Neutral Citation Number: [2017] EWHC 375 (QB)

Case No: HQ15X02259

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2017

Before :

MR JUSTICE GREEN

- -

Between :

Ipswich Town Football Club Company Limited	**Claimant**
- and -	
The Chief Constable of Suffolk Constabulary	**Defendant**

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- -

Nick De Marco of counsel and **Mark Gay** solicitor advocate (instructed by **Solesbury Gay**) for the **Claimant**
Dijen Basu QC and **Catriona Hodge** of counsel (instructed by **Suffolk County Council Legal Services**) for the **Defendant**

Hearing dates: 20th January 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GREEN

MR JUSTICE GREEN:

A. Introduction: Summary of Issues and Conclusions

(i) The issue

1. There is before the Court the second stage in litigation between Ipswich Town Football Club Limited (the "Claimant" or the "Club") and the Chief Constable of Suffolk Constabulary (the "Defendant" or "The Police"). In a judgment ("the Judgment") handed down on 8th July 2016 ([2016] EWHC 1682(QB)) I held that in principle it was open to the Police to charge the Club for the provision of policing services in two roads adjoining "Portman Road", the football stadium used by the Club. I do not in this judgment repeat the facts that I have described and made findings about in that earlier Judgment.

2. All along these two roads (Portman Road and Sir Alf Ramsey Way) are situated the series of gates and turnstiles at which football supporters both enter and depart the ground. There are 25 turnstiles on Portman Road and 33 on Sir Alf Ramsay Way. The two roads are the subject of a Traffic Control Order ("the TCO") by the local authority so that for a short period both prior to and after matches the Club, through its stewards, closes the roads by placing bollards and others signs and barriers at entry points and monitors and controls the closed area. Under the order there is strictly controlled access by vehicles into these roads during these times and entry is, in practice, administered by the Club's stewards. Close to the gates and turnstiles on the pavement of the two roads the Club's stewards erect a series of crowd control barriers which are designed to segregate the home and away teams and create safe and sterile areas in close proximity to the turnstiles so that spectators can enter the ground in an orderly fashion and be separated from the supporters of the opposing team (See Judgment paragraph [1]). In the Judgment I have referred to this area as the "TCO area". I use the same expression in this judgment.

3. Whilst I concluded that in principle the Police could charge for services provided within the TCO area, it was conceded by the Police that beyond this area there was no right to impose charges. I am therefore proceeding in this present dispute upon the basis that it is common ground that as between the Police and the Club there was no basis for the Police to charge the Club for the provision of operational services provided outside the TCO area. I describe the issue in this way because, in the course of the hearing in the present dispute, reference was made to other possibilities for the police to charge, such as the provision of policing at the railway station which is outside the TCO area, about which there is no judicial pronouncement.

4. In the Judgment I also used certain terms to describe the different types of police services. As I explained these are not technical terms or terms of art, but useful shorthand which differentiate a variety of different situations and circumstances. I use the same shorthand in this judgment and in particular the phrases: "*Operational*

duty"; "*Special Police Services*" or "*SPS*"; "*reactive*" policing; and, "*preventive*" policing.[1]

5. In this second stage to the litigation the Club seeks restitution of sums paid, under contract, to the Police for policing services provided in areas of Ipswich which are beyond and external the two roads in issue. The facts relating to the contracts in issue are set out in paragraphs [50] – [67] of the Judgment. It suffices to record here that contracts providing for the Police to provide policing services were entered into on various dates from 2008 onwards. In certain contracts the Club paid for the provision of policing services extending beyond the TCO area.

(ii) The nature of the police services arising in the present case

6. The basis of the right and ability of the Police to charge for services rendered is described in full in the Judgment. The law is presently reflected in section 25(1) Police Act 1996 ("PA 1996"). This provides:

> "25 Provision of special services.
>
> (1) The chief officer of police of a police force may provide, at the request of any person, special police services at any premises or in any locality in the police area for which the force is maintained, subject to the payment to the police authority of charges on such scales as may be determined by that authority."

7. That section reflects much older common law principles pursuant to which when the police are requested, and then agree, to provide SPS they may charge for the provision of such services. However they are not allowed to charge for services which are not "*Special*". The factual and evidential divide between that which can, and cannot, be charged for was at the heart of the first part of this litigation.

