LITTLEWOODS Retail Ltd. and others v Revenue and Customs Commissioners [2017] UKSC 70, 2017 (3) W.L.R. 1401, is the latest instalment in the long-running saga of restitution of overpaid tax.

The claimants paid VAT contrary to EU law. HMRC repaid the principal sums under section 80 of the Value Added Tax Act (VATA) 1994, plus simple interest under section 78(1). The claimants argued that the repayment was insufficient and only compound interest would fully restore the use value of the overpaid sums. Vos J. sent a preliminary reference to the Court of Justice of the European Union (CJEU) (see *Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2010] EWHC 2771 (Ch), [2011] S.T.C. 171) seeking a ruling on various questions including whether reimbursement plus simple interest was compatible with EU law (question 1), or whether compound interest was required (question 2).

The CJEU in Case C-591/10 (ECLI:EU:C:2012:478), *Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2012] S.T.C. 1714, ruled that EU law required a right to reimbursement of the tax and to the payment of interest, but that it was for national law (at [27]) to determine whether simple interest or compound interest, or indeed something else, would be required, in compliance with the well-known principles of equivalence (requiring a remedy equivalent to that available for comparable domestic claims) and effectiveness (requiring the Member State to avoid rendering exercise of EU rights practically impossible). The only further guidance offered by the Court (at [29]) was that the principle of effectiveness "requires that the national rules referring . . . to the calculation of interest . . . should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of VAT".

High Court proceedings then resumed before Henderson J. who held that Littlewoods' claim would succeed in full. In particular he held that only compound interest would satisfy Littlewoods' rights under EU law, that the exclusion of the claims by sections 78 and 80 of the 1994 Act was therefore incompatible with EU law. Those provisions had therefore to be disapplied *(Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch), [2014] S.T.C. 1761). Both parties then appealed. The Court of Appeal (*Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2015] EWCA Civ 515, [2016] Ch. 373, per Arden, Patten and Floyd L.JJ.) upheld Henderson J's conclusions on all issues.

The case was then appealed to the Supreme Court (SC), which identified two issues for decision: (1) whether Vos J. and the Court of Appeal were correct in holding that Littlewoods' claims were excluded by sections 78

and 80 of VATA, and (2) whether, if sections 78 and 80 did exclude Littlewoods' claim for compound interest, that exclusion was contrary to EU law.

On the first issue the SC held unanimously that sections 78 and 80 were indeed exclusive of other remedies. Section 80 "created a specific remedy for taxpayers who have overpaid VAT" (at [22]). Parliament could not "have intended the special regime in s. 80 to be capable of circumvention" as suggested by the claimants, given s. 80's statement that HMRC is not liable to repay VAT "except as provided by this section" (at [22]–[23]).

Section 78 was more difficult. Littlewoods had argued that, since section 78(1) refers to HMRC's liability to pay interest "if and to the extent that they would not be liable to do so apart from this section", section 78 would only apply where there was no free-standing right to interest, but that there had been such a right since the decision in *Sempra Metals Ltd. (formerly Metallgesellschaft Ltd.) v Inland Revenue Commissioners and another* [2007] UKHL 34, [2008] 1 A.C. 561. The SC replied that, if a claim based on *Sempra* (which post-dated the enactment of sections 78 and 80) were allowed to succeed, "section 78 would effectively become a dead letter" which would "fatally compromise... the statutory scheme created by Parliament" (at [37]). This could not have been what Parliament intended or the correct interpretation of section 78(1) (at [36]). Instead, those words could only refer to any other statutory liabilities to pay interest (at [39]).

This left the second issue, namely whether any exclusion of compound interest would be contrary to EU law, in the sense that the CJEU had ruled that HMRC must reimburse in full the use value of the money. The crucial words of the CJEU's judgment were certainly (at [29]) that "national rules should provide *an adequate indemnity*" (emphasis added). The SC concluded that this had a narrower meaning than that adopted by the lower courts. In the SC's view, "the CJEU has given member state courts a discretion to provide reasonable redress" (at [51]). There were three reasons for taking this approach.

