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LITTLEWOODS AND OTHERS V HMRC - COMPOUND INTEREST ON OVERPAID VAT

WHERE ARE WE NOW?

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The High Court decision of Vos J in *Littlewoods and others v HMRC (Littlewoods)*[1] is the most recent in a line of cases concerning claims for compound interest on overpaid VAT. Although the reference to the Court of Justice (CJ) does indicate that we are approaching a resolution to the dispute, this may not be an end to the matter. Further, even if the CJ does find in the taxpayer's favour, thorny issues concerning the nature of the claim and the relevant limitation period may undermine the victory.

Background

The background to these claims lies mainly in two cases in which the taxpayer was ultimately successful in the House of Lords, namely *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v HMRC (Sempra)*[2] and *Fleming (t/a Bodycraft) v HMRC (Fleming)*.[3]

[1] *Littlewoods and others v HMRC* [2010] EWHC 1071 (Ch); [2010] STC 2072.

[2] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v HMRC* [2008] UKHL 4; [2008] STC 1559.

[3] *Fleming (t/a Bodycraft) v HMRC, Conde Nast Publications Ltd v HMRC* [2008] UKHL 2; [2008] STC 324.

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Before 4 December 1996, the time for which overpaid VAT could be reclaimed under section 80 of the Value Added Tax Act 1994 (VATA) was three years from the time at which the mistake was discovered. Legislation was introduced from that date[4] which changed this limitation period to, broadly, three years from the end of the year in which the VAT was overpaid, regardless of when the mistake was discovered.[5]

The problem with the changes to the repayment regime were that they had at a stroke extinguished extant claims for VAT which had been overpaid by reason of mistake of law. This raised the question as to the effect of the failure to introduce adequate transitional arrangements when altering the limitation period in 1996. Although the new limitation period was not of itself objectionable, the House of Lords held in *Fleming* that the failure to introduce transitional provisions was contrary to EU law principles of effectiveness and legal certainty, such that the change in the limitation period could not be relief upon as against persons who had claims deriving from the period before 4 December 1996. Although *Fleming* related to claims for input tax where full credit had not been claimed, it was accepted by HMRC that the decision had the wider consequence of establishing that persons who had overpaid VAT by reason of a mistake of law in periods before 4 December 1996 (the date on which legislation became effective) were in a position to reclaim that VAT.[6] That was subsequently enacted in section 121 of FA 2008.[7]

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[4] The reduction in time limit was originally announced on (and designated to take effect from) 18 July 1996 (FA 1997 s. 47(3)). It became effective on 3 December 1996 under the terms of the Provisional Collection of Taxes Act 1968 and was enacted as FA 1997 s. 47 on 19 March 1997.

[5] This period has been extended to four years from 1 April 2009, but only for claims where the VATA, section 80 where the "relevant date" (the end of the year in which the overpayment was made) is on or before 31 March 2006.

[6] A further claim that the time limit would not apply for periods after 1996, although initially successful (Scottish Equitable v HMRC (2007) VATDT 194186) was subsequently withdrawn on appeal. It is clear that where legislation infringes directly enforceable EU rights, that legislation is not made void, but is simply without prejudice to those EU rights (*Fleming,* above fn. 3, [2008] STC 324 at [24] per Lord Walker). As such, the three year time limit continued to apply to claims made after 1 December 1996.

[7] FA 2008 s 121 provides, "The requirement in VATA 1994 s. 80(4) that a claim under that section be made within 3 years of the relevant

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Following the decision in *Fleming*[8] it was clear that the issue of interest payable on claims going back 30 years was going to be a significant one. While section 78 of the VATA makes provision for HMRC to pay interest on overpaid VAT "if and to the extent that they would not be liable to do so apart from this section", it has been understood that this provision provides only for simple interest (although how section 78 is to be interpreted is part of the current ongoing litigation.)

