mum's eyeshot, the teenager turns up the volume on his iPod and cycles obliviously into the road, causing a motorist to swerve and suffer injury. *JGE* is a tentative, but hugely significant, step towards a test for vicarious liability focused on specifically *tortious* policies and principles. The Court of Appeal refused leave to appeal to the Supreme Court, but only because "the Supreme Court may prefer to wait till they have a case fought out on all factual issues with a judgment at the conclusion of a fully contested trial." Let us hope the Supreme Court takes the bait.

JANET O'SULLIVAN

AVOIDING RESTITUTION OF TAX

WHERE a taxpayer has paid tax which is not due, restitution can be obtained from the Revenue. But, since this could involve the repayment of billions of pounds, the British Government sought to curtail such liability by enacting legislation to restrict the limitation period for these claims. When the restitutionary liability derives from the receipt of tax in breach of EU law, the legitimacy of such statutory restrictions requires careful analysis of both the nature of the claim and the compatibility of the statutory restrictions with EU law. Both of these matters were considered by the Supreme Court in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 W.L.R. 1149.

A number of taxpayers had paid excessive taxation on dividends, in breach of EU law, for which English law was required to provide a remedy. Over £5 billion had been overpaid. In principle the taxpayers had two alternative claims for restitution, one founded on mistake of law and the other on the unlawfulness of the receipt, the so-called *Woolwich* claim. Since the latter claim was time-barred, the taxpayers preferred to found their claim on mistake, for which the limitation period would not start until the mistake could reasonably have been discovered: Limitation Act 1980, s. 32(1)(c). Parliament had, however, sought to avoid repaying the tax by retrospectively disapplying section 32(1)(c) by two different legislative provisions. The claimants argued that these provisions were ineffective under EU law to restrict their restitutionary claims.

There were two distinct strands to the claimants' arguments, relating to the domestic law of restitution and the impact of EU law. As regards the former, the claimants argued that, since EU law required English law to provide an effective restitutionary remedy, they should be able to bring a claim founded on mistake and so gain the benefit of

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section 32(1)(c). This argument was founded on two contradictory propositions. First, that the *Woolwich* claim was unavailable because it only applied where the Revenue had demanded the payment of tax, which had not occurred on the facts. This would leave the mistake claim as the only route to an effective restitutionary remedy. Secondly, section 32(1)(c) applied to *Woolwich* claims, because the overpayments had been caused by a mistake, even though that mistake did not form a necessary part of the cause of action.

The Supreme Court held unanimously that a demand to pay tax was not required for the *Woolwich* claim. This must be right, both because, on the facts of *Woolwich* itself, there had been no demand, and because, as the Supreme Court confirmed, the *Woolwich* claim is founded on the constitutional principle that there should be no taxation without Parliamentary authority, and so should be available whatever procedure is used for levying and paying a particular tax.

The Supreme Court provided further clarification of the ambit of the *Woolwich* claim by confining it to ultra vires receipts of taxes and other levies (rather than commercial receipts), either arising from unlawful legislation or lawful legislation which been mistakenly interpreted by the Revenue. It remains unclear, however, whether the *Woolwich* claim applies where a tax overpayment is caused by the claimant's spontaneous mistake. For Lord Sumption, only a mistake claim would be available in such a case. Although the other Justices did not explicitly consider the point, Lord Walker suggested that the *Woolwich* claim required a "perceived obligation to pay" which may encompass a claimant's self-generated mistake. This is the preferable view of the *Woolwich* claim, and is consistent with its constitutional foundations, so that any overpaid taxes should be recovered, regardless of how the overpayment was caused.

But, does it matter whether the *Woolwich* claim is available to a mistaken taxpayer, given that such a claimant has an alternative claim founded on mistake? As the law stands, it might: Henderson J. in the *FII* case had decided that *Woolwich* claims cannot be defeated by the defence of change of position because, by receiving ultra vires payments, the Revenue is a wrongdoer.

Paradoxically, if Henderson J. is right there might be some merit in Lord Sumption's view that *Woolwich* claims are confined to ultra vires receipts caused by the Revenue – for it is artificial to treat the Revenue as a wrongdoer when it has been the passive beneficiary of a payment caused by the claimant's mistake. Nevertheless, the better view is that, by virtue of the constitutional foundations of the *Woolwich* claim, it should encompass all ultra vires receipts, even those caused by the taxpayer's mistake. The bigger question – not considered by the Supreme Court – is whether any ultra vires receipt by the Revenue

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should be considered wrongful so that the defence of change of position is not available. The better view is that it should not.