First, the SC attached less weight to the CJEU's word "reimbursement" than had the lower courts. Advocate General Trstenjak had explicitly stated that simple interest would be sufficient, and the SC thought the difference between her approach and that of the CJEU should not be overstated, especially since (at [30]) the CJEU had pointed out that Littlewoods had already received interest amounting to more than 125% of the principal sum, a fact that Henderson J. had admitted was difficult to reconcile with his ultimate conclusion (at [57]–[58]).

Secondly, the UK had pointed out that of 13 other Member States all but one paid simple interest on the recovery of unduly paid taxes. "In this context", concluded the SC, "if the CJEU were seeking to outlaw this practice, we would have expected clear words to that effect. They are absent" (at [60]).

And thirdly, the approach was consistent with the CJEU's other case law (see C-271/91, *Marshall v Southampton and South West Hampshire Health Authority (Teaching) (no. 2)* [1994] Q.B. 126), being distinguishable on the calculation of the principal sum which would compensate the discriminatory treatment suffered by the claimant and make good her loss.

The SC's decision was perhaps inevitable given the extensive retroactivity of the claim. However, if the history of the case had been different, as it could have been, this retroactivity and thus the path-dependent choice in this case need not have arisen.

First, regarding the relationship between the CJEU and domestic courts, it would be helpful if the CJEU were to be clearer and more principled in its rulings (R. Williams, "The ECJ's 'Remedies Jurisprudence' and the Role of Domestic Courts: How to Transfer Principle alongside Competence", 2018 *Restitution Law Review*, forthcoming). If its failure to do so arises from any concerns about being too interventionist, it is worth reflecting that the intervention is already taking place. The lack of clarity is therefore simply unhelpful to national courts that have to follow the resultant rulings, as evidenced by the litigation over "adequate indemnity" in this case.

Secondly, given first that the CJEU is not yet so principled and then that, when given complete carte blanche by national courts, the CJEU may take an unnecessarily exacting approach to what EU law requires (such as the unreasoned ruling-out of any defences to unjust enrichment claims other than passing on in Case C-398/09 (ECLI:EU:C:2011:540), *Lady & Kid A/S v Skattenministeriet*, and Case C-310/09 (ECLI:EU:C:2011:581), *Ministre du Budget des Comptes Publics et de la Fonction Publique v Accor SA*, or the relatively unreasoned decision, in Case C-362/12 (ECLI:EU:C:2013:834), *FII (No. 3)*, that every remedy made generally available by the Member State must *individually* fulfil the principle of effectiveness (rather than it being sufficient for there to be *a* national remedy which did so; see Williams, "ECJ's 'Remedies Jurisprudence'")), national courts should not be too quick to over-comply with what they believe EU law requires. The SC's more robust approach in *Littlewoods* is therefore welcome.

Thirdly, however, there may well be circumstances in which it *is* necessary to provide compound interest in order to provide full restitution (R. Williams, *Unjust Enrichment and Public Law* (Oxford 2010), 49) and English law should not now move too far in the opposite direction. Yet the optimum level of interest in this case could not be considered on its own terms, because it was too interlinked with the long time period over which Littlewoods were claiming. The real problem giving rise to all such cases was the decision of the House of Lords in *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 A.C. 558, which held that claimants should be allowed to bring actions against public authorities based on the mistake ground established in *Kleinwort Benson v Lincoln City*

Council [1999] 2 A.C. 349, thereby allowing time to run for 6 years from the point at which the mistake was discovered (long after the money had been paid). Instead, the House of Lords should have confined such applicants to the cause of action established in *Woolwich Equitable Building Society v Inland Revenue Comissioners* [1993] A.C. 70, under which enrichments can be reclaimed because they were received ultra vires, with a maximum time limit of 6 years total (see Williams, *Unjust Enrichment and Public Law*, ch. 4). The evident influence of the retroactivity of the claim on the availability or not of compound interest is clearly illustrated by the fact that the SC in *Littlewoods* asked (at [42]) "whether the CJEU has ruled that HMRC must reimburse in full the use value of the money *which over an exceptionally long period of time Littlewoods has paid by mistake*" (emphasis added). And in its conclusion (at [73]) the SC pointed out again that "Littlewoods have already recovered overpaid tax, and interest on that amount, going back several decades. The size of that recovery reflects a combination of circumstances which could not have occurred in most of the other EU member states".