Shortly before the decision in *Fleming* however, the House of Lords had decided in *Sempra*[9] that a restitutionary claim can lie in respect of the interest foregone when tax is overpaid. That claim for interest might lie in addition to the claim for the principal amount, and certainly would be available regardless of whether the principal amount had been repaid.[10] This was a departure from earlier case law. On a similar note, Advocate General Geelhoed in *Test Claimants in the FII Group Litigation v HMRC (FII GLO (EU))*[11] had stated that the effective remedy required by EU law included a remedy for the loss of use of money which had been overpaid.[12] This position appears also to have been accepted by the CJ.[13]

Accordingly, within a period of months, *Sempra* had established the possibility of claims for compound interest while *Fleming* made these claims significantly more worthwhile. This raised the possibility that claims might be made for compound interest in respect of the overpaid VAT going back at the very least until the Sixth Directive came into

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date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009."

[8] *Fleming,* above fn. 3, [2008] STC 324.

[9] *Sempra,* above fn. 2, [2008] STC 1559.

[10] See Lord Nicholls at [102] and Lord Walker at [183]

[11] *Test Claimants in the FII Group Litigation v HMRC* Case C-446/04; [2006] ECR I-11753; [2007] STC 326.

[12] *FII GLO (EU)*, above fn. 11, [2007] STC 326 [132].

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force on 1 January 1978.

Issues arising on claim for compound interest

The matter was not, however, clear. As a matter of common law, there is a potential claim for compound interest derived from the law of restitution as established in *Sempra* (the "domestic claim").[14] If, however, that right does not apply to claims in respect of overpaid VAT (because the claim is not available as a matter of statutory construction, as to which see below) then there remains a question as to whether or not the right to effective remedy under EU law requires the UK to provide a remedy under which taxpayers can claim compound interest on overpaid tax (the "*San Giorgio* claim"[15]). If it does, then the question of how that claim is to be satisfied as a matter of UK substantive law and procedure remains.

The domestic claim issue

The main difficulty with establishing the availability of the domestic claim was whether it had been displaced as a matter of statutory construction by section 78 of VATA, quoted above. Arden LJ had held in *Monro v HMRC* that "if Parliament creates a right which is inconsistent with a right given by the common law, the latter is displaced." [16]

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[13] *FII GLO (EU)*, above fn. 11, [2007] STC 326 [201] to [207].

[14] *Sempra*, above fn. 2, [2008] STC 1559.

[15]The so-called *San Giorgio* claim was established in *Amministrazione Delle Finanze Dello Stato v SpA San Giorgio* Case C-199/82; [1983] ECR 395. This established that a person who pays charges levied by a Member State contrary to the rules of EU law is 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 Community provisions prohibiting the relevant charges. .

[16] *Monro v HMRC* [2008] EWCA Civ 306; [2008] STC 1815, [22].

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Returning to *Sempra,*[17] Lord Nicholls had held in that case that section 35A of the Supreme Court Act 1981 (SCA) was not an exhaustive code and so did not displace the common law restitutionary remedy. Section 35A provides, "Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs". Was section 78 of VATA an exhaustive code? Were the words "to the extent that they would not be liable to do so apart from this section" to be construed in a similar manner to section 35A(4) of SCA so that the common law right to interest and the statutory right to interest are concurrent rights, running side by side?

The San Giorgio claim issues

The *San Giorgio* claim also raised two main issues. First and foremost, did this claim include a right to compound interest? Was this what Advocate General Geelhoed in *FII GLO(EU)* [18] meant, or was the question of interest really one which was to be left to the national courts to decide? The second issue is, assuming that the *San Giorgio* claim *does* include a right to compound interest, how should the UK give effect to this right as a matter of substantive law and procedure? There appear to be three ways in which this right might be given effect to under UK law. First, there is the possibility of a conforming interpretation[19] of section 78 of VATA being applied? ("the statutory remedy"). If not, should the right to interest be treated as arising as a result of as an unlawful demand for tax, a right established in *Woolwich*

[17] *Sempra*, above fn. 2 , [2008] STC 1559 at [98].

[18] *FII GLO (EU)*, above fn. 11, [2007] STC 326 [132].

[19] The concept of conforming interpretation is also called the *Marleasing* principle (from *Marleasing SA v La Commercial Internacional de Alimentación SA* Case C- 106/89; [1990] ECR 1–4135). In *Marleasing* it was explained that in applying national law, whether the provisions in questions were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 189 of the EU Treaty.

