Michaelmas Term
[2017] UKSC 70
On appeal from: [2015] EWCA Civ 515

JUDGMENT

Littlewoods Limited and others (Respondents) *v* Commissioners for Her Majesty's Revenue and Customs (Appellant)
Littlewoods Limited and others (Appellants) *v* Commissioners for Her Majesty's Revenue and Customs (Respondent)

before

Lord Neuberger
Lord Clarke
Lord Reed
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

1 November 2017

Heard on 3 and 4 July 2017

Appellant/Respondent (HMRC)	*Respondents/Appellants (Littlewoods)*
Jonathan Swift QC	Laurence Rabinowitz QC
Andrew Macnab	Steven Elliott
Peter Mantle	Maximilian Schlote
Imran Afzal	Michael Jones
(Instructed by the General Counsel and Solicitor to Her Majesty's Revenue and Customs)	(Instructed by Weil, Gotshal & Manges (London) LLP)

LORD REED AND LORD HODGE: (with whom Lord Neuberger, Lord Clarke and Lord Carnwath agree)

1. During the period with which this case is concerned, the claimants (whom we shall refer to as "Littlewoods") carried on catalogue sales businesses: that is to say, they distributed catalogues to customers and sold them goods shown in the catalogues. In order to carry on their businesses, they employed agents, who received a commission in return for their services. They could elect to be paid the commission either in cash or in kind. Commission was paid in cash at the rate of 10% of the sales achieved by the agent. Commission paid in kind took the form of goods supplied by Littlewoods, equal in price to 12.5% of the sales achieved by the agent.

2. As suppliers of goods, Littlewoods were obliged to account to HMRC for the VAT due in respect of their chargeable supplies. Between 1973 and 2004, they accounted for VAT on the supplies which they made to their agents, as commission paid in kind, on the basis that the taxable amount of those supplies was reduced by the enhancement in the commission, that is to say by 2.5%. On a correct understanding of VAT law, the taxable amount of the supplies was actually reduced by the entire 12.5% which constituted the agents' commission. Consequently, Littlewoods accounted for and paid more VAT to HMRC than was due.

3. Between 2002 and 2004 Littlewoods submitted claims to HMRC for the repayment of overpaid VAT in accordance with section 80 of the Value Added Tax Act 1994 ("the 1994 Act"). In 2004, HMRC conceded that VAT had been overpaid, and since then it has been paid on the correct basis.

4. Between 2005 and 2008, HMRC repaid £205m in accordance with section 80. In accordance with section 78 of the 1994 Act, HMRC also paid interest on the amount repaid. The interest was calculated on a simple basis, as section 78 required, and totalled £268m.

5. In these proceedings, commenced in 2007, Littlewoods seek additional interest, calculated on a compound basis, on the ground that such interest is due under the common law. The additional interest totals £1.25 billion. The amount involved is so enormous because, under the law of limitation applicable to common law claims, the ordinary limitation period of six years does not begin to run, where an action is for relief from the consequences of a mistake, until the claimant has discovered the mistake or could with reasonable diligence have discovered it:

Limitation Act 1980, section 32(1)(c). Littlewoods maintain that the period over which the interest has to be compounded, on that basis, is over 40 years.

6. A further 5,000 claims for compound interest in connection with VAT or other taxes are stayed pending the resolution of these claims. The total amount involved in relation to VAT claims is estimated by HMRC at £17 billion.

The basis of the claims

7. The claims for compound interest are made on two bases. First, it is argued that HMRC are under a liability to make restitution on the basis that they were unjustly enriched by payments made under a mistake of law, applying the principle established in *Kleinwort Benson Ltd v Lincoln County Council* [1999] 2 AC 349 and *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2006] UKHL 49; [2007] 1 AC 558. Although the payments have been reimbursed in accordance with section 80, it is argued that compound interest remains due at common law as restitution of the use value of the money mistakenly paid, applying the principle established in *Sempra Metals Ltd v Inland Revenue Comrs* [2007] UKHL 34; [2008] AC 561.

8. Secondly, it is argued that HMRC are in any event liable to make restitution on the basis that they were unjustly enriched by payments of undue tax, applying the principle established in *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70, as explained in *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2012] UKSC 19; [2012] 2 AC 337. On that basis also, it is argued that compound interest remains due under the principle established in *Sempra Metals*. *Woolwich*-type claims are only advanced, however, in respect of compound interest on overpayments made within the six years preceding issuance of the claim forms, in view of the limitation period applicable to such claims, and are therefore much more limited than the mistake-based claims.

9. Littlewoods contend that these common law claims are not excluded by sections 78 and 80 of the 1994 Act, as a matter of statutory construction. They also contend that, in any event, they have a right under EU law to compound interest on tax levied contrary to EU law. On that basis, they contend that, even if their claims to compound interest would otherwise be excluded by the provisions of the 1994 Act, the statute must be disapplied, or interpreted in such a way as to permit the claims to be made.

The history of the proceedings

10. A trial on liability was held before Vos J. In his judgment, he held that, as a matter of statutory construction, the claims were excluded by sections 78 and 80 of the 1994 Act: [2010] EWHC 1071 (Ch); [2010] STC 2072. He also held that the question whether the exclusion of the claims by those provisions was contrary to EU law should be referred to the Court of Justice of the EU. In a subsequent judgment, he determined the questions to be referred, and made the order for reference: [2010] EWHC 2771 (Ch); [2011] STC 171. At the same time, he made a declaration that the claims were, as a matter of English law and without reference to EU law, excluded by sections 78 and 80 of the 1994 Act.

11. The questions referred were the following:

Question 1:

Where a taxable person has overpaid VAT which was collected by the member state contrary to the requirements of EU VAT legislation, does the remedy provided by a member state accord with EU law if that remedy provides only for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums in accordance with national legislation, such as section 78 of the Value Added Tax Act 1994?

Question 2:

If not, does EU law require that the remedy provided by a member state should provide for (a) reimbursement of the principal sums overpaid, and (b) payment of compound interest as the measure of the use value of the sums overpaid in the hands of the member state and/or the loss of the use value of the money in the hands of the taxpayer?

Question 3:

If the answer to both questions one and two is in the negative, what must the remedy that EU law requires the member state to provide include, in addition to reimbursement of the principal sums overpaid, in respect of the use value of the overpayment and/or interest?