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[1] In paragraph [6] of the Judgment I stated:

> "In this judgment I have used various expressions to describe the difference between the policing services that can and cannot be charged for. These are not terms of art but are useful in differentiating between the most important situations that arise in cases such as the present. I provide below a brief description of these terms. i) I use the expression 'operational duty' to describe the obligation of the Police to provide services for which no charge may be levied. I use the phrase as shorthand for those activities which constitute the core of the public responsibilities of the Police. It is important to recognise that in the performance of this duty the Police retain a discretion as to how resources are allocated and therefore the prima facie duty arises upon the independent (i.e. unrequested) exercise of the discretion to allocate resources; ii) I use the expression 'SPS' as shorthand for 'Special Police Services'. These are services for which the Police may levy a charge and they are services which in a given case when provided are pursuant to a request and are not pursuant to the operational duty. iii) I use the expression 'reactive' to describe policing services which are in response to actual or imminent disorder or crime. iv) I use the expression 'preventative' to describe the provision of Police services which are intended to prevent the emergence of crime or disorder, i.e. are not reactive and in response to actual crime or anticipated, imminent crime. For the avoidance of doubt nothing in this judgment is intended to define what, in a given case, may be understood as 'imminent'."

8. The issue now is therefore exclusively with services which the police cannot charge for. The Courts have long made clear that the police owe a duty to provide policing services which are, to put the point simply, the citizen's lawful due or "*right*" upon the basis that the service is paid for out of taxation or rates and any attempt to impose yet further charges is not "*lawful*".

9. In *Glamorgan Coal Company v Glamorganshire Standing Joint Committee* [1916] 2 KB 206 ("*Glamorgan*") Pickford LJ, at page [229] held that where a person was threatened with violence the victim was entitled to protection provided by the Police which could not be made contingent upon an agreement or promise by the victim to pay or defray the expense incurred by the Police in providing a protective service. He observed that the obligation upon the Police to provide policing services was the concomitant of the "*… contribution... rate payers... make to the support of the Police*", and:

> "There is a moral duty on each party to the dispute to do nothing to aggravate it and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the Police authority of their own duty."

10. In the Judgment at paragraphs [94] and [95] I explained how the dichotomy between SPS and services provided pursuant to the operational duty emerged in case law:

> "94. In Glasbrook Brothers Limited v Glamorgan County Council [1925] AC 270 ("*Glasbrook*") Viscount Cave LC (at page 277) stated that there was:
>
> > '… an absolute and unconditional obligation binding the Police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury; and the public who pay for this protection through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right.'
>
> The House of Lords thus made plain that no charge could be levied by the Police for the provision of services which they were, otherwise, bound to provide to the public who paid for those services through rates and taxes. This statement may be viewed as the locus classicus of the principle that the obligation on the Police to act is not contingent upon or affected by the wealth or impecuniosity of the recipient of services. The dictum is also important because it defines the obligations of the Police in terms of 'preventing crime… protecting property from criminal injury… and the public.'
>
> 95. Viscount Cave articulated the concept of 'services of a special kind which might be charged for'. He stated:
>
> > '… I think that any attempt by a Police authority to extract payment for services which fall within the plain

> obligations of the Police force, should be firmly discountenanced by the Courts. But it has always been recognised that, where individuals desire that services of a special kind which, though not within the obligations of a Police authority, can most effectively be rendered by them, should be performed by members of the Police force, the Police authorities may… "lend" the services of constables for that purpose in consideration of payment. Instances of the lending of constables on the occasion of large gatherings in and outside private premises, as on the occasions of weddings, athletic or boxing contests or race meetings, and the provision of constables at large railway stations.'
>
> This gave rise to the concept of SPS. The situations identified as exemplars have had to be modified and modernised with the passage of time."

(iii) The availability of a restitutionary remedy

11. In the present case the Club argues that it is entitled to restitution of the sums paid upon two bases: (i) that the sums were paid to the Police in purported exercise of the latter's statutory powers which are now accepted to have been exercised unlawfully and *ultra vires* (referred to in this judgment as a *Woolwich* type claim – explained below); (ii) that the sums were paid pursuant to a mistake of law, namely that the Police were entitled to demand the sums in issue when in law they were not. The Police dispute this arguing that there is no *Woolwich* type restitutionary remedy based solely on the *ultra vires* nature of the charges (i.e. (i) above) and that the only basis of recovery is mistake (i.e. (ii) above) where there are defences open to the Police which defeat the claim.

(iv) The different limitation periods applying

12. Different limitation periods apply to the two causes of action referred to above. In the case of a claim based upon a mistake section 32(1) Limitation Act 1980 provides a potentially more generous limitation period than in the case of *Woolwich* type demands. There may, therefore, on the facts of a given case be a difference between the extent of any recovery depending upon which restitutionary cause of action is relied upon.