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Equitable Building Society v IRC (Woolwich)[20] ("the unlawful demand remedy") or is it based upon mistake of law relating to tax liabilities as recognised by the House of Lords in *Deutsche Morgan Grenfell Group plc v IRC*?[21] ("the mistake remedy") The precise nature of the remedy could have significant relevance as regards available limitation periods, as discussed later.

The Cases

F J Chalke Ltd v HMRC

The first court to consider the issue was the High Court in *F J Chalke Ltd v HMRC (Chalke (HC))*[22] which was heard under a group litigation order[23] by Henderson J in 2009. Henderson J considered three questions. First, whether or not the Domestic Claim was available, the answer to which was "no". He held that

> "since section 80 [VATA] … provides an exclusive regime for recovery of the overpaid VAT, any right to recover interest on the repayment as a matter of domestic law must likewise be found within the confines of the statutory scheme, that is to say either in, or through, section 78 [VATA]".[24]

Further, the words in section 78 of VATA ("to the extent that they would not be liable to do so apart from this section") referred only to statutory provisions. As such, section 78 was the only avenue available for claiming interest on overpaid VAT as a matter of UK law.

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[20] *Woolwich Equitable Building Society v IRC* [1992] STC 657 (HL).

[21] *Deutsche Morgan Grenfell Group plc v IRC* (*DMG*) [2006] UKHL 49; [2007] STC 1 (HL).

[22] *F J Chalke Ltd v HMRC* [2009] EWHC 952 (Ch); [2009] STC 2027.

[23] The VAT Cars GLO.

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The second question was whether a *San Giorgio* claim was available. Henderson J considered that the approach of the CJ in *FII GLO (EU)*[25] was such that,

> "the *San Giorgio* principle must now be regarded as entitling a claimant who has paid tax levied in breach of Community law not only to repayment of the tax itself, but also to reimbursement of all directly related benefits retained by the member state as a consequence of the unlawful charge".[26]

Section 78 of VATA was not sufficient to override such a claim and a claim for compound interest was indeed available.

Finally, in relation to the third question, he considered how the *San Giorgio* claim could be given effect in the UK, which was through the mistake remedy. He held, however, that even applying the extended limitation period in section 32(1)(c) of the Limitation Act 1980,[27] the claims were time barred as they were made more than six years after the discovery of the mistake in question[28].

A final point[29] concerned whether there was any defence on grounds that it would be inequitable for HMRC to be forced to repay the use value of the overpayment because they

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[24] *Chalke (HC),* above fn. 22, [2009] STC 2027 [72].

[25] *FII GLO (EU)*, above fn. 11, [2007] STC 326.

[26] *Chalke (HC),* above fn. 22, [2009] STC 2027 [107].

[27] The Limitation Act 1980 s 32 provides "(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either—…

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it".

[28] An argument that payment of the principal amount did not amount to a part payment for the purposes of section 29 of the Limitation Act 1980.

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changed their position by irretrievably spending those payments (the change of position defence). It was held that this would not apply to a mistake remedy where it was giving effect to the *San Giorgio* claim.

An appeal in *Chalke (HC)* was heard by the Court of Appeal[30] in 2010. The Court held that:

> "in view of those doubts and difficulties [as to the scope of the *San Giorgio* claim] and the importance and financial implications of the issue, it seems plainly desirable that there should be a reference to the ECJ for a preliminary ruling on the issue".[31]

It declined, however, to make a reference on the basis that the claims were time barred in any event. The issue of whether section 78 of VATA excluded a domestic law claim was not considered by the Court of Appeal.

Test Claimants in the FII Group Litigation

Shortly before the Court of Appeal gave judgment in *Chalke,* a differently constituted Court of Appeal[32] considered the manner in which the *San Giorgio* claim was to be given effect under UK law in *Test Claimants in the FII Group Litigation v HMRC (FII GLO (UK))*.[33]Although the case did not concern claims for compound interest, the decision is relevant for present purposes because of the views expressed on the manner in which remedies for breach of

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[29] The court also considered and dismissed a claim for damages resulting from breach of EU law by the UK. The breaches were not sufficiently serious to maintain a claim for damages. Another question of whether a claim could be made for pre-1978 payments was left open.