Question 4:

> If the answer to question 1 is in the negative, does the EU law principle of effectiveness require a member state to disapply national law restrictions (such as sections 78 and 80 of the Value Added Tax Act 1994) on any domestic claims or remedies that would otherwise be available to the taxable person to vindicate the EU law right established in the Court of Justice's answer to the first three questions, or can the principle of effectiveness be satisfied if the national court disapplies such restrictions only in respect of one of these domestic claims or remedies?
>
> What other principles should guide the national court in giving effect to this EU law right so as to accord with the EU law principle of effectiveness?

12. The Court of Justice (Grand Chamber) ("CJEU" or "the court") examined the questions together, and reformulated them as asking "in essence, whether, in a situation such as that at issue in the cases in the main proceedings, in which an amount of VAT overpaid by reason of non-compliance with EU law has been repaid to the taxpayer concerned, it is in accordance with EU law for national law to provide for the payment of only 'simple' interest on that sum, or whether EU law requires national law to provide for payment of 'compound interest' as a counterpart for the value of the use of the overpaid sums and/or the loss of the value of the use of the latter or for another method of reparation which, in that latter case, the court is asked to specify": (Case C-591/10) [2012] STC 1714, para 22. The court answered the question as follows at para 35:

> "European Union law must be interpreted as requiring that a taxable person who has overpaid value added tax which was collected by the member state contrary to the requirements of European Union legislation on value added tax has a right to reimbursement of the tax collected in breach of European Union law and to the payment of interest on the amount of the latter. It is for national law to determine, in compliance with the principles of effectiveness and equivalence, whether the principal sum must bear 'simple interest', 'compound interest' or another type of interest."

13. The High Court proceedings then resumed before Henderson J, who heard a trial of all outstanding issues. In his judgment, he held that Littlewoods' claims succeeded in full: [2014] EWHC 868 (Ch); [2014] STC 1761. In particular, he held that only an award of 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, and that those provisions had to be disapplied so as to allow Littlewoods to pursue their claims.

14. Both parties appealed. The Court of Appeal (Arden, Patten and Floyd LJJ) upheld Henderson J's conclusions on all issues, and dismissed both sides' appeals: [2015] EWCA Civ 515; [2016] Ch 373.

15. Both parties now appeal to this court. The first issue is raised by Littlewoods' cross-appeal, and is whether Vos J and the Court of Appeal were correct in holding that Littlewoods' claims are excluded by sections 78 and 80 of the 1994 Act, as a matter of English law and without reference to EU law. If not, then it follows that Littlewoods are free to bring any common law claims available to them without statutory impediment, and do not need to rely on EU law in order to overcome a statutory bar.

16. The remainder of the issues are raised by HMRC's appeal. The second issue is whether, if Littlewoods' claims are excluded by sections 78 and 80 of the 1994 Act, that exclusion is contrary to EU law. A number of further issues are raised in the appeal, but they only arise for decision if Littlewoods succeed on either of the first two issues. In other words, if Littlewoods fail on the first and second issues, then it follows that their claims are excluded by statutory provisions which are not incompatible with EU law, and that their claims must therefore be rejected.

The first issue

17. In considering the effect of sections 78 and 80 of the 1994 Act, it may be helpful to begin with section 80. This was first enacted as section 24 of the Finance Act 1989 and brought into force on 1 January 1990. Since its consolidation in the 1994 Act it has undergone amendment on a number of occasions. The version in force at the time when Littlewoods commenced the present proceedings is, so far as relevant, in the terms set out below. Later amendments are not relevant for present purposes:

> "**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.

(1A) Where the Commissioners -

(a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, have brought into account as output tax an amount that was not output tax due,

they 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.

(2A) Where -

(a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and

(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.

(3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant ...

(4) The Commissioners shall not be liable on a claim under this section -

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than three years after the relevant date [ie the end of the prescribed accounting period] ...

(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."

18. In view of the three year limitation period laid down by section 80(4), it is necessary to explain how Littlewoods were able to make claims between 2002 and 2004 for the recovery of overpaid tax going back to 1973. As originally enacted, section 80 provided for a limitation period of six years unless the undue tax had been paid by reason of a mistake, in which event a claim could be made at any time within six years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it. That limitation period was reduced to one of three years, as in the version of section 80(4) set out above, by an amendment enacted by section 47 of the Finance Act 1997. The amendment was brought into force with retrospective effect from the first announcement of the change on 18 July 1996.

19. The retrospective introduction of the reduced limitation period, without any transitional arrangements for cases where a right to recovery of overpaid tax already existed, was held by the CJEU to be incompatible with EU law: *Marks & Spencer plc v Customs and Excise Comrs* (Case C-62/00) [2003] QB 866. The House of Lords subsequently decided that the reduced limitation period had to be disapplied in respect of rights which had accrued before it was brought into force: *Fleming (trading as Bodycraft) v Revenue and Customs Comrs* [2008] UKHL 2; [2008] 1 WLR 195. It is on that basis that HMRC have repaid Littlewoods the overpaid tax back to 1973. The position was addressed legislatively in section 121 of the Finance Act 2008, which excluded the application of section 80(4) of the 1994 Act to claims in respect of amounts brought into account or paid before 4 December 1996, provided the claim was made before 1 April 2009.

20. For present purposes, the most material provisions of section 80 are subsections (3), (4) and (7). Section 80(3) provides HMRC with a statutory defence to a claim under section 80 where reimbursing the taxpayer who made the overpayment would unjustly enrich him. The possibility of unjust enrichment (in a non-technical sense) arises because the taxpayer often passes on to his customers the burden of the output tax for which he accounts to HMRC. Section 80A (as inserted by section 46(2) of the Finance Act 1997), and the Value Added Tax Regulations 1995 (SI 1995/2518), as amended, create a scheme under which the defence is disapplied where reimbursement arrangements are made with the purpose of ensuring that the payment to the taxpayer is used to reimburse the customers who have borne the economic burden of the tax.

21. Section 80(4) lays down a limitation period for claims under the section which, following the amendment effected by the Finance Act 1997, is shorter than the period of six years, capable of extension where a mistake has been made, which would apply to a common law claim in unjust enrichment under the Limitation Act 1980. A statutory claim by the taxpayer must therefore be brought within a shorter and more certain period of time. The evident aim is to protect public finances against the risk of a liability to repay tax emerging more than three years after the tax was

received. That is consistent with the background to the amendment: as Lord Walker of Gestingthorpe explained in the *Fleming* case at para 36, it was prompted by developments in the case law of the CJEU which exposed HMRC to the risk of claims for repayment of large amounts of output tax, some of it going back for many years. As this court put it in *Investment Trust Companies v Revenue and Customs Comrs* [2017] UKSC 29; [2017] 2 WLR 1200, para 88, the limitation period is designed to avoid the disruption of public finances.