13. Section 32(1) of the Limitation Act 1980 provides:

> "… where in the case of any action for which a period of limitation is prescribed by this Act, either –
>
> (a) …
>
> (b) …
>
> (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.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

14. This provision replaced (with a minor amendment to section 32(1)(b)) provisions first introduced by section 26 of the Limitation Act 1939. In that legislation section 26(c) was in the same terms as section 32(1)(c). The 1939 change to the law was recommended by the Law Review Committee in its Fifth Interim Report, (Statutes of Limitation) (1936) (Cmd. 5334). The recommendation was that in such cases the equitable rule (that time should run only from when the mistake was, or could with reasonable diligence have been, discovered) should apply to claims which were formerly within the exclusive jurisdiction of common law courts (as opposed to being within equitable or concurrent jurisdiction).

15. In the case of a claim for recovery of sums under *Woolwich* the normal six year limitation period applies. It has been confirmed that section 32(1) does not therefore apply to claims not premised upon mistake.

(v) Defences available to claims for restitution

16. It is common ground that if a claim is based upon *Woolwich* then the payee cannot claim change of position or *quantum meruit*. But, if the cause of action is based upon mistake then the payee is entitled to seek to defeat the claim by arguing change of position or that on a *quantum meruit* the payor had full value and there is nothing to restore.

(vi) Interest: Compound, simple or nothing?

17. A further issue between the parties is whether, assuming the Club can recover it is entitled to compound interest or only simple interest pursuant to Section 35A Supreme Court Act. The Club argues that it is entitled to recover the time vale of the money wrongfully paid to the Police by way of compound interest but in the alternative they are entitled to simple interest on ordinary principles. The Police argue that to award compound interest would be inappropriate and unjust.

(vii) Conclusion

18. For the reasons that are set out in this judgment I have concluded as follows.

19. First, the Club has a cause of action in restitution based upon both (i) the fact that the payment was made in response to a demand for payment made by a public authority that had no lawful power to make the demand which was therefore a *Woolwich* type claim and (ii) the fact that payment was made pursuant to a mistake of law.

20. Second, the causes of action are complementary and not mutually exclusive. The Club may choose which of the two causes of action is most advantageous to its position.

21. Third, there are no defences available to the Police (based upon *quantum meruit* or change of position) which would defeat the restitutionary claims. The claim for restitution is to be calculated upon the basis that the sums actually paid under the

contracts in issue constituted fair market prices and constitute the benchmark for the apportionment exercise now to be performed.

22. Fourth, that the Club is entitled to simple interest under section 35A Supreme Court Act 1981 but not compound interest.

(viii) Consequences / the limits of this judgment

23. It has been agreed between the parties that this second stage of the litigation be confined to points of principle. Once decided the parties are content then to seek to apply the principles found to the facts in order to determine quantum as between themselves.

B. The submissions of the parties

24. In this section I summarise the competing submissions.

(i) The Claimants submissions

(a) Police have admitted liability

25. The Club argues, first, that the Police have admitted that the sums demanded were unlawful and its liability to repay the sums overpaid. The Police admitted that policing provided under contract on land not owned, leased or controlled by the Club did not constitute SPS and that the Police therefore unlawfully charged the Club for those services prior to 5th August 2011 (see paragraph [7] of the Amended Defence and Counter Claim ("ADCC"). At paragraph [13(i)] ADCC the Police "*admits that the Claimant is entitled to immediate repayment in respect of any monies for which the Defendant could not lawfully charge*". It is said that this is an admission not only to liability to repay those sums but also, specifically, to the Club's entitlement to recover monies upon the basis that they were imposed *ultra vires*. The Club is entitled under CPR 14.1 to judgment. The Club points out that, in the wake of the first trial the Court gave the parties a full opportunity to amend their pleadings to bring them up to date and the Defendant has not sought to resile from the admissions in any way: see Judgment paragraph [156].

(b) Police liable on basis that the sum claimed was ultra vires: "Woolwich"

26. In any event with regard to ordinary principles of restitution the Defendant is liable. The claim falls within the scope of the principle of recovery set out by the House of Lords in *R v Inland Revenue Commissioner ex parte Woolwich Equitable Building Society* [1990] 1 WLR 50 ("*Woolwich*").

