary legislation,[26] he concluded at [68] that hypothesising secondary legislation offended the principle of legality as much as hypothesising primary legislation.

32. The judge then said at [69] that there was a distinction of substance between a failure of legislation and a missing administrative step. That was a satisfactory explanation for the House of Lords' decision in *South of Scotland Electricity Board v. British Oxygen Co Ltd* [1959] 1 WLR 587 ("*British Oxygen*"). There was a difference in principle between hypothesising the completion of an administrative step and hypothesising a change in the law. A further, and independently significant, element here was that the counterfactual principle required the court to hypothesise not just a new law but a change in the existing law; although the position would be no different

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22 These cases included *Dew v. Parsons* (1819) 2 B & Ald 562 ("*Dew*"), *Steele v. Williams* (1853) 8 Ex 625 ("*Steele*"), *Attorney General v. Wilts United Dairies Ltd* (1921) 37 TLR 884 (CA), (1922) 38 TLR 781 (HL) ("*Wilts Dairies*"), *Atchison, Topeka & Santa Fe Railway Co v. O'Connor* (1912) 223 US 280 per Holmes J at [285]-[286] ("*Atchison*"), *Bell Bros Pty Ltd v. Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 (High Court of Australia) following *Marsh v. Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 ("*Bell Bros*").

23 [53(c)] of the judgment.

24 [64-5] of the judgment.

25 See *R (Public Law Project) v. Lord Chancellor (Office of the Children's Commissioner intervening)* [2016] AC 1531 at [21]–[23] per Lord Neuberger.

26 See *F Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry* [1975] AC 295 per Lord Reid at page 341F.

even if there were a legislative vacuum left by the quashing of the 2015 Regulations.[27]

33. At [75]-[89], the judge dealt in detail with *Hemming* and *Waikato Regional Airport Ltd v. Attorney General of New Zealand* [2001] 2 NZLR 670 (Wild J), [2002] 3 NZLR 433 (NZ CA), [2003] UKPC 50 and [2004] 3 NZLR 1 (PC) ("*Waikato*").

34. He concluded that *Waikato* did not involve the exercise of a present power with retrospective effect for the purpose of correcting an earlier error. It was a case, like *British Oxygen*, where the court was prepared to hypothesise the taking of lawful administrative steps which had not in fact been taken, in order to assist its determination of the amount of an appropriate lawful charge.[28]

35. As regards *Hemming*, the judge thought that the case was probably about setting a lawful retrospective fee, but the court in that case did not think it mattered whether the council was creating a new lawful fee for the preceding years, or identifying a notional fee that could and would have been charged. The quantum of the claim was the same in either case.[29] His conclusions were fortified by Morgan J's analysis in *Lindum Construction Co Ltd v. Office of Fair Trading* [2014] Bus LR 681 at [87]-[88] ("*Lindum*").

36. Having stated these conclusions at [90], the judge said at [91] that the MNOs were entitled to succeed in their claims for the net sum, but that it was also necessary to go on to consider how the claims fitted within the unjust enrichment schema. He thought, however, that, if, as he had held, the counterfactual principle was inapplicable, Ofcom's overlapping further specific responses that presupposed its application, had a fatal flaw.

37. In asking whether Ofcom had been enriched, the judge considered the authorities and academic treatises on whether receipt of money does indeed carry its own incontrovertible benefit.[30] His conclusion at [96] was that he did not need to determine the question, because Ofcom's case on enrichment was based on the flawed premise that new compliant legislation could be hypothesised. The judge held that Ofcom's argument that it could subjectively devalue the money it had received was no more than another way of putting its argument on enrichment.

38. The judge dealt with Ofcom's theory of net enrichment at [98]-[101]. He rejected the analogy with the swaps case of *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1994] 4 All ER 890 at page 929, on the basis that

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27 [69]-[72] of the judgment.

28 [80] of the judgment.

29 [84]-[85] and [88] of the judgment.

30 See *BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1979] 1 WLR 783 at page 799 per Goff J, Professor Birks on *Unjust Enrichment*, 2nd edition (2005) at pages 53 and 59, *Goff & Jones* on *The Law of Unjust Enrichment*, 9th edition (2016) at [4-28], Professor Burrows on *The Law of Restitution*, 3rd edition (2010) at pages 50–51, Professor Burrows: *A Restatement of the English Law of Unjust Enrichment* (2012) at section 7, *DD Growth, Littlewoods Ltd v. Revenue and Customs Commissioners* [2014] STC 1761 at [433] per Henderson J, and *Benedetti* at [17].

Hobhouse J was there concerned with counter-restitution,[31] which was disavowed in this case, and with equitable set off of payments made at the time of the transfers, not at the time of the action.