22. In section 80, Parliament has thus created a specific remedy for taxpayers who have overpaid VAT, but has done so subject to limitations, including those set out in subsections (3) and (4). Those limitations would have no equivalent in a common law claim, and would therefore be defeated if it were possible for the taxpayer, or his customers, to bring such a claim. Parliament cannot have intended the special regime in section 80 to be capable of circumvention in that way.

23. That is reflected in section 80(7), which provides that HMRC shall not be liable to repay an amount paid to them by way of VAT on the ground that it was not due, "except as provided by this section". In the light of section 80(3) and (4), this court concluded in *Investment Trust Companies* that section 80(7) should be construed as excluding non-statutory claims by customers, as well as taxpayers (as was conceded), which might otherwise lie against HMRC in circumstances falling within the scope of section 80. As the court stated:

> "Parliament cannot sensibly be taken to have intended, when it created this scheme for the reimbursement of suppliers (with provision for them in turn to reimburse their customers), subject to strict time limits, that it should exist concurrently with non-statutory liabilities towards suppliers and their customers which were potentially wider in scope and were subject to a longer and less certain limitation period. Such an intention would be inconsistent with the rationale of the statutory scheme." (para 84)

24. Littlewoods take no issue with that conclusion. They made their claims for the repayment of the tax under section 80, and they accept that no other route to the recovery of the tax was open to them. But, they argue, section 80 does not deal with the question of interest, and has no bearing on their present claims. Interest is addressed in the statutory scheme by section 78, and that section, they argue, provides a statutory right to interest which is of a residual character, and leaves common law claims unaffected.

25. Section 78 of the 1994 Act was originally enacted as section 38A of the Value Added Tax Act 1983, inserted by section 17 of the Finance Act 1991, which received the Royal Assent on 25 July 1991. It was then consolidated in the 1994 Act together with an amendment (immaterial for present purposes) which had been made in 1992. Like section 80, it has undergone frequent amendment. In the version in force when Littlewoods commenced the present proceedings, it provides, so far as material:

> "**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 to 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 ...
>
> (10) The Commissioners shall only be liable to pay interest under this section on a claim made in writing for that purpose.

> (11) A claim under this section shall not be made more than three years after the end of the applicable period to which it relates [ie the period ending when the Commissioners authorise payment of the amount on which the interest is payable]." (emphasis added)

26. As originally enacted, section 78(11) provided for a limitation period of six years running from the date on which the claimant discovered HMRC's error or could with reasonable diligence have discovered it. Like the corresponding provision in section 80, it was amended by the Finance Act 1997 so as to impose a three year period, with retrospective effect, and with no transitional provisions. In view of the incompatibility of that situation with EU law, HMRC have paid Littlewoods interest under section 78, back to 1973, on the amount repaid to them under section 80.

27. Littlewoods' cross-appeal centres on the words in section 78(1) which we have italicised ("if and to the extent that they would not be liable to do so apart from this section"). They argue that those words should be given their ordinary meaning. So construed, section 78 yields to any other liability to pay interest. The purpose of the legislation, so they argue, is to create a liability to pay interest where none would otherwise exist. However, following the decision of the House of Lords in *Sempra Metals*, where HMRC have had the use of money as a result of the payment of tax which was not due, it is possible for the taxpayer to bring a claim for compound interest on the money in question under the common law, on the ground of unjust enrichment. Since a liability to meet such a claim is one which exists apart from section 78, it is not excluded by section 78.

28. This argument has been consistently rejected by the courts, but for a variety of different reasons. In *F J Chalke Ltd v Revenue and Customs Comrs* [2009] EWHC 952 (Ch); [2009] STC 2027, Henderson J focused on the fact that section 80(7) excludes any common law liability to repay the overpaid VAT, and inferred that it must also exclude any common law liability to pay interest: "the exclusion in section 80(7) of any liability to repay overpaid VAT save as provided for by section 80 necessarily prevents the recovery of any interest on the overpaid VAT, except where section 78 or some other statutory provision provides an entitlement to such interest" (para 74). The difficulty with that reasoning, as the Court of Appeal pointed out in the present case (paras 37-42), is that it was held in *Sempra Metals* that a restitutionary claim in respect of the use value of money is distinct from a restitutionary claim in respect of the money itself: the right to recover interest was described as a free-standing cause of action. On that basis, it would appear, at least on a strict reading, that even if the cause of action for repayment of the overpaid tax is swept away by section 80(7), that may not exclude a cause of action in respect of the use value of the money.

29. In the present case, Vos J considered that sections 78 and 80 had to be regarded as creating an integrated regime for repayments of overstated and overpaid VAT, which should be read as a whole. Paragraphs (a) and (c) of section 78(1) applied specifically to cases where repayments were due under section 80. If, however, the critical words in section 78(1) covered common law restitution claims, then the right to interest under section 78 would be disapplied in every case where repayments were due under section 80. In those circumstances, to construe the critical words as including common law restitutionary claims would make a nonsense of the provision (para 60).

30. The Court of Appeal focused on the fact that the critical words in section 78(1) concern liabilities to pay "interest". In their view, it was a strained use of language to describe a liability to make restitution for the time value of money as a liability to pay interest, even if the relief was calculated by reference to interest rates (para 45). There are two difficulties with this reasoning. The first is that it is difficult to see any substantial distinction between a liability to pay for the time value of money and a liability to pay interest: interest is a measure of the time value (or use value) of money. The second is that, if Littlewoods' claim does not concern a liability to pay interest, it is difficult to see how it can be affected by section 78, which is solely concerned with interest.

31. Despite the attractive way in which Littlewoods' argument was presented, we agree with the courts below that it should be rejected. It is notable in the first place that the scheme established by section 78 applies in circumstances falling within paragraphs (a) to (d) of subsection (1). Although section 78(1) is not confined to circumstances in which a repayment is due under section 80, such circumstances fall within its scope. The present case falls under paragraph (a), which applies expressly where a person has accounted to HMRC for output tax which was not due, "and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him". HMRC are only liable to pay interest on the repayment under section 78, however, if the circumstances leading to the repayment are "due to an error on the part of the Commissioners". That limitation strongly suggests that section 78 is intended to be exclusive of any common law right to interest on the repayment. What would be the point of limiting interest under section 78 to cases of official error, if interest was generally available at common law regardless of whether any official error had been made?