[30] *F J Chalke Ltd v HMRC (Chalke CA)* [2010] EWCA Civ 313; [2010] STC 1640.

[31] *Chalke CA*, above fn. 31, [2010] STC 1640 per Etherton LJ at [41].

[32] Etherton LJ was a judge in both cases but the Court was otherwise differently constituted

[33]*Test Claimants in the FII Group Litigation v HMRC (FII GLO (UK))* [2010] EWCA Civ 103, [2010] STC 1251.

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EU law are to be given effect in UK law.[34] In the absence of a conforming interpretation, as mentioned earlier there are two alternative bases on which to found a remedy under EU law: an unlawful demand remedy and a mistake remedy. In contrast to Henderson J in *Chalke (HC)* who had analysed the claim in that case as based on mistake, the Court of Appeal in *FII GLO (UK)* treated it under the unlawful demand heading. An earlier view of the Court of Appeal that an *actual* demand for payment of tax[35] was necessary before an unlawful demand claim could be made was rejected.[36] It was held that the unlawful demand claim would be available in any case where tax has been unlawfully exacted from a person by virtue of a legislative requirement, including compulsory self-assessment.

The significance of this in *FII GLO (UK)* related to limitation periods. As Arden LJ noted:

> "It may seem counter-intuitive for the Claimants to be arguing for a narrower approach to *Woolwich* than the Revenue, but the reason is tactical. *Woolwich* claims [*i.e. those based on unlawful demands*] are, generally speaking, subject to a 6 year limitation period. Restitutionary claims based on mistake are, generally speaking, subject to the extended limitation period under the Limitation Act 1980 section 32(1)(c)".[37]

As such, if the only right to compound interest is derived from the *San Giorgio* principle and that is only given effect by virtue of an unlawful demand , then there could be no claim for

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[34] *FII GLO (UK)*, above fn. 11, [2010] STC 1251 at [152] to [174].

[35] *NEC Semi-Conductors Ltd v HMRC* [2006] EWCA Civ 25; [2006] STC 606.

[36] Henderson J's decision was based on the decision in *NEC Semi-Conductors*, and started from the premise that the decision in that case was correct. This was not the approach of the Court of Appeal in *FII GLO (UK)*.

[37] *FII GLO (UK)*, above fn. 11, [2010] STC 1251 at [155]

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compound interest in respect of VAT paid prior to 4 December 1996.[38]

FII GLO (UK) has been appealed to the Supreme Court[39].

John Wilkins (Motor Engineers) Ltd v HMRC

In September 2009 the Upper Tribunal released its decision in *John Wilkins (Motor Engineers) Ltd v HMRC (Wilkins)*[40] another claim for compound interest based upon overpaid VAT.

The Court of Appeal[41] has already overturned the Tribunal on a preliminary point relating to whether the appeal was in time[42].

The Tribunal considered the substantive issue of whether section 78 of VATA could be construed so as to confer a right to compound interest in line with the general principle that domestic legislation intended to implement EU legislation is to be construed in the light of, and so far as possible in a way to give effect to, the relevant EU instrument (a conforming interpretation). The Tribunal noted as a starting point that:

"the statutory scheme contained in s 78, s 197 of the Finance Act 1996 and the

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[38] An additional issue in *FII GLO (UK)* related to Finance Act 2004 s. 320 (which disapplied the effect the Limitation Act 1980 s. 32(1)(c) that a mistake-based claim could be brought up to six years after the date on which the mistake was or could have been discovered) and FA 2007 s. 107 (which introduced a further, entirely retrospective, extension of s. 320 to all existing claims). These provisions breached EU law in that they purported to curtail the limitation period applicable to such claims without providing any, let alone adequate, transitional arrangements. If, however, the mistake claim was not required to give effect to EU law there was nothing to prevent those provisions from applying.

[39] Another development on this area is that on 30 September 2010 the EU Commission issued a reasoned opinion as part of infringement proceedings against the UK on the basis that restrictions on limitation periods applying to the mistake remedy (see above fn. 39) restricted EU law rights. The reasoned opinion implicitly rejects the analysis of the Court of Appeal in *FII GLO (UK)*.