39. On the second question of whether the enrichment was at the MNOs' expense, the judge considered Lord Reed's views on the meaning of loss in unjust enrichment at [43] and [45] in *ITC*. He nonetheless concluded that the point was not separate from Ofcom's argument on enrichment, and that the causation argument was dependent on the existence of a counterfactual principle. Once he had found that Ofcom was enriched by the face value of the fees paid (over and above the amounts due under the 2011 Regulations) it followed that that was at the MNOs' expense.[32]

40. In relation to the third question of whether the enrichment was unjust, the judge again thought this was repetitive. He said that an unjust factor had to be identified, but none such existed where Ofcom had received that to which it was legally entitled.[33]

41. Finally at [108]-[110], the judge recited the arguments on EU law, but held that, having determined the English law claim in the MNOs' favour, the question did not need to be determined.

Grounds of appeal

42. Ofcom's first ground of appeal was that the judge was wrong to make a distinction between administrative steps, which he accepted could be hypothesised, and delegated legislation, which he held could not. In any event, Ofcom argued that only administrative steps had to be hypothesised in this case.

43. Ofcom's second ground raised the contention that the judge had been wrong to hold that Ofcom's counterfactual assessment would undermine the actual legal relations by which the parties' rights and obligations were governed. Ofcom submitted that setting an appropriate measure for restitution neither altered nor subverted the parties' obligation under the legislative scheme.

44. Ofcom's third ground was that the judge had been wrong to conclude that (a) Ofcom was enriched, (b) Ofcom was not entitled to subjectively devalue any enrichment received, (c) any enrichment was at the MNOs' expense, (d) that any enrichment was unjust, and (e) the MNOs were not required to give credit for the benefit of its use of spectrum in the amount that Ofcom could and would have charged.

The MNOs' Respondents' Notices

45. The MNOs submitted that it was not appropriate even to hypothesise omitted administrative steps in assessing the quantum of a *Woolwich* claim. The trilogy of cases relied upon by Ofcom (*British Oxygen*, *Waikato* and *Hemming*) all involved a present power to set fees for the past, which does not exist in this case.

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31 A view also taken by Professor Burrows in *The Law of Restitution*, 3rd edition (2011) at pages 570–571.

32 [102]-[105] of the judgment.

33 [106] of the judgment.

46. Secondly, the MNOs contended for an applicable principle of parity that provided for symmetry between the positions of those who pay under protest and those who refuse to pay.

47. Finally, the MNOs submitted that EU law mandates full reimbursement of fees levied in breach of EU law. These ALFs were unlawful under article 13 of the Authorisation Directive (read together with article 8 of the Framework Directive) as was held in the JR decision. The principle of full reimbursement stated in *Lady & Kid* applied to all charges levied in breach of EU law, and article 13 excluded retrospective setting of licence fees for spectrum use.

The *Woolwich* decision

48. The circumstances of the claim in *Woolwich* are well known and set out in the judgment. I shall not repeat them. I do, however, think that it is useful to mention some of the details of Lord Goff's seminal judgment in that case.

49. Lord Goff began his judgment with a summary of the law as it was understood at the time at pages 164-6. His review included the following:

> "(c) Money paid to a person for the performance of a statutory duty, which he is bound to perform for a sum less than that charged by him, is also recoverable to the extent of the overcharge. A leading example of such a case is Great Western Railway Co. v. Sutton, L.R. 4 H.L. 226; for a more recent Scottish case, also the subject of an appeal to this House, see [*British Oxygen*]".

50. Lord Goff later explained that Woolwich had submitted that, despite the authorities, the law should be reformulated "so as to establish that the subject who makes a payment in response to an unlawful demand of tax acquires forthwith a prima facie right in restitution to the repayment of the money". He then said that the justice underlying Woolwich's submission was plain to see because of what has been described in this case as the "principle of parity", which he said made the revenue's position, as a matter of common justice, unsustainable.

51. Lord Goff then dealt with the objections to this "simple call of justice". The first was that it required the reversal of the structure of the English law of restitution, as it had developed during the 19th and early 20th centuries. That law had not developed so as to recognise a *condictio indebiti* - an action for the recovery of money on the ground that it was not due. Instead, common law actions for the recovery of money paid under a mistake of fact, and under certain forms of compulsion had developed.

52. He gave two answers to this objection at page 172:

> "The first is that the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law - enshrined in a famous constitutional document, the Bill of Rights 1688 - that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of

> taxes exacted under an unlawful demand can be enforced as a matter of right".
>
> "The second is that, when the revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state and may well entail (as in the present case) unpleasant economic and social consequences if the taxpayer does not pay. In any event, it seems strange to penalise the good citizen, whose natural instinct is to trust the revenue and pay taxes when they are demanded of him. The force of this answer is recognised in a much-quoted passage from the judgment of Holmes J. in [*Atchison at [285]-[286]*]".

53. Lord Goff then discussed whether this pointed to a development of the common law concept of compulsion, rather than recognition of the broad principle of justice for which Woolwich contended. He concluded that Woolwich's alternative claim founded upon compulsion was difficult to sustain, and that logic demanded that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was exacted unlawfully should prima facie be enough to require its repayment.