32. Secondly, section 78(3) specifies the rate of interest payable by reference to section 197 of the Finance Act 1996, which in turn enables the rate to be set by regulations. Rates have been set by statutory instrument for the whole lifetime of VAT back to 1 April 1973. The interest is calculated on a simple rather than a compounded basis. The provision again suggests that section 78 is intended to be exclusive of any common law right to interest, which might be calculated at other rates and on a different basis.

33. Thirdly, section 78(11) lays down a limitation period for claims under the section which is shorter than the period of six years, with the potential for an extension in the event of mistake, which would apply to a common law claim in unjust enrichment under the Limitation Act 1980. Like the corresponding provision in section 80, that shortened limitation period must be intended to protect public finances from disruption.

34. In section 78, Parliament has thus created a specific right to interest for taxpayers who have overpaid VAT, but has done so subject to limitations, including those set out in subsections (1), (3) and (11). Those limitations are a special feature of the statutory regime and would have no equivalent in a common law claim. They would therefore be defeated if it were possible for the taxpayer to bring a common law claim. Parliament cannot have intended the special regime in section 78 to be capable of circumvention in that way. Unlike section 80, however, section 78 contains no provision expressly excluding alternative remedies. That does not prevent the exclusion of alternative remedies by implication. As Littlewoods point out, however, the critical words in subsection (1) acknowledge that there are other rights to interest which must be given priority. Read literally, those words would apply to common law rights to interest; but that reading, as we have explained, would render the limitations in subsections (1), (3) and (11) effectively pointless. How, then, are those words to be construed in the context of the provision as a whole?

35. In *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, para 8, Lord Bingham of Cornhill stated, in relation to statutory interpretation:

> "The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty."

In that regard, his Lordship cited the speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs."

36. At the time of when section 78 was enacted, interest was available under the VAT legislation only in limited circumstances, discussed below. Interest was also available under statute on a sum for which judgment was given in proceedings for the recovery of a debt or damages: Senior Courts Act 1981, section 35A (as inserted by section 15 of the Administration of Justice Act 1982). Under the common law, on the other hand, the general rule was that the court had no power, in the absence of agreement, to award interest as damages for the late payment of a debt: *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429. An exception to that general rule existed where loss due to late payment constituted special damage within the contemplation of the parties, under the second limb of *Hadley v Baxendale* (1854) 9 Exch 341: *President of India v La Pintada Cia Navigacion SA* [1985] AC 104. So far as restitutionary claims were concerned, it had been held that in an action for money had and received only the net sum could be recovered: *Johnson v The King* [1904] AC 817, applying *London, Chatham and Dover Railway Co v South Eastern Railway Co.* Against that background, the statutory scheme established by section 78 was more generous than the common law, as then understood.

37. In this context, the aspect of the decision in *Sempra Metals* which is important is that it was accepted for the first time that a claim would lie at common law for the use value of money by which the defendant was unjustly enriched, even if the money itself had been repaid, and that the enrichment could normally be calculated by compounding interest over the period of the enrichment. That decision was not contemplated by Parliament when it enacted sections 78 and 80, many years earlier. If a claim based on the principle established by that decision were held to be available to Littlewoods, on the basis that it fell within the critical words in section 78(1) ("if and to the extent that they would not be liable to do so apart from this section"), then it would equally be available in any other case where an amount was paid under section 80. As counsel for Littlewoods accepted in argument, section 78 would effectively become a dead letter. It follows that the literal reading fatally compromises the statutory scheme created by Parliament. It cannot therefore be the construction of the critical words which Parliament intended.

38. Is it possible to construe the critical words more narrowly than their literal sense? What source or sources of a liability to pay interest can Parliament have contemplated, which were to take priority over the liability created by section 78? Given the background which we have explained, such sources can only have been statutory. One such source is the power to award interest following a decision on an appeal, originally enacted in section 40(4) of the Finance Act 1972 and now contained in section 85A of the 1994 Act (as inserted by paragraph 223 of Schedule 1 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56)). Another is the power to award interest where an appeal is settled, originally enacted in section 25 of the Finance Act 1985, and now contained in section 85 of the 1994 Act. A third example is the power to award interest on an

amount for which judgment is given, under section 35A of the Senior Courts Act 1981. The effect of the critical words in section 78(1) is to give priority to provisions such as these, and to prevent double recovery by the taxpayer.

39. The reservation in section 78(1) ("if and to the extent that they would not be liable to do so apart from this section") must therefore be interpreted as referring only to statutory liabilities. It is not a literal construction, but a departure from a literal construction is justified where it is necessary to enable the provision to have the effect which Parliament must have intended.

Summary on issue 1

40. Since the scheme created by section 78 is inconsistent with the availability of concurrent common law claims to interest, it must therefore be interpreted as impliedly excluding such claims. The reservation set out in section 78(1) must therefore be construed as referring only to statutory liabilities to pay interest. So construed, section 78 impliedly excludes the claims made by Littlewoods, as a matter of English law, and without reference to EU law.

The second issue

41. On this second issue HMRC challenge the interpretation which Henderson J and the Court of Appeal have placed on the judgment of the CJEU, to which we have referred in para 12 above. The question for this court is the proper interpretation of that judgment.

42. As we shall seek to demonstrate, the central question is 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. In order to answer that question, it is necessary to set out the central paragraphs of the CJEU's judgment which support the ruling in that judgment (para 35), which we have quoted in para 12 above.

43. In para 24 of its judgment the CJEU recorded its settled case law that the right to a refund of charges levied in a member state in breach of rules of EU law is a consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court. In that regard, the CJEU referred to *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 3595, para 12 and *Metallgesellschaft Ltd v Inland Revenue Comrs* (Joined Cases C-397/98 and C-410/98) [2001] Ch 620; [2001] ECR I-1727, para 84. It continued:

"The member state is therefore in principle required to repay charges levied in breach of Community law [*Société Comateb v Directeur Général des Douanes et Droits Indirects* (Joined Cases C-192/95 to C-218/95) [1997] ECR I-165, para 20; *Metallgesellschaft*, para 84; *Weber's Wine World Handels-GmbH v Abgabenberufungskommission Wien* (Case C-147/01) [2003] ECR I-11365, para 93; *Test Claimants in the FII Group Litigation* (Case C-446/04) [2006] ECR I-11753, para 202)].