[40] *John Wilkins (Motor Engineers) Ltd v HMRC* [2009] UKUT 175 (TCC); [2009] STC 2485.

[41] *John Wilkins (Motor Engineers) Ltd v HMRC* [2010] EWCA Civ 923

[42] The Upper Tribunal held that it had no jurisdiction to hear the matter. A letter from HMRC setting out that simple interest was being paid was a decision not to pay compound interest. As such, the appeal against that decision under section 83(1)(s) of VATA was out of time as it was made more than 30 days after the decision. This part of the decision has since been considered by the Court of Appeal which has

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1998 Regulations not only does not use the word "compound" but also does not contain any mention of one essential of compound interest, that is the frequency of rests".

On this basis it considered that on a natural construction section 78 of VATA provided only for simple interest. It then noted that the *Marleasing* principle may require it to construe UK legislation consistently with the EU provisions which it is implementing. However, a conforming interpretation of legislation may not be necessary if effect is given to the requirements of EU law *elsewhere* in domestic legislation (for example, here, under the law of restitution). On this basis the Tribunal considered

> "that there is nothing in *Marleasing* … which would require the right to compound interest in the present cases to be found within the 1994 Act even if the Sixth Directive had made provision for repayment of charges wrongfully levied. Still less is there any such requirement where the right to compound interest is not found in the Sixth Directive but is a right which arises under general principles of Community law. It is enough that an appropriate remedy is available under English law which gives full effect to the claimants' Community entitlement". [43]

A construction of section 78 of VATA whereby interest meant compound interest would, it was said, go against the grain of the legislation because the "statutory scheme is one of simplicity and is straightforward administratively". [44] As such, the statutory scheme should be disapplied to the extent necessary to permit a restitutionary remedy, but need not be interpreted in any way other than in accordance with the natural meaning.

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overturned the Upper Tribunal on this point and held (Etherton LJ dissenting) that successive claims for interest under section 78 VATA can be made, with the time limit for appeal running afresh from subsequent claims.

[43] *Wilkins*, above fn. 41, [2009] STC 2485 at [106].

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Perhaps surprisingly the Tribunal gave scant attention to the authoritative and recent guidance on conforming interpretation of the Court of Appeal in *Vodafone 2 v HMRC (Vodafone 2)*[45] despite giving some consideration to the case. The Tribunal's timid approach in refusing to give a conforming interpretation is in stark contrast to the approach of the Court of Appeal in *Vodafone 2*. An appeal on this part of the decision has been made.

Littlewoods and others v HMRC

The final case in this series is the one with which this note started, *Littlewoods*,[46] where once again the issue related to interest on VAT which had been overpaid over a number of years as a result of mistake of law. As the most recent of the three cases, and the only case in which procedural defences did not play a significant role, it is worth considering in some detail.

Vos J, after setting out much of the background discussed above, considered that the first question for the High Court to determine was whether "the *Woolwich* and/or mistake-based claims for restitution … [are] as a matter of English law … excluded by sections 78 and 80 VATA?". Although this was a question which had been asked, and answered, (affirmatively) in *Chalke (HC)*[47] by Henderson J, it was suggested in *Littlewoods* that he had given insufficient consideration to the wording of section 78(1) of VATA, quoted above, and Vos J provided a rather fuller analysis.

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[44] *Wilkins,* above fn. 41, [2009] STC 2485 at [120].

[45] *Vodafone 2 v HMRC* [2009] EWCA (Civ) 446; [2009] STC 1480.

[46] *Littlewoods*, above fn. 1, [2010] STC 2072 at [23],

[47] *Chalke (HC)* above fn. 22, [2009] STC 2027.

