



Unjust Enrichment and Unfair Treatment

The High Court has recently considered the two unlikely bedfellows of unjust enrichment and unfair treatment, in the *Comms of Customs & Excise v National Westminster Bank plc* [2003] STC 1072 case. The conclusion reached was in Customs' favour, reversing the Tribunal. The case picks up from *Marks and Spencer* in the High Court [1999] STC 205, where some similar issues were considered in the context of the three-year cap. (After being heard in the High Court, *Marks and Spencer* became focused on the issue of retrospectivity of the capping legislation. The aspects of relevance to *National Westminster* were not taken further by the Court of Appeal or the ECJ. References to *Marks and Spencer* below are therefore to the decision of Moses J in the High Court.) Mr Justice Jacob has now underlined the central message in unjust enrichment cases: whether unjust enrichment is made out or not is highly dependent upon the evidence produced to support or defeat the claim. It is vital for the taxpayer to engage with the specifics of the claim. Mere assertions of loss, and arguments of unfairness, alone, will not avail. Secondly, he has adopted an orthodox approach to the Tribunal's jurisdiction to decide cases concerning allegedly unfair treatment by Customs. That approach is rooted in existing authority, in his view binding even in the face of novel arguments of Community Law. The existing demarcation line between the Tribunal's jurisdiction and that of the administrative court does risk some cases becoming fragmented between the two, but the line does not breach the EC principles of effectiveness and equivalence, and so is valid.

FACTS

The case concerned a car leasing entity named Lombard, part of the National Westminster group of companies. Lombard purchased vehicles for onward leasing to customers and at the end of the

Christopher Vajda QC of Monckton Chambers and Philippa Whipple of 1 Crown Office Row, who represented Customs, give an insight into the NatWest case and discuss some novel issues which arise from it

lease period sold the cars at auction. Lombard purchased the vehicles from manufacturers at an agreed price. But in addition and in recognition of its purchases, Lombard received payments from the manufacturers periodically, referred to as manufacturers' bonuses. Manufacturers' bonuses were originally treated as taxable consideration for a supply by Lombard; Lombard accounted for output tax on them. Following *Elida Gibbs v CCE* [1996] STC 1387 Customs acknowledged that the manufacturers' bonuses were properly characterised as discounts off the original vehicle purchase price. This meant not only that

Customs and an approach to the Revenue Adjudicator, who broadly supported Lombard. But Customs still declined to make payment. Lombard appealed to the Tribunal, citing VATA 1994, s 83(t) 'a claim for the repayment of an amount under section 80'; and VATA 1994, s 84(10) 'an appeal ... against a decision of the Commissioners which depended upon a prior decision taken by them in relation to the appellant ...'.

UNJUST ENRICHMENT Legislative basis

VATA 1994, s 80(1) enables a taxpayer to claim back an amount paid to Customs

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Lombard had accounted for VAT which was not properly due on the manufacturers' bonuses but also that the true price of the car on which Lombard should have incurred input tax was lower than the price agreed with the manufacturers, and Lombard had suffered input tax on an unreal high price. Recovery of that input tax was blocked.

Customs issued a *Business Brief 16/97* inviting reclaims of overpaid tax. Lombard submitted a claim for more than £700,000. Customs refused to pay the claim on the basis that it would unjustly enrich Lombard. There ensued considerable correspondence with

which 'was not VAT due' to Customs. The claim is subject to the unjust enrichment defence contained in s 80(3) being invoked. Subsections 80(3A) to (3C) circumscribe what amounts to unjust enrichment and importantly provide that 'loss and damage ... incurred by the taxpayer as a result of mistaken assumptions made in his case about the operation of any VAT provisions' is recoverable (s 80(3B) and (3C)).