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

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

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

28. Thus, according to consistent case law, the principle of effectiveness prohibits a member state from rendering the exercise of rights conferred by the EU legal order impossible in practice or excessively difficult [*(R (Wells) v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] ECR I-723, para 67, and *i-21 Germany*

> *GmbH v Federal Republic of Germany* (Joined Cases C-392/04 and C-422/04) [2006] ECR I-8559, para 57)].
>
> 29. In this case that principle requires that the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of VAT.
>
> 30. It is for the referring court to determine whether that is so in the case at issue in the main proceedings, having regard to all the circumstances of the case. In that regard it should be noted that it is apparent from the order for reference that, under the provisions of section 78 of the VATA 1994, the Commissioners paid Littlewoods interest on the VAT levied in breach of EU law. Pursuant to those provisions, Littlewoods received payment of simple interest, in accordance with the said provisions, in an amount of GBP 268,159,135, corresponding to interest due over about 30 years, which amount exceeds by more than 23% that of the principal sum, which amounts to GBP 204,774,763."

The CJEU then addressed what was required in order to comply with the principle of equivalence; but no question concerning that principle arises in this case.

44. Before both Henderson J and the Court of Appeal Littlewoods succeeded in their assertion that EU law, as laid down in this judgment of the CJEU, gave them a right to a full reimbursement of their loss caused by their mistaken payment of VAT. At the trial before Henderson J, Littlewoods led evidence from Professor John Kay that reimbursement of the use value of money over long periods of time required the payment of compound interest and that the simple interest, which HMRC had paid, reimbursed only about 24% of Littlewoods' loss, which amounted to approximately £1.2 billion. Littlewoods argued that simple interest therefore did not give an adequate indemnity or reimbursement of Littlewoods' loss as EU law required.

45. In order to understand the debate in this appeal and the reasons for our conclusions, it is useful to summarise the relevant parts of Henderson J's impressive judgment. Henderson J upheld Littlewoods' submission essentially because he interpreted the reference to "an adequate indemnity" in para 29 of the CJEU's judgment as a right to reimbursement of the losses representing the time value of unlawfully levied tax which the member state retained. Those losses resulted from the unavailability to the taxpaying company of the sums of money which it had

erroneously paid as tax. The CJEU had held in para 25 that those losses fell within the sums retained by the state "which relate directly to that tax". The right to interest to make good those losses had been recognised as a right conferred by EU law (para 260). He found support for that interpretation of the CJEU judgment in two later judgments of the CJEU. In the first, *British Sugar plc v Rural Payments Agency* (Case C‑147/10) heard with *Zuckerfabrik Jülich AG v Hauptzollamt Aache* (Case C-133/10) and *Société Tereos v Directeur général des douanes et droits indirects* (Case C-234/10) EU:C:2012:591, the Fourth Chamber of the CJEU held that interest was payable by the national body, the Rural Payments Agency, on invalidly levied sugar levies even if it could not recover interest on those levies from the EU institution, to which it had paid them, and it had not been enriched by the receipt of the levies. This, Henderson J held, emphasised the potency of the right to interest in EU law, which the CJEU appeared to regard as conceptually indistinguishable from the right to repayment of the unlawfully levied tax (para 263).

46. The second case, *Irimie v Administratia Finantelor Publice Sibiu* (Case C-565/11) [2013] STC 1321, concerned a rule of Romanian law which provided that interest on unlawfully levied tax, which had to be repaid, ran only from the date of the claim for repayment and not from the date when the tax had been paid. The CJEU held (paras 26-28) that the temporal limitation on the accrual of interest did not meet the requirements of the court's ruling in *Littlewoods* that the calculation of interest should not lead to depriving the taxpayer of adequate compensation for the loss sustained through the undue payment of tax.

47. Henderson J expressed the view that the case advanced by Littlewoods in their detailed written observations to the CJEU assisted in interpreting the judgment of the court. Littlewoods had argued not that EU law always required the payment of compound interest on overpaid tax but that interest reflecting the use value of the money received should always be paid in order to satisfy the principle of effectiveness (para 273). Littlewoods had founded on the decision of the CJEU in *Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2)* (Case C-271/91) [1994] QB 126; [1993] ECR I-4367. That case concerned the measure of compensation in a successful claim for sex discrimination arising from the health authority's provision of an earlier compulsory retirement age for women compared with that for men in the same employment. The health authority paid her the maximum sum of £6,250 which was then permitted as compensation under the Sex Discrimination Act 1975 and the House of Lords referred to the CJEU the question whether it was essential to the due implementation of article 6 of Council Directive 76/207/EEC ("the Equal Treatment Directive") that her compensation should not be less than the loss she had sustained and that it should include an award of interest. The CJEU held (paras 22-26) that the object of article 6 of the Equal Treatment Directive was to arrive at real equality of opportunity; when financial compensation was the measure adopted to achieve that objective, "it must be adequate, in that it must enable the loss and damage actually sustained as a

result of the discriminatory dismissal to be made good in full in accordance with applicable national rules". In relation to the award of interest, the CJEU held (para 31) that full compensation could not leave out of account factors, such as the effluxion of time, which reduce its value; an award of interest in accordance with applicable national rules was therefore an essential component of compensation for the purpose of restoring real equality of treatment. Henderson J considered that the references in that case to "adequate" compensation, with the connotation of "full compensation", involved similar language to the phrase "an adequate indemnity" in para 29 of the CJEU's judgment in this case (para 279).

48. Henderson J interpreted the CJEU's judgment in the present case as having held that the right to interest on unduly levied tax is a right conferred by EU law which ranked equally with the right to repayment of the unlawful tax itself. That was the substance of the EU right which the CJEU established in para 26 of its judgment (para 287). The principle of effectiveness, which sets minimum standards for the enforcement and protection of EU rights in national law, was a secondary or adjectival principle, which did not define the substance of those rights and could not whittle down those rights (para 286). He looked at English dictionary definitions of "adequate" and "indemnity" (para 292) in support of his conclusions, and faced up to the "puzzling questions" (a) why the CJEU had not given clearer guidance that compound interest was required and (b) why the CJEU in the final sentence of para 30 had referred to the sums which HMRC had paid (para 296). He accepted that he did not have a satisfactory answer to the latter question (para 299).