54. Next, Lord Goff rejected the idea that the development proposed was beyond the power of the House, and that it would be impossible to set limits for the application of the principle. He cited with apparent approval the dissenting opinion of Wilson J in *Air Canada v. British Columbia* (1989) 59 D.L.R. (4th) 161 (SCC), where the question was whether money in the form of taxes paid under a statute held to be ultra vires was recoverable. She had said at page 169:

> "The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments 'under protest.' Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so"; and
>
> "What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me),

> it should be one that distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due."

55. Having set out reasons why it was, in his opinion, appropriate to make the change at that time, Lord Goff said that there was a sixth reason which favoured his conclusion, namely the decision of the European Court of Justice in *San Giorgio*, which had established at [12] that a person who paid charges levied by a member state contrary to the rules of EU law was entitled to repayment of the charge, such right being regarded as a consequence of, and an adjunct to, the rights conferred on individuals by the EU provisions prohibiting the relevant charges. Whilst EU law did not prevent a defence of passing on,[34] Lord Goff commented that "at a time when [EU] law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law".

56. Lord Goff concluded that "money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority [was] prima facie recoverable by the citizen as of right". He thought the principle extended to embrace cases where the authority had misconstrued a relevant statute or regulation. He left open the defence of passing on, saying that, although that was contemplated in the *San Giorgio* case, *Air Canada* showed that the point was not without difficulty.

57. It seems to me that it is of some significance to note that Lord Goff reached his conclusion by reference to the position under EU law.

58. Lord Browne-Wilkinson's concurring speech explained that most of the previous cases were concerned with payments *colore officii*, which were "payments extracted ultra vires by persons who in virtue of their position could insist on the wrongful payment as a precondition to affording the payer his legal rights". He could see no reason for so limiting the principle, and said that cases of *colore officii* were "merely examples of a wider principle, viz. that where the parties are on an unequal footing so that money is paid by way of tax or other impost in pursuance of a demand by some public officer, these moneys are recoverable since the citizen is, in practice, unable to resist the payment save at the risk of breaking the law or exposing himself to penalties or other disadvantages". He too approved the *dictum* of Holmes J. in *Atchison* at pages 285-6. Lord Slynn also found that *dictum* persuasive, and found it "quite unacceptable in principle that the common law should have no remedy for a taxpayer who has paid large sums or any sum of money to the Revenue when those sums have been demanded pursuant to an invalid regulation and retained free of interest pending a decision of the courts".

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[34] For example, where the charges had been incorporated into the price of goods and so passed on to the purchaser.

The cases relied upon by Ofcom

59. When considering the cases relied upon by Ofcom, it is as well to keep in mind the statutory premise of this case, as it compares to the statutes that were in issue in the other cases. Section 12 of the WTA 2006 provided that a licensee must pay to Ofcom such sums as Ofcom may prescribe by regulations.

60. In *British Oxygen* the relevant statutory provision was section 37(8) of the Electricity Act 1948 ("section 37(8)") that limited the fixing of tariffs by providing that "[a]n area board in fixing tariffs … shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of persons …".

61. In *Waikato,* section 135 of New Zealand's Biosecurity Act 1993 ("section 135") provided under the heading "[o]ptions for cost recovery" that the Director-General should "take all reasonable steps to ensure that so much of the costs of administering this Act … as are not provided for by … Parliament … are recovered in accordance with the principles of equity and efficiency in accordance with this section and the regulations".

62. In *Hemming,* paragraph 19 of schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 as amended ("paragraph 19") provided that an applicant for a licence should pay "a reasonable fee determined by the appropriate authority".

63. In each of these three cases, the authority had either fixed charges that were higher than the statute allowed or had failed to fix a charge at all. In none of these cases was it common ground, as it is here, that a charge could not lawfully be imposed retrospectively.

64. With that introduction, I will turn to consider each of the cases in turn.

British Oxygen

65. British Oxygen claimed that the electricity board had unduly discriminated against it as compared to low voltage electricity users, contrary to section 37(8). It claimed only a sum equal to the amount by which they had been overcharged. It failed before the Lord Ordinary, who held that it could not recover the overcharge because it was not appropriate for the court to be required to determine what the board should have charged.

66. On appeal to the Inner House (where Lord Mackintosh dissented), the Lord Justice-Clerk (Thomson) certainly used counterfactual language. He said this at pages 70-1:

> "Once the pursuers' case is held relevant, the position is that they have wrongfully and without statutory warrant been charged too much. This surely on principle entitles them to get back what they would not have had to pay, had the statute been obeyed. I see no reason why the Court should not be competent to make the attempt to ascertain the amount at stake. It is the sort of thing that the Courts do daily in all kinds of cases.

> Sometimes it can be done with mathematical accuracy; sometimes the broadest of axes has to be used. …
>
> Nobody may ever be in a position to know just exactly what the high-voltage users would have been charged if the defenders had adjusted their tariff on the proper basis, but that should not prevent the Court assessing what it thinks would have been the appropriate figure".