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The taxpayer's argument noted, *inter alia,* that Lindsay J had held in *R. (on the application of Elite Mobile plc) v HMRC*[48] that section 78 of VATA was not exhaustive. In addition, the House of Lords had stated in *Total Network SL v HMRC*[49] that to supersede and displace common law rights "the statute must positively be shown to be inconsistent with the continuation of the ordinary common law remedy otherwise available".[50] Furthermore section 80(7) of VATA ("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") was irrelevant to the question of interest. The issue turned on whether the right to interest under section 78 is "inconsistent" with the common law right to compound interest, and issue which Vos J considered to be a matter of statutory interpretation. Referring to similar cases cited by the taxpayer he held that:

> "these authorities … seem to me to be no more than examples of cases in which a statute dealing with one specific situation will not normally be taken to exclude common law relief in another situation …[E]qually there will be cases where Parliament's provisions for one specific situation must be seen as inconsistent with common law remedies surviving in other situations …"[51]

He went on to set out his view of the interpretation of section 78. That was that sections 80(2) ("the Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for that purpose") and 80(7) (as set out above) of VATA

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[48] *R. (on the application of Elite Mobile plc) v HMRC* [2004] EWHC 2923 (Admin); [2005] STC 275

[49] *Total Network SL* v *HMRC* [2008] UKHL 19; [2008] 1 AC 1174.

[50] Quoting *DMG*, above fn. 21, [2006] STC 1, per Lord Walker at [135]

[51] *Littlewoods* above fn. 1 [2010] STC 2072 at [54]

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showed that Parliament's intention had been to exclude other remedies for the repayment of principal sums claimed by way of overpaid VAT and, consequently, section 78 could not be construed as allowing for recovery of interest where the recovery of capital was prohibited by section 80. That left the "problem"[52] of the exclusionary words in section 78(1).[53] Vos J held:

> "… despite their generality, they must be taken to be referring only to other statutory provisions under which the Commissioners would be liable to pay interest… . Parliament must have been saying that, in cases covered by sections 80 and 78, this is the only regime that applies … but insofar as interest is concerned, other statutory provisions still subsist … if the exclusionary words in section 78(1) were construed as referring to any common law restitutionary claims they would … be "inconsistent" with the core provisions in section 80 and 78 … so far as interest is concerned that is a restriction to simple interest …"[54]

On this basis, the answer to the first question was that (without reference to EU law) the common law restitutionary remedies were excluded by sections 80 and 78 of VATA.

The second question was therefore whether the application of EU law led to a different conclusion. Vos J considered that the previous cases indicated two alternative views. First, that *San Giorgio* establishes an EU law right to reimbursement of improperly levied tax charges and that any question relating to the requirement to pay interest (including the type and rate of interest) are to be determined by national law, provided that

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[52] The use of the word 'problem' by Vos J at [56] was perhaps unfortunate. It was only a problem if one took as a starting point that the taxpayer was incorrect in its approach.

[53] ("… if and to the extent that they would not be liable to do so apart from this section …")

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the EU principles of equivalence and effectiveness are not violated. This would mean that an award of simple interest would suffice. The second view is that in *FII GLO (EU)*[55] the CJ had determined that the *San Giorgio* principle requires member states not to profit from the receipt of tax charges improperly levied and that this requires compound interest reflecting the use value of the money gained by the member state.

Vos J recognised that there was some question as to how the "use value of the money" was to be determined, and this was one of the questions which he ultimately decided must be referred to the CJ. The questions which he referred to the CJ were

> (1) where a taxable person has overpaid VAT contrary to the requirements of EU VAT legislation will the remedy of the EU member state comply with EU law if it allows for (a) reimbursement of principal sums overpaid and (b) simple interest on those sums, in accordance with national legislation;
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> (2) if not, does EU law require that the remedy provided should allow for (a) reimbursement of the principle sum and (b) the use value of the overpayment in the use of the hands of the member state and/or the loss of the use value in the hands of the taxpayer; and
>
> (3) if the answer to questions (1) and (2) was no, what must the remedy provide, in addition to the reimbursement of the overpaid sum and the use value to be in accordance with EU law[56].

The third question which Vos J posed was (on the assumption that the *San Giorgio*

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[54] *Littlewoods* above fn. 1 [2010] STC 2072 at [60]

[55] *FII GLO (EU)*, above fn. 11, [2007] STC 326.