49. He stated his conclusion on this matter in these terms (para 302):

> "In sum, my overall conclusion on the difficult question of the meaning of the 'adequate indemnity' test in para 29 of the [CJEU's] judgment is that it requires payment of an amount of interest which is broadly commensurate with the loss suffered by the taxpayer of the use value of the tax which he has overpaid, running from the date of payment until the date of repayment."

On that basis, the simple interest which HMRC had paid could not have provided Littlewoods with an adequate indemnity for their loss (para 310).

50. The Court of Appeal, like the judge, considered that it was logically necessary to identify the content of the right to interest, which the CJEU had recognised in this case, before answering the question whether the UK's rules in section 78 of VATA gave effect to the right in accordance with the principle of effectiveness. The Court focussed on para 25 of the CJEU's judgment, treating the

word "reimbursement" as very important (para 94). That right to reimbursement included losses constituted by the unavailability of money (para 96). This approach was supported by the CJEU's judgment in *Irimie* (above). Para 27 of the CJEU's judgment, on which HMRC had relied in their submissions, did not modify the content of that right. The Court of Appeal therefore rejected HMRC's submission that "an adequate indemnity" in para 29 of the CJEU's judgment only required that a member state provide for "interest in some recognisable form" and stated that the test was that the taxpayer was "entitled to reimbursement of the losses constituted by the unavailability of sums of money as a result of a tax being levied" (para 107).

51. We have reached a different but nonetheless clear view as to the meaning of the CJEU's judgment in this case. In our view the phrase "an adequate indemnity" in para 29 of the judgment, when construed in the context of the wider judgment, and in particular the paragraphs which we have quoted in para 43 above, bears a broader meaning than that which Henderson J and the Court of Appeal favoured, and suggests that the CJEU has given member state courts a discretion to provide reasonable redress in the form of interest in addition to the mandatory repayment of any wrongly levied tax, interest and penalties. We have three reasons for this view. First, the structure of the CJEU's judgment itself and its choice of words support this conclusion. Secondly, the practice of member states in awarding interest on wrongly levied tax provides the context of the CJEU's judgment and suggests that the court was not being as radical as the courts below have held. Thirdly, prior and subsequent case law of the CJEU is consistent with this interpretation. We examine each in turn.

52. First, the structure of the relevant passage in the CJEU's judgment can be analysed in three parts. The first part is paras 24 to 26 in which the CJEU sets out the prior case law which established the right to a refund of charges levied by a member state in breach of EU law, and the extension of that right by *Metallgesellschaft* (above) and *Test Claimants in the FII Group Litigation v Inland Revenue Comrs* (Case C-446/04) (Note) [2012] 2 AC 436 to include other amounts retained by the member state, including compensation for the unavailability of sums of money paid as tax. We discuss those cases when we set out the third reason below. The conclusion which the CJEU reaches from the case law set out in paras 24 and 25 is stated in para 26 and merits repetition:

> "It follows from that case law that the principle of the obligation of member states to repay with interest amounts of tax levied in breach of EU law follows from that law."

There is therefore a general entitlement to interest on tax levied in breach of EU law.

53. In the courts below, emphasis was placed on the CJEU's use of the word "reimbursement" in para 25 when it speaks of the reimbursement of losses constituted by the unavailability of money. We do not attach such significance to a single word, considered in isolation. It is necessary to consider para 25 in the context of the judgment as a whole. In our view, consistently with the conclusion expressed in para 26, reimbursement of loss means no more than recompense or compensation, which is achieved through the payment of some form of interest. In relation to the principal sums, whether of tax, interest or penalties levied by the member state, the compensation would be full compensation in order to achieve restitution of those principal sums. But interest is a means of compensating a person for being kept out of his money. The measure of such compensation is not as straightforward as the calculation of the principal sums which must be repaid. The Court does not specify the level of the compensation for the unavailability of money which that interest is to provide. Instead, the CJEU confirms in this first part that there is an EU principle that a member state must repay with interest charges which it has levied in breach of EU law. It is in the second part that the CJEU lays down what EU law requires member states to provide by way of interest.

54. In the second part, which is paras 27 to 29, the CJEU restates the principle that it is for the internal order of each member state to lay down the conditions in which such interest must be paid. The member state is given a discretion both as to the interest rate and also as to the method of calculation, in particular whether it is simple or compound interest. That discretion is qualified by the established EU law principles of equivalence and effectiveness. The former principle, which in this context requires that the interest to be awarded must not be less favourable than that which would be paid on similar claims for the repayment of unduly levied tax under domestic law, is not in issue. The latter principle, the principle of effectiveness, is in issue as it gives the context of the phrase "an adequate indemnity" in para 29. We discuss the principle further when we set out the third reason below. Paragraph 29 of the judgment describes what the principle of effectiveness requires. It is that the national rules on the calculation of interest should not deprive the taxpayer of "an adequate indemnity" for the loss occasioned through the undue payment of the tax.

55. The phrase, "an adequate indemnity" has a less definitive meaning than "full reimbursement". The French text of the judgment speaks of "une indemnisation adéquate" and the German text refers to "eine angemessene Entschädigung". In both languages, as in English, the words chosen can support a range of meanings, including the meaning of "adequate compensation" or "reasonable redress", which are not tied into the idea of full compensation for the time value of money.

56. In using the principle of effectiveness to require the existence of "an adequate indemnity" but not expressing a definitive view on the adequacy of simple interest, the CJEU was less categorical than Advocate General Trstenjak, who opined (paras 33 and 34) that the payment of simple interest clearly complied with that principle

and that that principle would be breached only if the interest rate were so low as to deprive the claim of substance. In support of that view she recited (para 37) the amounts of principal and interest which HMRC had paid and recorded that the latter exceeded the former by over 25%. But it would be wrong to overstate the extent of the CJEU's departure from the Advocate General's approach. In what we see as the third part of the relevant passage in its judgment (para 30) the CJEU, after stating that it was for the referring court to decide whether the national rules for the calculation of interest would deprive the taxpayer of "an adequate indemnity", recorded what HMRC had already paid and repeated the comparison which the Advocate General had made between the amount of principal and the amount of interest on that principal.