Nor, in view of the preferable interrelationship between the mistake and *Woolwich* grounds, should such a situation have occurred in this Member State. Not only did the law take a wrong turning in *Deutsche Morgan Grenfell*, a further chance to take the right path was missed in *Littlewoods* itself. At first instance in *Littlewoods*, Vos J. had held that, even if sections 78 and 80 were in breach of EU law, breach would only require the disapplication of those sections in relation to the *Woolwich*-based claim (with a time limit of six years) not the mistake claim (see *Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2010] EWHC 1071, at [88] and [90]). The Grand Chamber of the CJEU and its Advocate General had then both confirmed in Case C-591/10 that a *Woolwich*-based claim would be sufficient on its own to fulfil the EU requirement of effectiveness. To recognise its sufficiency would also best allow a balancing of the public and private concerns at issue in such cases, since the "unjust factor" or "reason for restitution" in *Woolwich*-based claims arises wholly out of public law (ultra vires) while the other requirements for the unjust enrichment claim are dealt with by private law, allowing both spheres of law to play a role in the claim. And yet Henderson J. and then the Court of Appeal in *Littlewoods* held that the domestic restrictions had to be removed in relation to *both* the *Woolwich* ground *and* the mistake ground, thereby generating the huge retroactivity of Littlewoods' claim. The ground of claim issue was not revisited by the SC, which simply allowed the assumed availability of the mistake claim to colour its conclusions on compound interest. While the law remains as it is at present, therefore, it is inevitable both that litigation such as *Littlewoods* will continue and that the courts will be constrained from responding to the questions raised in an optimal manner. The longer-

term and more satisfactory solution would be to rethink the underlying structure of the law.

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ORALLY AGREED JURISDICTION AGREEMENTS UNDER THE BRUSSELS I REGULATION RECAST

IN 2016/17, British litigants accounted for only 28% of the Commercial Court's cases. Many disputes involving non-British litigants have no connections at all with England other than an English jurisdiction agreement. The way in which English courts give effect to jurisdiction agreements is accordingly of considerable commercial importance. In relation to a jurisdiction agreement in favour of the courts of a Member State, the approach is governed by Article 25(1) of the Brussels I Regulation recast (1215/2012) (BIR recast).

In *Saey Home & Garden NV/SA v Lusavouga-Maquinas e Acessorios Industriasis SA*, Case C-64/17 (EU:C:2018:173), the CJEU considered the application of Article 25 when a jurisdiction agreement is contained in standard terms and conditions which follow oral negotiation. The CJEU took a strict view, holding that the requirements of Article 25 were not satisfied and the jurisdiction clause did not apply.

Saey, a Belgian company, specialised in the manufacture and sale of kitchen equipment with the "Barbecook" trademark. Saey entered into a commercial concession agreement with Lusavouga, a Portuguese company, under which Lusavouga agreed to become the (nearly) exclusive promotor and distributor of Barbecook products in Spain. In July 2014, Saey terminated the arrangement. Lusavouga brought an action against Saey in Portugal seeking compensation for the termination of the agreement. Saey challenged the jurisdiction of the Portuguese court.

The BIR recast rules on jurisdiction apply in civil and commercial cases (Art. 1) where the defendant is domiciled in a Member State (Art. 4). The defendant, Saey, was a company domiciled in Belgium and accordingly the BIR recast rules engaged. The general rule of jurisdiction under the Regulation requires a defendant to be sued in the courts of its domicile (Art. 2), here Belgium. However, special grounds of jurisdiction may apply to give additional courts jurisdiction. In this case, Lusavouga relied on Article 7(1) arguing that this was a matter relating to contract and that the place of performance of the obligation in question was Portugal (where the goods were delivered). Saey disputed the application of Article 7(1) and sought to rely on Article 25, arguing that the contract