As regards the claimant's second proposition, relating to the operation of the extended limitation period, the Supreme Court decided unanimously that section 32(1)(c) only applied where the mistake formed a necessary part of the cause of action. This aspect of the decision is also to be welcomed, for otherwise the operation of section 32(1)(c) would become too wide and unstable.

On the assumption that section 32(1)(c) was prima facie applicable to their claims, the claimants' other arguments related to the compatibility with EU law of two pieces of legislation which had sought to curtail the operation of section 32(1)(c). The first of these, section 320 of the Finance Act 2004, disapplied section 32(1)(c) to claims which had arisen prior to 8 September 2003 but which had been brought on or after that date. The second, section 107 of the Finance Act 2007, retrospectively cancelled the extended limitation period for claims brought before 8 September 2003. The claimants argued that both provisions infringed EU principles by failing to provide an effective remedy, or one that was equivalent to that available under national law, or thwarted their legitimate expectations that their claims would succeed.

The Justices concluded unanimously that section 107 breached EU law, although for differing reasons. For Lord Walker, the claimants' right to an effective remedy had been infringed. For Lord Sumption, by 2006 when section 107 was enacted, the claimants had a legitimate expectation that claims which had commenced before 8 September 2003 would attract the extended limitation period. That expectation had been thwarted without reasonable notice, and consequently section 107 could not operate retrospectively.

The Justices disagreed, however, on the validity of section 320 in disapplying the extended limitation period for claims commenced on or after 8 September 2003. Since this issues was not *acte clair* it was referred to the CJEU. The majority, led by Lord Walker, considered that section 320 infringed the principle of effectiveness. Lord Sumption, however, considered it to be consistent with EU law, particularly because the claimants had no legitimate expectation that their restitutionary claims would succeed at the point when the legislation was announced in 2003. Other Justices considered, obiter, that the taxpayers did hold such a legitimate expectation by virtue of the declaratory theory of law-making. The House of Lords in *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558, had held that a claim would lie for restitution of overpaid taxes paid by mistake, and this decision applied retrospectively so that the claimants were deemed to have an expectation in 2003 that their mistake claims would succeed.

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The reasoning of Lord Sumption is to be preferred on this point. The curtailment of the extended limitation period for claims not commenced before 8 September 2003 does not infringe the principle of effectiveness, since the *Woolwich* claim still operates, albeit subject to the usual limitation period. Neither does it infringe the principle of equivalence, since it applies to all claimants regardless of whether the unlawfulness of the tax receipt derived from the infringement of domestic or EU law. Finally, the construction of an artificial legitimate expectation in the light of subsequent events is perverse. A legitimate expectation as to the success of a claim can only be assessed by reference to contemporaneous events and not in the light of what is known later. The reliance on the declaratory theory of law-making by some of the Justices confuses the relevance of that theory to the identification of whether there was mistake with the existence of a legitimate expectation in 2003 as to whether the restitutionary claim might succeed.

Nevertheless, Lord Sumption's conclusion that the claimants had no legitimate expectation that their restitutionary claim might succeed in 2003 is itself dubious. For Park J. in *Deutsche Morgan Grenfell v IRC* [2003] EWHC 1779 had held that such a claim might succeed and, whilst that decision might have been overturned on appeal (and was in fact overturned by the Court of Appeal and then reinstated by the House of Lords), that cannot be sufficient to negate a legitimate expectation that the restitutionary claim might succeed. Further, this was the view at the time of a number of commentators. See, for example, Virgo [2004] B.T.R. 8.

So where does this decision leave us? It is clear that those taxpayers who had overpaid taxes and commenced proceedings for restitution before 8 September 2003 can still assert a claim grounded on mistake of law and gain the benefit of the extended limitation period. For those claimants who only commenced proceedings later, it remains unclear whether the restriction of the extended limitation period is valid, this now being a matter for the CJEU to determine. But the recent decision of the CJEU in *Littlewoods Retail Ltd v Her Majesty's Commissioners for Revenue and Customs* (2012) Case C-591/10 suggests that such matters may be left for the English courts to determine. Since the disapplication of the extended limitation period by section 320 arguably infringes the principle of legitimate expectations, it should not have retrospective effect. Therefore, the claimants would be able to recover all taxes exacted ultra vires since 1972. Such a result would thwart the Government's attempt at restitution-avoidance.

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