67. Lord Patrick's analysis was, however, different. He said first that, since the board admitted that, if breach of an equality clause were in question, any unwarranted excess charge could be recovered, he was unable to see why in principle an excess charge, proved to have been imposed in breach of a prohibition against undue discrimination, should be treated differently. At page 83-4, he said this:

> "The pursuers offer to prove that the minimum differential which will avoid the prohibited discrimination against them is 5.55 per cent when the cost of fuel is 38s., increasing as the cost of fuel rises in the way they set out. They say the minimum differential has not been observed, so that they have been unduly discriminated against. If they establish that, there is no difficulty in calculating what the charges against the pursuers would have been if the minimum differential had been observed throughout, the minimum which would avoid undue discrimination against the pursuers."
>
> "It is sufficient that the undertaker must not unduly prefer A to B or unduly discriminate against B in the matter of price. If he has done so, and if it can be proved how much less B would have been charged if the giving of an undue preference or exercise of an undue discrimination had been avoided, the excess he has been charged ought in principle to be recoverable."

68. Both of these statements by Lord Patrick seem to reflect the court evaluating what would have constituted a lawful charge in order to determine the proportion of the actual payment to which the public body had been entitled.

69. Lord Kilmuir L.C. gave the speech for the majority in the House of Lords. He said at page 596:

> "In my opinion, the first governing principle is that a tariff which imposes a charge upon the respondents involving their being unduly discriminated against is contrary to section 37(8) of the Electricity Act, 1947. The respondents were charged more than is warranted by the statute. Then it is clear that, until a court so declares, the respondents have no alternative but to continue to pay the charges demanded of them. In principle the appellants should not be permitted to retain payments for which they have no warrant to charge. The respondents may therefore recover whatever sum they may be able to prove was in excess

> of such a charge as would have avoided undue discrimination against them. I did not understand it to be disputed that the charges to the low voltage consumers are correct. It is fully within the competence of a court on the evidence before it to estimate the amount by which the respondents have been overcharged, and the respondents have, in my view, averred with sufficient specification the standard by which that amount should be estimated".

70. It is to be noted that Lord Kilmuir seems to have adopted a very similar formulation to that employed by Lord Patrick. It is not, I think, quite the same to say that British Oxygen can recover whatever sum it can show was in excess of "such a charge as would have avoided undue discrimination against [it]" as to say, which Ofcom does, that the court should ask what the board would have done if it had acted lawfully. As Lord Patrick explained in the Inner House, the electricity board might have charged everyone higher amounts. In other words, British Oxygen recovered whatever sum was in excess of what it could lawfully have been charged without discrimination under section 37(8).

Waikato

71. The Director General made two decisions to impose biosecurity charges only on regional airports, rather than metropolitan airports. The charges were held to be in breach of section 135, and Waikato Regional Airport Limited ("WRAL") claimed restitution of the full amounts paid. Wild J quashed the Director- General's decisions and ordered that WRAL should recover the payments it had made insofar as they were not in accordance with section 135,[35] and that the Director-General could recover unpaid charges insofar as they were charged in accordance with section 135 principles.[36] Insofar as the overpaid charges were concerned, Wild J said that it was "not clear how much [the Ministry] would have been entitled to lawfully, as that determination is for the Director-General". [37] He directed the parties to agree the figures, but said he would hold another hearing to assess quantum if they failed.[38] The Court of Appeal allowed the defendant's appeal, but the Privy Council restored the decision of Wild J.

72. Lord Nicholls and Lord Walker delivered the judgment of the Board, accepting at [75] that time limitations had meant that the issue of restitution was not fully addressed in oral argument. Nonetheless, the Board applied *Woolwich* principles and said the following:

> "80. … Their Lordships also note (without basing their decision on it, since it was not cited or discussed in argument) that one of the cases referred to with apparent approval by Lord Goff of Chieveley in *Woolwich* [*British Oxygen*], was a case of

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35 See [158], [177]-[180], and [192]-[193] of Wild J's judgment.

36 See [198-9] of Wild J's judgment.

37 At [158] of Wild J's judgment.

38 See [193-4] of Wild J's judgment.

> a public board overcharging for electricity supplies which were of commercial benefit to the recipient, but the House of Lords did not doubt that excessive charges were recoverable by the company which had paid them.
>
> 81. The Court of Appeal … thought that it was still open to the Director-General to fix valid charges for the period before 13 May 1998. In support of that view the respondent referred to the decision of the Board in *Wang v The Commissioner of Inland Revenue [1995] 1 All ER 367*. Their Lordships feel considerable doubt whether the principle in that case would now permit the Director-General to put in place retrospectively a lawful system of charges in respect of the whole period since 1995 down to the present time. But without expressing any definite view on that point, their Lordships see no reason to reject as inappropriate the relief which Wild J granted. The Director-General's persistence in an unfair and unlawful system of charging had continued for nearly six years when the matter was decided by Wild J. It has now continued for eight years. In those circumstances the Court has the right and the duty, not to substitute its own view for that of the statutory decision-maker, but to indicate the proper basis on which a restitutionary remedy should be granted in respect of money unlawfully exacted. …
>
> 84. … There is no injustice in their claims to partial recovery being allowed. But their Lordships can see no ground for departing from the judge's decision to allow partial recovery only (that is, of the excess over what would have been a fair and proportionate charge)".