[56] *Littlewoods* above fn. 1 [2010] STC 2072 at [69]

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claim provided for compound interest) whether sections 80 and 78 of VATA could be construed so as to conform with EU law, or whether they should be disapplied to allow the mistake claim to apply, thus giving effect to the *San Giorgio* claim. This issue was only dealt with briefly as Vos J's view was that it would be necessary to reconsider it in the light of the CJ ruling.

An alternative approach to that considered in *Wilkins*[57] was to construe the exclusionary words in section 78(1) of VATA as permitting restitutionary remedies. Somewhat inconsistently with the difficulties which arose in construing those words in the context of normal UK principles of statutory interpretation, this approach was said to be "contrary to [the] fundamental or cardinal features" of section 78 of VATA. This conclusion, once again timid in comparison to the approach in *Vodafone 2*, left the issue of disapplication and the extent to which section 78 VATA could be disapplied to be considered.

Vos J considered that the English Court would have a choice as to which remedy should be allowed to give effect to the *San Giorgio* claim. He ultimately concluded that "to give effect to Littlewoods' putative *San Giorgio* right to the use value of the overpayment of tax, sections 78 and 80 of VATA must be disapplied so as to allow only the *Woolwich* claims". This was because the *Woolwich* claim rather than the claim based on mistake of law was the one which "most naturally and comprehensively gives effect to Littlewoods' *San Giorgio* right" (although the applicable limitation period would also effectively extinguish the value of that claim). This was on the basis that such a claim would be of wider application since it does not require a mistake.

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Vos J did, however, recognise the utility of a CJ view on this issue and referred a fourth question to the CJ: does the EU law principle of effectiveness require a member state to disapply the domestic restrictions on all domestic claims or remedies that would otherwise be available or can the national court chose to disapply restrictions only on the claim or remedy that most effectively allows that right to be vindicated.

Further arguments related to the change of defence and also a defence based upon the argument that no benefit was derived from overpayments of tax after they were spent in a given tax year. After expressing an initial view that these defences would be available on remedies based on mistake, but not to those based on unlawful demand, he concluded that neither defence was made out on the facts, although they may be relevant to arguments as to quantum.

As regards the relevance of EU law to these defences, Vos J referred a further question to the CJ. This enquired whether the EU law principle of effectiveness requires a member state to disallow a taxation authority a change of defence and/or exhaustion of benefits defence which would otherwise be available in national law, in order to give effect to the *San Giorgio* rights of a taxpayer seeking a restitutionary claim.

A final point related to the measure of damages. Vos J held that damages were to be based on a compound rate of interest reflecting the cost of national government borrowing, albeit that HMRC might show that they have benefited to a lesser extent. The loss of value to the claimant was not relevant for the UK remedy but this was left open to the CJ in the context of the *San Giorgio* claim.

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[57] *Wilkins,* above fn. 41, [2009] STC 2485.

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Conclusion

The issue of compound interest claims is a complex one, illustrated not least by the varying approaches adopted by litigants in the UK Courts. The reference to the CJ will undoubtedly bring greater focus to where these claims lie and how they are to be made.

Vos J is to be applauded for making full use of the reference to obtain guidance going beyond the core question of the extent of the *San Giorgio* claim and whether it should provide compensation for loss of use. Guidance on issues such as what the measure of damages is to be (the claimants loss or the respondents benefit), the extent to which disapplication should apply and the available defences will hopefully give definitive guidance on a wide range satellite issues and significantly shorten the time frame for a resolution of this legislation (on which numerous other cases await). That does, however, assume that the ECJ will answer the main question in the affirmative, a question which very much hangs in the balance and may be tipping towards HMRC in these times of straightened finances for exchequers throughout the EU.

In the absence of an EU remedy, the UK Courts have displayed little appetite for allowing these claims as a matter of domestic law. The consistent line has been to exclude and limit claims for compound interest in a manner which, in the writers' view, does not necessarily reflect the merits of the arguments.

Indeed, even to the extent that an argument based on EU law is conceded by the UK Courts, the decisions have generally been to deny any remedy which would allow compound interest for claims over any meaningful length of time. The decisions on conforming

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interpretations of section 78 of VATA which have this effect are, in particular, somewhat difficult to square with the more adventurous approach interpretations in other areas.