(c) Police liable upon the basis that they paid by virtue of a mistake of law

27. Further, the Defendant is also liable because the Club paid the sums in dispute under a (mutual) mistake of law believing them to be owed whereas in fact and in law they were not owed and restitution lies in such circumstances. There are no defences available to the Police.

(d) The period for recovery is extended by section 32(1) LA 1980

28. It is sufficient for the purposes of section 32(1)(c) LA 1980 that the mistake be one of law but it must be as to an element of the cause of action (*Kleinwort Benson Ltd v Lincoln City Council* [1992] 2 AC 349 ("*Kleinwort Benson*"), at page [389C] per Lord Goff. The House of Lords in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 ("*DMG*") held that the mistake of law under which the claimant made payments was not discoverable until a judgment of the Court of Justice of the European Union concerning the legality of the underlying fiscal regime. Lord Hoffman held (at page [572]):

> "The 'reasonable diligence' proviso depends upon the true state of affairs being there to be discovered. In this case, however, the true state of affairs was not discoverable until the Court of Justice pronounced its judgment […] they could not have discovered the truth because the truth did not yet exist. In my opinion, therefore, the mistake was not reasonably discoverable until after the judgment had been delivered."

29. As such, time ran from when the mistake was discovered and not from when the mistaken payments were made. In this case the mistake could only have been discovered following the judgment of the High Court in *Leeds United Football Club Ltd v The Chief Constable of West Yorkshire Police* [2012] EWHC 2113 ("*Leeds*"). Any claim brought within six years of 2012 therefore captures <u>*all*</u> prior overpayments whenever made.

(e) Compound interest should be paid on sum outstanding

30. The Court may award interest on a restitutionary award as follows. Simple interest is payable pursuant to section 35A of the Senior Courts Act 1981 (*Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 ("*Sempra*"), at [114] per Lord Nicholls. Compound interest is payable at common law or in equity based on the use value of the money paid to the Police (*Sempra*, at paragraphs [31] – [32], per Lord Hope and at paragraphs [116] – [117], per Lord Nicholls). This is a proper case in which to award compound interest to compensate the Club for the lost time value of the money.

(ii) The Defendant's submissions

(a) Woolwich does not apply

31. The Police argue that reliance upon *Woolwich* is misconceived.

32. First, *Woolwich* does not extend beyond the regime for taxes and other analogous levies. The claim in the present case is not for a charge in the nature of a tax or analogous duty or impost. In *Woolwich* the Appellate Committee was called upon to determine: "*whether <u>money exacted as taxes</u> from a citizen by the revenue ultra vires is recoverable by the citizen as of right*", per Lord Goff at page [163B] or, alternatively, whether the citizen has "*the right to recover from the revenue money demanded by the revenue and paid by him which was not due in law because the law was ultra vires*" per Lord Slynn. In recognising such a right Lord Goff delineated the principle (page [177F–G]) in terms limiting the right to the recovery of fiscal charges: "*I would therefore hold that money paid by a citizen to a public authority <u>in the form</u>*

of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right".

33. Second, the policy justification for recognising the *Woolwich* right to recovery does not extend to restitutionary claims of the present type. Subsequent case law makes clear that *Woolwich* does not extend to claims such as the present. The policy rationale for recognising a right to recover unlawfully levied taxes was explained by Lord Goff at page [172B–G] and was summarised by Lord Sumption in *FII Group Test Claimants v Revenue and Customs Commissioners* [2012] 2 AC 337 ("*FII*"), at paragraph [173] as a "*special rule for unlawful charges by public authorities"* that *"… no tax should be collected without parliamentary authority, and (ii) that citizens did not deal on equal terms with the state, and could not be expected to withhold payment when faced with the coercive powers of the revenue, whether those powers were actually exercised or merely held in reserve*".

34. Third, in *Kleinwort Benson* (*ibid*) at page [381G–H], Lord Goff distinguished the restitutionary principles applicable to the tax regime from those which apply to other "*private*" transactions:

> "At this point it is, in my opinion, appropriate to draw a distinction between, on the one hand, payments of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions. The former category of cases was considered by your Lordships' House in Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] A.C. 70, in which it was held that at common law taxes exacted ultra vires were recoverable as of right, without the need to invoke a mistake of law by the payer."

35. The sums sought to be recovered in this case are in the nature of private transactions under which the Club agreed to pay a fixed fee for each category of match in return for the supply of a policing service "*sufficient to facilitate the safety of both home and away spectators and to prevent crime, violence and disorder"*. The Claimant requested such a policing service in full knowledge that it was being expected to pay for policing provided other than inside the stadium and the closed roads. The Claimant was free to accept or reject the fixed rates for each category of match stipulated in the MOU. The Club has freedom to choose not to acquire the service.