73. It is true, as Ofcom submitted, that the Privy Council doubted in [81] whether the Director-General was able to put a valid retrospective charge in place. That may have been because of the delay, rather than because of the lack of a retrospective power. Either way, this decision seems to support the argument that the appropriate measure of restitution was the difference between the sums actually charged and the sums that the authority was entitled to recover in accordance with the statutory power in section 135.[39] This does not seem to me to be a very different formulation from that adopted by the House of Lords in *British Oxygen*.

Hemming

74. In *Hemming*, the claimants were operators and licensees of sex shops in Westminster. Their licences were renewable annually on 1st February. The council's committee determined the licence fee in September 2004 for the year 2005/2006 including a reflection of the cost of administering and enforcing the licensing system. The fees were paid for that and subsequent years without the Committee considering the fee again. The claimants challenged by way of judicial review the licence fee demanded

[39] See [158], [180], and [192] of Wild J's judgment.

for 2011/2012 on the basis that the council had not determined the fee for that year, and sought a mandatory order requiring the council to determine a reasonable fee under paragraph 19, and claimed restitution of the difference between the sums paid and the reasonable fees payable under paragraph 19 for each of the years between 2007 and 2011. They also claimed that, after regulation 18(4) of the Provision of Services Regulations 2009[40] ("regulation 18(4)"), the council was no longer entitled to include in the licence fee the costs of enforcement activity.

75. Keith J allowed all these claims including ordering the council to determine reasonable fees for each of the years, having regard to regulation 18(4) and "the need to carry forward from year to year any previous surpluses or deficits from the year ending 31st January 2007", and ordering the council to pay to the claimants the difference between (a) the fees paid, and (b) the reasonable fees determined by the council.

76. The Court of Appeal dismissed the council's appeal against the effect of regulation 18(4), but held that, in determining the extent to which the council had been unjustly enriched by the claimants' payments, a distinction had to be drawn between (i) the period before December 2009 when the council was entitled to charge a fee reflecting investigation and enforcement costs, and (ii) the period after 2009 when those costs could not be included. After the claimants' entitlement to restitution crystallised by the issue of proceedings in April 2011, the council had to determine the proper fees payable as at that date on a rolling basis for each year (i) from the end of January 2007 to the end of January 2010, carrying forward any surplus or deficit from previous years, and (ii) likewise from the beginning of February 2010 to April 2011 without including the investigation and enforcement costs. Those investigation and enforcement costs, insofar as they had been paid by the claimants, were repayable forthwith.

77. Beatson LJ began his treatment of the basis on which restitution was to be made at [110] by reciting that the claimants had claimed the difference between the sums paid and whatever would have constituted reasonable fees for those years. He said that Keith J had described that as a "concession by the claimants" at [47], but that it in fact reflected the principle in the old *colore officii* cases which had been held to be appropriate by the Privy Council in *Waikato*, and had been mentioned by Lord Goff in the passage cited above at [49] from *Woolwich*, referring to *British Oxygen*. Beatson LJ continued by saying that "[i]t also has the practical attraction of entitling the person who overpaid in circumstances in which the public authority is able to levy the fee or part of it lawfully to recover only the excess. In this way it reflects the economic reality of what happened notwithstanding the public law flaw in the circumstances of the original payment".[41] Ofcom place particular reliance on this passage.

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[40] The Provision of Services Regulations 2009 (implementing Parliament and Council Directive 2006/123/EC3 on services in the internal market).

[41] See also Beatson LJ's reference at [129] to Henderson J's "illuminating and analytically powerful judgment" in *ITC* [2012] STC 1150 concerning the need to give due weight to economic reality, but note the Supreme Court's views on economic reality at [59]-[60] in *ITC*.

78. Beatson LJ then explained what was in contention between the parties at [111]-[119]. At [118], he explained that the claimants were contending for an approach which was to the effect that, if the council did not determine lawful fees for the relevant years, the claimants could recover the whole of the sums paid.

79. At [120], Beatson LJ recited the question before the court, having noted that in *Woolwich*, unlike in *Hemming*, there was no lawful way the payments could have been claimed: the question was "whether a public law payee which could lawfully determine a fee and demand some payment and is ordered to do so will be regarded as unjustly enriched by the entire amount received before it has lawfully determined the fee".

80. Beatson LJ noted at [121] that the claimants answered this question positively, but that that answer was inconsistent with their acceptance, on the facts, that only the difference between the sums paid and the reasonable fees was recoverable. Beatson LJ thought that *Waikato* indicated a negative answer, because "[e]ven before any new and lawful decision, the payee will only be regarded as unjustly enriched to the extent of the excess of what might have been lawfully demanded".