57. What the CJEU said in para 30 suggests that the payment of a substantial amount of interest in a claim for repayment, which, unusually, stretches back over decades, can constitute reasonable redress. This is consistent with the application of the principle of effectiveness, namely that the rules do not render practically impossible or excessively difficult the exercise of rights conferred by EU law: having recognised a right to interest (para 26), the CJEU points out in para 30 that the taxpayer has already received interest amounting to more than 125% of the principal sum. This approach is also readily understandable in a context in which the CJEU, in the interests of legal certainty, has upheld the validity of national limitation periods of relatively short duration which restrict the ability of taxpayers to recover unduly paid tax: for example *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (Case C-33/76) [1976] ECR 1989, para 5; *Palmisani v Instituto Nazionale della Previdenze Sociale (INPS)* (Case C-261/95) [1997] ECR I-4025, para 28; *Fantask A/S v Industriministeriet (Erhvervsministeriet)* (Case C-188/95) [1997] ECR I-6783, paras 48-52. This case law suggests that there is no general principle of EU law that there must be full reimbursement of the use value of money.

58. If, as Henderson J and the Court of Appeal have held, the CJEU, in the paras leading up to para 26, had established a principle that the interest awarded should achieve a full or almost full reimbursement of loss, there is no satisfactory explanation for what the CJEU then said in para 30. As we have said, Henderson J recognised this difficulty and described it as a "puzzling" question to which he had "no satisfactory answer" (paras 296 and 299). He accepted that the CJEU sometimes makes "an observation about the facts which gives a strong indication of what it thinks the answer probably should be", while leaving it to the referring court to provide the answer. But, as he interpreted the words "an adequate indemnity" as requiring an amount of interest broadly commensurate with the loss suffered by the taxpayer of the use value of the tax, he found it incredible that the CJEU would have thought that simple interest over 30 years could achieve that result. Differing as we do from Henderson J and the Court of Appeal in our interpretation of the CJEU's judgment, we have no difficulty in seeing para 30 as fitting into the structure of that

judgment: having set out a criterion of reasonable redress which was to cover the aggregate of principal and interest, the CJEU in quoting the figures, which had persuaded the Advocate General to assert that simple interest sufficed, has given a strong indication of its view, when handling the matter back to the referring court to apply a broad judgment.

59. In summary, we interpret the CJEU's judgment as (i) requiring the repayment of tax with interest, without specifying the form of that interest (ii) stating that the principle of effectiveness requires that the calculation of that interest, together with the repayment of the principal sum, should amount to reasonable redress for the taxpayer's loss, and (iii) suggesting that the referring court might consider that interest which is over 125% of the amount of the principal sum might be such reasonable redress.

60. Turning to the wider context of member state practice, the United Kingdom Government in its written observations to the CJEU examined the legislation in 13 other member states (Belgium, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Poland, Spain, and Sweden). In all but one (Sweden) simple interest is payable both on the recovery by taxpayers of taxes which were unduly paid and on the recovery by the tax authorities of taxes paid late. Thus, there was and is a widespread practice within the member states of the EU which is the same as that in the United Kingdom. In this context, if the CJEU were seeking to outlaw this practice, we would have expected clear words to that effect. They are absent.

61. Thirdly, we see no inconsistency between our interpretation of the CJEU's judgment in this case and its prior and subsequent case law.

62. The obligation in principle on a member state to repay charges levied in breach of EU law, which is enshrined in cases such as *San Giorgio* and *Société Comateb v Directeur Général des Douanes et Droits Indirects* (Joined Cases C-192/95 to C-218/95) [1997] ECR I-165, was initially accompanied by rulings that, in the absence of EU rules governing the matter, the payment of interest on such sums was an ancillary problem to be settled in national law, whether it concerned the date from which interest was payable, the rate of interest or the method of calculation: for example *Société Roquette Frères v Commission of the European Communities* (Case 26/74) [1976] ECR 677, paras 11-13; *Express Dairy Foods Ltd v Intervention Board for Agricultural Produce* (Case 130/79) [1980] ECR 1887, paras 16 and 17; and *Ansaldo Energia SpA v Amminstrazione delle Finanze dello Stato* (Joined Cases C-279/96, C-280/96 and C-281/96) [1998] ECR I-5025, paras 27, 28 and 30.

63. More recently, in *Metallgesellschaft* (above) the CJEU recognised that there was a right in EU law to obtain interest accrued on the advance payment of tax in breach of EU law for the period between the illegal advance payment and the date on which the tax became payable under EU law. In that case, because the purported but illegal liability to pay advance corporation tax had later been replaced by a valid obligation to pay corporation tax, the taxpayer had no claim for the tax itself and claimed merely for interest on the premature payment of the tax. The CJEU reiterated its case law that it was for the national courts to settle ancillary questions such as the payment of interest (para 86) but nonetheless recognised as part of EU law a claim for interest, holding (para 87):

> "where the breach of Community law arises, not from the payment of the tax itself but from its being levied prematurely, the award of interest represents the 'reimbursement' of that which was improperly paid and would appear to be essential in restoring the equal treatment guaranteed by article 52 of the Treaty."

In support of this view the CJEU referred (para 94) to *Marshall* (above) which we discuss further in para 65 below.

64. In *Test Claimants in the FII Litigation* (above) the CJEU confirmed this approach, holding in para 205 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."

While the CJEU spoke in this passage about the "reimbursement" of losses constituted by the unavailability of sums of money which gave rise to an entitlement to claim interest, it made no statement as to the rate or method of calculation of that interest, by which the use value of money might be compensated. It is unsurprising, therefore, that the CJEU in para 26 of its judgment in the present case deduced from the case law a general principle that the repayment of tax levied in breach of EU law had also to provide for the payment of interest, without specifying further the content of that right to interest.