Jacob J's decision

The Judge reviewed the long line of ECJ authority on unjust enrichment,



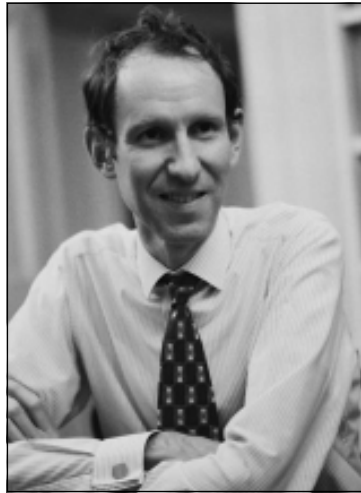
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starting with Case 68/79 *Hans Just* [1980] ECR 501 and ending with the Advocate-General's Opinion in Case C-147/01 *Weber's Wine World*. The principle is well entrenched in Community law.

To recap: in order to make out the defence, there are two steps. First, it is necessary to establish that the tax in question has in fact been passed on to someone other than the taxable person; it need not necessarily be passed on as tax, but as an economic matter it must be borne by someone other than the taxable person. If that is established, the second step is to establish whether the passing on of that tax has caused the taxable person any loss and/or damage. Typically this will be loss of profit due to reduced sales or loss of market share. If loss or damage is established, the defence of unjust enrichment will not be made out to the extent of that loss or damage.

Three key points emerge from the *National Westminster* decision: first, the burden of proof. The Judge accepted, based on existing ECJ and domestic authority, that it is incorrect to start with any presumption of unjust enrichment. What is necessary is that one 'assembles the available evidence and reaches a fair decision taking into account reasonable inferences from the known facts' (paragraph 27). Although not at odds with the approach in *Marks and Spencer*, Jacob J's approach is rather simpler. There is no 'shifting burden of proof', just a requirement to look at the evidence in the round.

Secondly, whatever loss or damage may be shown to exist, it must be causally linked with the overcharged tax. The taxpayer had argued that any loss or damage, howsoever caused, was sufficient to defeat the defence of unjust enrichment. Its case was that it had suffered loss on the transactions overall by virtue of a downturn in the second-hand car market, apparently unconnected with the VAT incorrectly charged. As a result, it had not in fact passed on the tax to the customers. That submission was rightly rejected by the Judge. The legislation and authorities treat as implicit and fundamental that commercial matters unrelated to the overcharged tax are irrelevant. The commercial accident of whether a trader has made a loss or profit on the transaction overall cannot sensibly dictate whether the defence of unjust enrichment applies or not: that loss or profit may have been made regardless



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of the overcharged tax. It is only if the loss can be shown to be greater or the profit shown to be smaller by reason of the overcharged tax that compensation in the form of repayment of that tax is due. The key question, identified by the Judge, was: 'what in the light of all the known facts would have been the financial position of Lombard if the undue tax had not been imposed?'

This engages the third point: it is first and foremost a matter of evidence. It is crucial for the taxable person to produce evidence to back up the case advanced. The Tribunal is likely to be fairly easily satisfied: after all, given that the taxing authority was at fault in the first place in levying a charge to which it was not entitled, it is unlikely that detailed facts and figures will be available. But what the Judge in this case wanted (and was not given) was some evidence that Lombard had suffered loss and damage because of the excessive blocked input tax it had incurred. But Lombard's case was on an entirely different tangent, which was, so the Judge held, inadequate to counter Customs' defence of unjust enrichment.

UNFAIR TREATMENT

Having established that repayment would unjustly enrich Lombard, the Judge turned to consider the issues concerning the unfair treatment of Lombard by reference to other taxpayers. Although not conceded by Customs, there was, so the Judge found, ample material upon which to conclude that Lombard had been treated differently from its rivals: unjust

enrichment was not, apparently, raised in the context of any other claim by a leasing company arising out of the changed treatment of manufacturers' bonuses. But this challenge targeted the fairness of Customs' treatment of Lombard and ran headlong into the issue of the jurisdiction of the Tribunal.

Could the Tribunal hear the equal treatment issue?