81. Beatson LJ concluded at [126] that the council had to determine the extent to which it was unjustly enriched at the expense of the claimants by the payments. Any system of retrospective determination of the sums due would have an element of imprecision at the margin: "[t]his, in part, is because it is accepted as a matter of principle that it is for the decision-maker, here the council, and not the court to fix the licence fee, and in part because it is recognised that deficits and surpluses can be carried forward and the accounting does not have to be on an annual basis". He thought at [127] that it appeared from the *colore officii* cases and *Waikato* that "no distinction has been made between the position where part but not all of the payment is due in any event and where nothing is due until a valid public law decision is made". Beatson LJ concluded at [128] from his reading of [177] of Wild J's judgment and the incomplete reasoning of the Privy Council that it must have been the case that, before a further lawful determination of the charge, the entire payment was not due back forthwith (with the attendant consequences for interest), but only that part of it to which the authority was not lawfully entitled.

82. In my judgment, this passage makes clear the same principle as I have already extracted from *British Oxygen* and *Waikato*, namely that the claimant can recover in unjust enrichment whatever sum was in excess of what it could lawfully have been charged.

83. Beatson LJ then explained the distinction between the first and second periods as follows at [131]. At [132] he held, in relation to the first period:

> "132. As far as the first period is concerned, the council failed to determine the fee it was entitled to determine. Although it will now have to determine a lawful fee retrospectively, it is entitled to do this on the basis that it would have been entitled to do [so] at the time. It is entitled to do so by applying the principles in *Ex p Hutton* 85 LGR 461, 516. *Ex p Hutton* enabled the council to fix fees reflecting all the three elements

> on a rolling basis without adjusting surpluses and deficits in each year".

84. The outcome was described in [135] so that the council could determine the fee in the way it proposed up to 31st January 2010. For the period after that, the investigation and enforcement element of the fee would be repayable forthwith, but the remaining elements could continue to be determined in the way the council proposed.

Norwich City Council v. Stringer [2001] 33 H.L.R. 15 ("Stringer")

85. Ofcom relied heavily also on *Stringer* as being binding authority in favour of the operation of a counterfactual principle. In that case, the council overpaid housing benefit of £140 directly to Mr Stringer in respect of his tenant after she had in fact left the premises. The council demanded repayment, and Mr Stringer repaid £64, refusing to pay the balance as it related to a period before he knew the tenant had left. The council sued for the balance and Mr Stringer counterclaimed in restitution for the £64 he had repaid on the ground that the demand for the whole £140 was unlawful as in breach of the applicable regulations. At all levels, Mr Stringer's counterclaim failed. The Court of Appeal (Buxton and Otton LJ) did not attempt to review the law of restitution, and did not mention the concept of a counterfactual analysis, or suggest that the council could resist repayment on the basis that it could and would have lawfully demanded the £64.

86. Buxton LJ simply held at [20]-[23] that the *Woolwich* principle did not encompass the counterclaim because the demand was not backed by the right kind of coercive power, and it was artificial to equate the case with one where a public authority demanded a citizen's own money from him under powers that it did not have. Justice did not require repayment. He did not, however seek to express any definitive view on the nature and ambit of the *Woolwich* principle.

87. Whilst it is true that Otton LJ, in agreeing, did say at [27] that it would have been open to the council to go through the process correctly and within the time limits, and that a second regular demand would have been a valid demand, not an ultra vires demand, I do not accept that it is possible to extract a wide counterfactual principle from the judgments, read fairly as a whole. None of the other cases relied upon by Ofcom were cited in *Stringer*, but the decision can anyway be explained by saying that Mr Stringer could only recover the difference between the amount paid and the amount which was lawfully due under the regulations.

88. Once these 4 cases are properly understood, it seems to me that the outcome of this appeal becomes more straightforward to determine. I will move now to consider each of Ofcom's grounds of appeal in turn.

<u>Ground 1: Was the judge wrong to distinguish between administrative steps and delegated legislation?</u>

89. In one sense the premise of this ground of appeal is undermined if my analysis of Ofcom's authorities is correct. Instead of justifying the broad counterfactual principle advanced by Ofcom, the cases support a narrower, perhaps more pragmatic, legal position.

90. Before stating any principle, it is necessary, I think, to consider in broad terms the first 3 unjust enrichment questions in the way enunciated by Lord Reed in *ITC* at [37]-[45]. It is obvious that, on the basis of the *Woolwich* principle, Ofcom has been enriched by the payment of the ALFs insofar as they exceeded the amounts payable under the 2011 Regulations. Ofcom has received a benefit from the MNOs, and they have suffered a loss through providing that benefit, in the very particular sense explained by Lord Reed at [43]-[45] in *ITC*. The factor that makes the enrichment unjust is, as stated in *Woolwich*, that money paid by a citizen to a public authority in the form of levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right. It is a fundamental principle of law that monies should not be levied without the authority of Parliament, and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right.

91. This ground of appeal addresses, most fundamentally as it seems to me, each of the essential elements of the claim in unjust enrichment. At each stage, Ofcom says that the unjust enrichment elements cannot exist because it was open to Ofcom to make regulations that could and would lawfully have charged ALFs close to those set by the 2015 Regulations. The judge made this clear at [92]-[106] when he dealt with the three elements, and concluded that each of Ofcom's arguments was another way of repackaging its counterfactual principle.