(b) Mistake / Change of position / Quantum meruit

36. In oral submissions Mr Basu QC accepted that there was a mutual mistake of law and that the real issue in dispute was whether, in the course of unravelling the contracts to isolate the sums overpaid, the Police could establish that in fact there was nothing to repay. This was because: (i) the calculations appended to the contracts in issue involve an under-charge for the cost of each police officer; (ii) ACC Sarah Hamlin gave oral evidence during the first trial that had she been in post at the material time and had she understood the true legal position then she would have ensured that the officers who were providing SPS were charged at a rate which reflected the full cost recovery rate; (iii) it was hence only to the extent that the Police recovered more than the hypothetical actual (full) cost of providing the officers engaged in providing the SPS that there would be any over recovery at all; and (iv) the law does not permit the Club to be unjustly enriched at the expense of the Police which it could be if the Club would now recover having paid a less than full cost in the past under the contracts.

37. The Police argue that they have a defence based upon *quantum meruit* and/or change of position. It is said that the Police changed their position in reliance upon the assumption (shared with the Club) that the MOU was valid in two material respects. First, the Police provided SPS plus the other services for which they then believed they could charge, at a discounted rate per officer and hence at a net cost to the Police when the Police could have chosen not to provide the services at all. Had the Police not provided the services in issue then they would have avoided the associated costs of policing the town, given that the matches in question would not have proceeded as originally envisaged. Second, because of their mistake the Police were denied the opportunity to set aside the invalid MOU and to substitute in its place an agreement under which recovery for SPS was set at a full cost recovery rate. The Police in such circumstances would have avoided incurring net costs by charging the same amount per category of match limited to the officers performing what is now understood to be SPS and the Club would have agreed such that exactly the same policing would have occurred at exactly the same matches for exactly the same prices.

(c) Mistake: Section 32(1)(c) Limitation Act 1980 does not serve to extend the recovery period

38. As to limitation, Section 32 (1)(c) LA 1980 only stops the '*limitation clock*' from running where the mistake in question is an essential ingredient in the cause of action. In the present case the law is long established and uncertainty arose only as to the application of the law as to the facts. And as to this it was, or at least should have been, apparent to the Club that there was a serious issue relating to the ability of the Police to charge as from 1986 (and possibly earlier) and 2005 at the latest.

(d) Interest

39. The Police argue that there is no basis in law or policy for ordering compound interest. In *Sempra* (*ibid*) the effect of payment of advance corporation tax, under statutory provisions held by the CJEU to infringe Art 52 of the EC Treaty, was that the Inland Revenue effectively received "*a massive interest free loan*" for a period of time and this was the basis upon which compound interest was ordered. The present case was wholly distinguishable on the facts.

40. An unjust enrichment claim measures the benefit to the defendant. It does not compensate the claimant for loss. In *Sempra* the Revenue accepted that the money concerned had a value to it (it being a notorious fact that HM Government was in debt) and that to service the debt HMG obtained loans at preferential rates in the money markets and issued Treasury Bills. It is open to an enrichee to show that it would have been able to borrow money on more favourable rates of interest than those available in the ordinary commercial market (*Sempra*, per Lord Hope at paragraph [49] and per Lord Nicholls at paragraphs [118], [119] and [128], and see per Lord Walker at paragraph [188]). An unjustly enriched company which runs an expensive overdraft facility in an overall debt position would be likely to be required to provide restitution of the saving it made in interest payments in reducing its use of the facility by the amount and duration of the enrichment. An unjustly enriched person who always keeps his bank accounts in credit may (or may not) have, and take, the opportunity to earn modest interest on positive balances. Any such modest benefit will form part of his enrichment. However, the Police are a public service. They must operate within the limits of their public funding. ACC Hamlin explained this in oral evidence: Police budgets are under substantial pressure. If they run under budget they will either provide more policing or ask for less funding (or both); but if they operate

over budget they will either provide less policing or ask for more funding (or both). If the police are unjustly enriched, being under budget to that extent, they will either provide more policing or ask for less funding (or both). The police will accordingly not be enriched by the mere fact of holding money for a period of time.

41. Further, a party which is out of pocket as a result of the actionable conduct of another can protect himself from remaining out of the money (which protection is the function of section 35A SCA) by bringing proceedings promptly. Here the Club chose to stop paying the Defendant's invoices and delayed in bringing proceedings.

