# *Vodafone & Ors. v The Office of Communications*

**William Hooper, Barrister, Monckton Chambers**

*Philip Woolfe appeared on behalf of EE Limited*

## Preliminary

In *Vodafone v Ofcom* [2019] EWHC 1234 (Comm), the Commercial Court dealt, for the first time, with an important point in the law of unjust enrichment concerning the counterfactual yardstick against which restitution should be measured.

## Factual background

The claimant Mobile Network Operators ("**MNOs**") claimed restitution of certain payments made by them towards annual licence fees for licences issued under the Wireless Telegraphy Act 2006. The fees were calculated, demanded and paid pursuant to the pithily titled Wireless Telegraphy (Licence Charges for the 900 MHz frequency band and the 1800 MHz frequency band (Amendment and Further Provisions) Regulations 2015 ("**the 2015 Regulations**"). The 2015 Regulations purported to amend the Wireless Telegraphy (Licence Charges) Regulations 2011 ("**the 2011 Regulations**"). Prior to the purported implementation of the 2015 Regulations, therefore, the annual licence fees were calculated, demanded and paid pursuant to the 2011 Regulations. On EE's application for judicial review, the Court of Appeal ([2017] EWCA Civ 1873) quashed the 2015 Regulations.

It was common ground that the MNOs were entitled in principle to claim restitution because (on account of the quashing order) the fees for the licences were extracted from them by a public body without lawful authority: *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70. The question for the Court concerned the measure of that restitution.

The MNOs argued that the measure should be the difference between (i) the sums paid under the unlawful 2015 Regulations and (ii) the sums that were properly due under the lawful 2011 Regulations. Ofcom argued for the difference between (i) the sums paid by under the unlawful 2015 Regulations and (ii) the sums that would have been due had Ofcom acted lawfully in accordance with the judgment of the Court of Appeal. The MNOs' case was premised on the fact

that the only lawful entitlement to fees during the relevant period arose under the 2011 Regulations. As such, the extraction of fees over and above what would have been charged under those regulations was unlawful, and restitution should be given in respect of the difference. By contrast, Ofcom argued that the Court had to consider what could and would have been done in the absence of the 2015 Regulations, and contended that there would have been different, lawful regulations in place. If correct, Ofcom's case would require the Court to consider hypothetical alternative legislation providing for fees to be paid. If the Court accepted Ofcom's argument in principle, then quantum would fall to be determined on another occasion.

## The Court's approach

Adrian Beltrami QC (sitting as a Deputy High Court Judge) preferred the MNOs' argument.

The judge reminded himself (at [31]) of the well-known four questions the Court must ask itself when faced with a claim for unjust enrichment: (1) has the defendant been enriched; (2) was the enrichment at the claimant's expense; (3) was the enrichment unjust; and (4) are there any defences available to the defendant: *Benedetti v Sawiris* [2013] UKSC 50. While the questions are broad headings of investigation, they provide the court with a structured approach, so as to avoid uncertainty and unpredictability: *ITC v Revenue & Customs Commissioners* [2017] UKSC 20 at [41].

The Court noted that the MNOs' claim was necessarily limited to the sums paid pursuant to the 2015 Regulations less what would have been paid under the 2011 Regulations because Ofcom would have had a legal right to the latter sum, such that it could not constitute an enrichment *per Lord Sumption in DD Growth Premium 2X Fund v RMF Market Neutral Strategies* [2017] UKPC 36 at [62].

As to the competing positions with regard to the measure of restitution, both sides advocated what were termed points of principle. The MNOs argued that a public authority can only ever exact by way of taxes of levies sums which were lawfully authorised, such that there can be no question of hypothesising levies which were are not in fact lawfully authorised and thereby permitting an authority to retain that which it could not lawfully have obtained. This they termed the "*principle of legality*". The MNOs also advocated a "*principle of parity*", whereby a party who successfully mounts a judicial review claim but has paid fees pursuant to the contested legislation should not be in a worse position than one who has not. The latter will not, following the quashing of the offending legislation, have to pay the unlawful levies. The former should not be in a worse position when seeking to claim restitution of the unlawful levies paid. See at [36].