92. The question is why, if the proper analysis of the cases is that one can hypothesise administrative steps, should one not also hypothesise delegated legislation that it was open to the defendant to formulate and make? The answer in my judgment is that the cases do not show that the courts have ever hypothesised any counterfactual steps at all in a *Woolwich* case. The unjust factor in a *Woolwich* case is, as I have said, that monies should not be levied without the authority of Parliament, and that principle requires recovery as of right. In this case, therefore, there was no valid Parliamentary foundation beyond section 12 of the WTA 2006 and the 2011 Regulations. Sums paid over and above what was authorised by those legislative instruments were squarely covered by the *Woolwich* claim. In evaluating the quantum of enrichment, it is, however, open to the court, as the cases relied upon by Ofcom show, to identify the sum that is in excess of what could lawfully have been charged, and I would add, **under the existing legislation**. No case has ever said expressly or impliedly that the court can reduce a *Woolwich* claim by hypothesising new and unenacted legislation. Such an exercise would anyway be uncharted speculation. More importantly, it would undermine the *Woolwich* principle itself.

93. It is one thing for the court to say that a defendant has not been enriched to the extent that it could lawfully have raised the charge under the extant primary and secondary legislation; it is quite another to hypothesise what secondary legislation might in a parallel world have been enacted to regularise the whole or part of the challenged tax or levy. Whilst this may appear semantic, I do not believe that it is. I do not think that any of the cases relied upon by Ofcom can be wholly explained by the existence of a retrospective power to fix charges that might have been lawfully fixed at an earlier stage. Moreover, the courts have not said, clearly or otherwise, that they will not themselves evaluate what an authority could lawfully have charged. Either the

court or the public authority[42] can make the determination. The courts have understandably sought to avoid excessive claims against public authorities by only awarding *Woolwich* based restitution for the sum in excess of what the authority was, under existing legislation, lawfully entitled to charge. The evaluation will sometimes have what Beatson LJ described as "imprecision at the margin", but that should not affect the legal position.

94. As I have said, the judge drew a bright line distinction between hypothesising administrative steps and hypothesising primary or secondary legislation, saying that the cases were explained by the former proposition. To the extent that what he said endorses Ofcom's counterfactual principle, I do not agree. I do not think that any of the courts in these cases were asking "what would the authority have done?". Instead, I think they were simply limiting the extent of the appropriate restitutionary award to the sums which the authority could not have lawfully charged under the existing legislative regime.

95. Ofcom's final point under this ground was that only administrative steps had to be hypothesised in this case for new regulations to be envisaged lawfully charging the MNOs the ALFs due under the 2015 Regulations. For the reasons, I have given, I do not think this approach is justified by the cases, because I do not think that the courts hypothesised any steps being taken by the authorities in question.

Ground 2: Was the judge wrong to hold that a counterfactual principle undermined the *Woolwich* principle and the parties' legal relations?

96. This ground of appeal answers itself in the light of my treatment of the first ground. The *Woolwich* principle would indeed be undermined by the counterfactual approach advanced by Ofcom. Ofcom was right to say that setting an appropriate measure for restitution would neither alter nor subvert the parties' obligation under the legislative scheme, but that measure can only be set in the way I have explained, not by the application of a counterfactual principle.

Ground 3: Was the judge wrong as to enrichment, subjective devaluation, "at the MNOs' expense", the unjust factor, and Ofcom's "netting off" arguments?

97. I have already dealt with the question of whether Ofcom was enriched. I agree with the judge that there is no need in this case to look beyond Ofcom's receipt of monies without lawful entitlement. There is no need to consider the interesting arguments that might arise in another case concerning the Supreme Court's decision in *Benedetti* and the principles of subjective devaluation.[43] For the reasons I have already given, Ofcom's enrichment in this case was at the MNOs' expense, in that they sustained loss of the kind enunciated by Lord Reed. Ofcom was seeking to do what Lord Reed warned against: treating loss in the same way as damages.

98. The question here was how was that loss to be evaluated bearing in mind the invalidity of the 2015 Regulations. The answer, as I have said, was that the MNOs

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[42] If it has the continuing power to do so, and the exercise of that power at that late stage is not ruled out on other grounds.

[43] It is to be noted also that *Benedetti* was a case about the valuation of services.

were entitled to recover the parts of the ALFs that they had paid in excess of what Ofcom could lawfully have charged them under existing legislation – which in this case was the WTA 2006 and the 2011 Regulations.

99. Ofcom's 'netting off' argument assumed that the value of the spectrum was at a level at which Ofcom might counterfactually have charged for it under putative lawful regulations. The fact was, however, that the valid 2011 Regulations valued access to the spectrum at a lower level, and no counter-factual exercise is justified as I have explained.