Lombard's best point, which only took centre stage in the High Court, relied upon the Community law principle of equal treatment. The argument went thus: the Tribunal has jurisdiction to adjudicate a claim for the repayment of an amount under s 80, pursuant to s 83(t); the Tribunal is bound to observe Community law principles such as equality of treatment in its application of the law, both domestic and European; so where the refusal of the claim for repayment itself infringes the Community law principle of equal treatment, the Tribunal has jurisdiction. Further, it was argued that although domestic case law (starting with *Corbitt* [1980] STC 231) had held that the Tribunal had no jurisdiction to review the conduct of Customs, the position was different where an EU right was involved, not least because two other Community law principles, of effectiveness and equivalence, required it; the existing authorities had not been decided in the face of any Community law argument such as was now being raised.

The Judge identified two flaws with Lombard's argument. First, the principles of effectiveness and equivalence were not infringed by requiring a taxable person to take a grievance about Customs' conduct to the Administrative Court. The Administrative Court provided an adequate machinery for determining such challenges, which was all that was required.

Secondly, as a matter of construction, s 80 only applied to a claim for repayment of an amount paid to Customs which was not 'VAT due'. But the very hypothesis of the appellant's argument was that *even though* the unjust enrichment defence was made out on the facts, the tax should nonetheless be repaid because trade rivals were unjustifiably repaid in similar circumstances. In other words, once one turned to look at the treatment of trade rivals, the argument ceased to be about whether the VAT was due or



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not. The argument moved on to different ground entirely, namely whether and why trade rivals had been repaid; and that ground that was not covered by s 80 or s 83(t) at all.

The Judge's approach was rooted in the facts of this case but can (and should) be extended beyond this case to provide more general guidance. Claims based on inequality of treatment invariably comprise two elements, the first of which is the decision to apply specific treatment to the specific taxpayer; the second of which is not to apply that treatment to other taxpayers in a similar situation (this latter component may not be a decision as such – it may just be the practical effect of a number of divergent decisions). The two elements are separate and even if the first element falls within the Tribunal's jurisdiction, the second does not.

This is a narrow but important carve-out from the Tribunal's jurisdiction. The rationale for the demarcation line is simple: the review of Customs' conduct involves entirely different legal considerations from those normally deployed in the Tribunal. Elias J in the *British Sky Broadcasting* case [2001] STC 437 stated that such unfairness challenges had to meet the high threshold required to demonstrate abuse of power. This is classic public law territory; it is not the day-to-day business of the VAT and Duties Tribunal. Jacob J held that just because Customs made a blunder which favoured other taxpayers did not mean that he should perpetuate that blunder in favour of this taxpayer.

He considered that it was in the interest of the public at large that tax properly due should be collected.

Briefly, it is necessary to mention Lombard's other line of argument, that this was a s 84(10) case, the prior decision allegedly being the decision not to invoke unjust enrichment against other taxpayers. Section 84(10) is a difficult provision. The Judge provided some guidance on its scope in dismissing Lombard's arguments. There were a number of holes in Lombard's arguments.

belongs to the taxpayer, which must, as a practical as much as a legal matter, marshal all the evidence it can to show that it has suffered economic loss of some description, as a result of the unlawfully levied tax.

The Administrative Court remains the appropriate forum for challenges to the way in which the Commissioners have conducted themselves, particularly if a comparative assessment of the treatment of other taxpayers is required. This case has decided that this rule applies even

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The most obvious, and that focused upon by the Judge, was that in this case there were really two *independent* issues: unjust enrichment on the one hand and unfair treatment on the other. The one was in no way dependent upon the other, and *interdependency* of two decisions is central to the operation of s 84(10). So on the facts, the provision had no application.

SUMMARY

The last word in any case where Customs invoke unjust enrichment

in the face of a Community law challenge invoking the principle of equal treatment (rather than generalised unfairness arguments more familiar in domestic law).

This decision will not now be appealed. It marks the most recent guidance on these two important issues. It provides clarity in three difficult areas: unjust enrichment, the correct forum in which to bring an unfair treatment case under EC law, and what a taxpayer needs to establish unfairness. For that reason it is to be welcomed.