By contrast, Ofcom argued for a "*counterfactual principle*" whereby (as summarised above) the Court needed to consider what Ofcom would have done had it been aware of its unlawful error and would have made lawful regulations in place of the unlawful 2015 Regulations. Payment pursuant to those hypothetical lawful regulations would then have been in satisfaction of a legal right (which, Ofcom argued, was wide enough to embrace a hypothetical legal right). See at [35].

Having reviewed the authorities and legal arguments in some detail, the judge set out his conclusions at [90]:

'a. I accept the submissions of the MNOs that there is a principle of legality which precludes the exaction by a public authority of an unlawful fee or charge and, equally, facilitates the recovery of unlawfully exacted fees through a claim in unjust enrichment.

b. Where an unlawful fee has been exacted, the payer will in principle be able to make a claim in unjust enrichment for the return of the fee (subject of course to applicable defences). But where a lawful fee could and would have been charged, then the claim is likely to be for the net sum. [i.e. the difference between what was exacted unlawfully and what would have been exacted lawfully].

c. In determining whether a lawful fee could and would have been charged, and if so the amount of that fee, it may be necessary or helpful to hypothesise the taking of necessary administrative steps which were omitted, for the purpose of fixing the proper amount.

d. There is no warrant for hypothesising a new legal entitlement in order to render that which was unlawful notionally lawful, which would be to undermine the principle of legality; it would also tilt the balance unfairly towards public authority payees making unlawful demands. [As regards (c) and (d), it is important to note that the judge drew a distinction between hypothesising administrative steps necessary to consider the enforcement of the fee and hypothesising legislation].

e. Nor, and separately, is there any warrant for hypothesising a change in the law. On the contrary, where parties have proceeded on the basis of an existing legislative framework, the law of unjust enrichment should not be used to undermine those legal relations.'

The judge thereby dismissed Ofcom's arguments, finding for the MNOs on the point of principle. He went on to consider the four components of unjust enrichment more specifically but, in finding for the MNOs, his conclusions largely resulted from his position on the points of principle.

## Comment

The case has important ramifications for unjust enrichment claims founded on Woolwich principles (namely where the public authority has no lawful authority to exact monies). In circumstances where the public authority has an entitlement to a lesser sum, restitution will be measured on the differential. The public authority will not be permitted to hypothesise the historic introduction of alternative legislation which would have given it an entitlement to a higher sum. This seems sound: the Court should not in such circumstances hypothesise what might have been lawful but was not. To do so would in practical terms enable the public authority to retain monies which were not lawfully received.

*Woolwich* aside, Ofcom had also argued that it could not have been enriched by something which it '*could and would otherwise have obtained for free*' (at [95]). Because it could have made regulations increasing the fees, and would have done so, it could and would have obtained the fees "*for free*". This had potentially far-reaching consequences and '*… would be applicable in many cases where a public authority, or indeed any private party, in receipt of a sum of money following a normatively defective transfer, could claim that, if only things had been different, it would have been able either to reduce the cost to it of achieving the payment in question or to increase that payment*'. It would also go against the grain of authority that money is an incontrovertible benefit. The judge gave this short shrift (at [96]): the proposition was premised on the "counterfactual principle".

There was a further problem with Ofcom's case. It conceded that it would have no claim to counter-restitution. It would follow that had certain MNOs paid their licence fees in the sum required by the 2011 Regulations and declined to adhere to the 2015 Regulations, Ofcom would have no claim in restitution calculated by reference to the latter regulations; their being unlawful. This rendered its argument paradoxical. Ofcom found itself in a position where it was arguing that its liability should be limited by reference to hypothetical lawful legislation yet at the same time conceding that it would have no right to recover fees *per se* by reference to that hypothetical lawful legislation (a point the judge seemingly found perplexing at [99]).

It is understood that permission to appeal was granted by the judge. Given the ramifications for public authorities defending claims to restitution based on *Woolwich* principles, it seems likely that the High Court's judgment will not

be the last say on the matter. The case is certainly one to follow through the appellate process.

***The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.***

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