100. It follows from what I have said that I accept Mr Weisselberg's submission that the question in this case is the extent of the restitution, which is a private law question. I do not, however, find the 'but for' analysis helpful in this particular case for two reasons. First, the *Woolwich* principle itself assumes reimbursement of overpaid charges as of right, and secondly, the cases themselves make clear how the enrichment is to be valued in this situation. The recoverable enrichment is, at the risk of repetition, the amount by which the charge exceeded what could lawfully have been levied under the existing legislation. There is no need to ask what, hypothetically, the authority might have itself done. We are not concerned here with a case where Ofcom could retrospectively undertake the task of fixing the relevant charges as was discussed in *Waikato* and *Hemming*.

The MNOs' argument that even administrative steps cannot be hypothesised?

101. This point has already been covered in my treatment of Ofcom's grounds of appeal. I accept, for the reasons I have given, the MNOs' submission that administrative steps in assessing the quantum of a *Woolwich* claim cannot be hypothesised, but do not accept that the proper explanation for the trilogy of cases relied upon by Ofcom (*British Oxygen, Waikato* and *Hemming*) is that they all involved a present power to set fees for the past. There is, as I have explained, no counterfactual principle applicable to *Woolwich* claims in the way Ofcom advanced it.

The MNOs' argument as the existence of a "principle of parity"

102. I do not think it is useful to consider whether or not a principle of parity exists to provide for symmetry between the positions of those who pay under protest and those who refuse to pay. Such a consideration was undoubtedly a significant part of the reasoning in *Woolwich* itself and in some subsequent cases. For my part, I do not find it helpful to elevate steps in the courts' reasoning into principles.

The MNOs' EU law argument

103. This case was argued primarily as a matter of domestic law. As I have already pointed out, Lord Goff in *Woolwich* relied upon the existence of the *San Giorgio* right in his reasoning. But, the EU law remedy would not in this case give the MNOs anything beyond what I have held they are entitled to under English law. The MNOs are entitled in any event to recover the difference between the amounts they paid under the 2015 Regulations and the amounts that were due under the 2011 Regulations.

104. For that reason, I am disinclined to engage upon a detailed review of the JR decision to identify what, if any, breach of EU law was established. The principles are clear from *Lady & Kid* as the MNOs submitted. I would endorse the judge's approach.

Conclusions

105. For the reasons I have already given, I would hold that there is no counterfactual principle applicable to *Woolwich* claims as contended for by Ofcom. The trilogy of cases relied upon by Ofcom (*British Oxygen*, *Waikato* and *Hemming*) are explained by the courts having determined that, in a *Woolwich* case,[44] the public authorities were only enriched by the receipt of sums that could not have been lawfully charged under the existing legislative regime.

106. I would, therefore, hold that the judge was right to decide that the MNOs were entitled to restitution of the ALFs paid over and above those that were due under the 2011 Regulations.

107. Finally, I would like to pay tribute to the judge's formidable exposition of the law in this area. Whilst I have disagreed with some of the detail of his reasoning, probably because of the further development of the arguments before us, his concise and accurate exposition has been invaluable to this court.

108. I would dismiss this appeal.

Lord Justice Underhill:

109. I agree fully with the Chancellor's analysis and conclusions. The recognition of the counterfactual principle for which Ofcom contends would be contrary to the principle of legality which is the foundation of the unjust factor in *Woolwich* cases. As the Chancellor demonstrates, the cases on which Ofcom relies are examples of a different exercise, namely identifying the extent by which the payment in question exceeded the amount lawfully authorised at the time of payment. Such an exercise is straightforward in cases like *Dew v Parsons* and *Steele v Williams* where the amount of the lawful charge is a fixed amount already stated in the legislation. It is less straightforward where the amount of the lawful charge depends on an assessment which the legislation authorises the defendant to perform, but which it has failed to perform lawfully, as in *British Oxygen*, *Waikato* and *Hemming*; but those cases establish that the exercise of identifying the amount of the lawful charge (and thus the excess) can in principle still be done in such a case, if necessary by the Court itself. (That may at first blush seem rather surprising, but the Privy Council in *Waikato* was at pains to point out that the Court was not usurping the role of the statutory decision-maker: see para. 81 of its judgment, quoted by the Chancellor at para. 72.) The point is that, even in such a case the exercise is still conceptually the same, and fundamentally different from deciding what the defendant might have been able to charge under a lawful authority which was not then in place.

110. Disallowing a counterfactual analysis in a case of the present kind may sometimes appear to give the payer a windfall, most obviously where the absence of lawful

[44] Acknowledging that *British Oxygen* was, of course, determined before *Woolwich* itself.

authority is simply the result of a drafting error. But that is a necessary consequence of upholding the principle of legality. In a case that appears to merit it, the Government can always seek to validate the payment retrospectively by primary legislation, as in fact it did in the case of the regulations which were quashed in *Woolwich 1*. The building societies affected by that legislation (Woolwich itself was excluded from its scope) challenged it under the European Convention of Human Rights, but the challenge was unsuccessful: see *National & Provincial Building Society v UK* (1998) 25 EHRR 127.

Lord Justice Simon:

111. I agree with both judgments.