65. The CJEU in the present case did not refer in its judgment to *Marshall* (above). But that case was cited to the court in argument and, as we have said, featured in the reasoning of the court in *Metallgesellschaft*. We have discussed the case of *Marshall* in para 47 above. In our view, the case is clearly to be distinguished from the present case because it was concerned with ascertaining the principal sum which should be paid to the claimant to remove the discriminatory treatment which she had suffered and to achieve equality of opportunity. The use by the CJEU in that case of the phrase "adequate" to describe the making good in full of the loss sustained as a result of her dismissal makes good sense in that context. But there are three reasons why we do not infer that the CJEU in the present case intended the phrase "an adequate indemnity" to have the same meaning in the context of interest. First, in *Marshall* the CJEU applied the principle of effectiveness in a contextual manner; as in the earlier case of *von Colson v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891, the court had regard to the purpose of the Equal Treatment Directive in giving content to the principle in relation to the principal sum to be paid as compensation. Secondly, the court in *Marshall* addressed the claim for interest separately (para 31), holding that full compensation included taking account of the effluxion of time which might diminish the value of the award and that therefore an award of interest in accordance with the applicable national rules was an essential component of the compensation. Taking into account the diminution in value of a sum of money through the passage of time is not the same as compensation in full for the use value of money. Thirdly, as Henderson J recognised (para 282), the CJEU may have adopted the phrase "an adequate indemnity" from para 32 of the written observations submitted by the European Commission in support of the sufficiency of simple interest in which it spoke of such interest providing "adequate restitution or compensation". The Advocate General summarised the Commission's position by referring to this paragraph in her opinion (para 11). *Marshall* therefore is of no assistance.

66. Turning to the subsequent case law, we encounter the CJEU formulating the law in substantially the same way as it did in this case. Thus, in *Zuckerfabrick Jülich AG v Hauptzollamt Aachen, British Sugar plc v Rural Payments Agency and Société Tereos v Directeur général des douanes et droits indirects* (Joined Cases C-113/10, C-147/10 and C-234/10) EU:C:2012:591; [2012] All ER (D) 174 the CJEU in paras 65 and 66 repeated the reasoning in paras 25 and 26 in the judgment in this case and concluded (para 69) that individuals who were entitled to reimbursement of sums paid as production levies under invalid EU legislation were also entitled to interest on those sums. The member state was obliged to pay interest even though it could not recover the corresponding interest from the EU institution to which it had paid the invalid levies. But the CJEU did not rule on the method of calculating that interest.

67. In *Irimie* (above) the CJEU ruled that a system, which limited the interest accruing on tax unduly levied to that which accrued from the day following the claim

for repayment, deprived the taxpayer of adequate compensation for her loss contrary to the principle of effectiveness (paras 26-27) and was therefore in breach of EU law (para 29). It held (para 28):

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

In formulating its reasoning, the CJEU (at paras 20-23) again followed the pattern in its judgment in this case in paras 24-27. In summary, the CJEU confirmed that the right to repayment of unduly levied tax was accompanied by a right to interest on that tax from the date of payment until the date of repayment but it did not suggest that EU law required either the rate or the method of calculation of the interest payable to achieve full reimbursement of the use value of money during that period.

68. In *Wortmann KG Internationale Schuhproduktionen v Hauptzollamt Bielefeld* (Case C-365/15) EU:C:2017:19; [2017] All ER (D) 55 the CJEU was concerned with a claim for the repayment of import duties after EU legislation imposing an antidumping duty was annulled. The court addressed the question whether the relevant EU legislation establishing the Community Customs Code must be interpreted as meaning that national law, having regard to the principle of effectiveness, must provide for the payment of interest on the reimbursed import duties from the date of payment until their repayment, even in cases where no claim for reimbursement had been made in the national court. Advocate General Campos Sánchez-Bordona, in proposing that the CJEU give a positive answer to the question, relied on the court's ruling in *Irimie* which, he suggested (paras 69-70), was based on reasoning that the taxpayer was not to be deprived of compensation "commensurate with the loss suffered". But the CJEU in its judgment did not adopt any such principle but merely repeated its case law that parties who had paid taxes levied by a member state pursuant to an EU regulation which had been declared invalid or annulled by the CJEU had the right in principle to obtain not only the repayment of the amounts levied but also interest on those amounts (paras 37-38). Again, no ruling or comment was made as to the scope of a member state's discretion in fixing the rate or the method of calculation of interest.

69. We are satisfied therefore that there is nothing in the prior or subsequent case law of the CJEU which militates against our interpretation of its judgment in this case. Consistently with the views expressed by the European Commission and the member state governments which submitted arguments to the court in this case, the CJEU (para 34) has not required the payment of more than simple interest if the national legal order treats that as reasonable redress for the unavailability of the

money and no issue of equivalence arises. The CJEU's reliance on the principles of effectiveness and equivalence is wholly consistent with its jurisprudence that the questions of the rate and method of calculation of interest are matters for the internal legal order of a member state.

Summary on issue 2

70. In our view, there is no requirement in the CJEU's jurisprudence that the value which the member state, by the award of interest, places on the use of money should make good in full the loss which a taxpayer has suffered by being kept out of his money. We are satisfied that Henderson J and the Court of Appeal erred in reading too much into the phrase "an adequate indemnity" and failed to give sufficient weight to its context in the relevant passage of the CJEU's judgment, including para 30 which they could not satisfactorily explain.

71. We are satisfied that the judgment of the Grand Chamber of the CJEU in this case, which addresses directly the issue which will determine this case, is clear when read as a whole. The Grand Chamber has specifically addressed the issue of whether simple or compound interest is required, in a reference made in these very proceedings. It has given such guidance as it considered appropriate. It has ruled that "it is for national law to determine, in compliance with the principles of effectiveness and equivalence, whether the principal sum must bear 'simple interest', 'compound interest' or another type of interest." Here, national law provides for simple interest. No issue of equivalence arises. So far as effectiveness is concerned, the Grand Chamber has held that it is for the national court to determine whether the national rules would deprive the taxpayer of an adequate indemnity for the loss caused by the undue payment of VAT. In that regard, it has said that it should be noted that the interest already paid exceeds the principal amount due by more than 23%. It is now the duty of this court to apply that guidance. There is no basis for a further reference to the CJEU.

72. Consistently with a widespread practice among member states of the EU, the United Kingdom has treated the award of simple interest as an appropriate remedy for being held out of money over time whether the claimant is HMRC, when a taxpayer fails to pay his tax in a timely manner, or the claimant is the taxpayer, when tax has been unduly levied.

73. 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: the retroactive nature of a major development of the common law by the courts, so as to allow for the first time the recovery of money paid under a mistake

in law, and the inability of the legislature to respond to that development, under EU law, by retroactively altering the law of limitation so as to protect public finances. The resultant payment of interest cannot realistically be regarded as having deprived Littlewoods of an adequate indemnity, in the sense in which that expression should be interpreted.

Conclusion

74. We would dismiss Littlewoods' cross-appeal on issue 1 and allow HMRC's appeal on issue 2. We would invite the parties, in the absence of agreement, to lodge written submissions on the appropriate form of order to be made in this case within 21 days of the handing down of this judgment.