(e) No admissions made

42. Finally as to the alleged admissions the characterisation of the Amended Defence and Counterclaim, as an admission of the Club's entitlement to recover monies pursuant to the *Woolwich* principle was wrong: (i) the actual pleading qualifies the alleged admission with the phrase "*subject to the set off and counterclaim pleaded below*"; (ii) the Claimant does not mention *Woolwich* in its pleaded case but instead relies upon the ill-defined concept of "*ultra vires* charges"; (iii) the qualified concession as to the Claimant's right to repayment is also expressly made subject to a defence of change of position which is not available to a claim based on the *Woolwich* principle; (iv) it runs counter to the understanding reached by counsel culminating in paragraph [1] of the Agreed List of Issues.

43. I turn now to consider the issues arising

C. Issue I: The existence and applicability of a Woolwich type restitutionary remedy

(i) The issue

44. The first issue is as to the nature of any restitutionary remedy available to the Club. There are two possibilities. First, restitution under the "*Woolwich*" principle; and secondly restitution upon the basis of mistake. The dispute focuses upon the precise dividing lines between *Woolwich* and other types of restitutionary claim based upon mistake. As I have noted the distinction has practical significance in relation to the availability of defences and as to limitation. The scope and classification of restitutionary claims has absorbed the attention of the House of Lords, Privy Council and Supreme Court and there is a considerable amount of judicial pronouncement upon the point. There is nothing however which is four square on the issue arising in the present case. In order to identify the principles which govern this case, it is necessary to consider how the law governing restitution involving public bodies has evolved over time.

(ii) The scope of a Woolwich type claim: R v Inland Revenue Commissioner ex parte Woolwich Equitable Building Society [1990] 1 WLR 50 ("*Woolwich*")

45. The starting point is to set out what is understood to be a "*Woolwich*" type claim. As to this it is common ground that it concerns (at least) claims for repayment of moneys wrongly paid to public authorities there being no need to establish that the payment was made upon the basis of a mistake of law (though the existence of a mistake does not disqualify a claim from being a "*Woolwich*" claim if it otherwise has the requisite hallmarks). Where the parties disagree is (a) whether this is a general principle or one

confined to tax and related charges; and (b) if it is confined to taxes and related charges whether the demand in the present case amounts to such a charge.

46. **Facts**: In *Woolwich* The Woolwich Building Society ("Woolwich") paid three instalments of tax amounting to £56,998,221 to the Revenue under the Income Tax (Building Societies) Regulations 1986 ("the Regulations") and Schedule 20 Finance Act 1972 without prejudice to the right to recover the tax in the event of a successful challenge to the validity of the Regulations by way of judicial review proceedings. Woolwich was not labouring under any mistake of law when it made payment; Woolwich wished to avoid reputational damage arising out of possible collection or tax recovery proceedings following a refusal to pay tax, and also to avoid liability to interest or penalties. Subsequently it applied for judicial review. The High Court (Nolan J) granted the application upon the basis that the Regulations were *ultra vires* and void to the extent that they purported to impose a tax liability on building societies in respect of dividends and interest paid before 6 April 1986. Woolwich issued a writ for recovery of the £56,998,221 together with interest under s 35A of the Supreme Court Act 1981 from the respective dates of payment of each instalment. Negotiations occurred resulting in repayment of the £56,998,221 but with interest only from the date of the decision. The writ action continued in respect of Woolwich's claim for interest for the periods from the respective dates of payment of each instalment to the date of the decision. Woolwich contended that on general restitutionary principles the payments had discharged no liability and there was no consideration for them and/or that they had been made under duress. The Revenue argued that the payments had been made voluntarily and were thus not repayable, or that there had been an implied agreement that the money would be repaid only if and when the Woolwich succeeded in its judicial review proceedings or that the Court could have imposed a constructive trust on the Revenue in recognition that it would have been unconscionable for the Revenue to retain the money after the decision. The High Court dismissed Woolwich's claim. Woolwich appealed. The Court of Appeal (by a majority) allowed the appeal and held that the law of restitution included as a distinct head a general principle that a subject making a payment in response to an unlawful demand for tax, or any like demand, i.e. a demand for which there was no basis in law, immediately acquired a *prima facie* right to be repaid the amount paid. That principle was subject, at least where the matter in issue was the interpretation of a statute, to two limitations: (i) that the payment might not be recoverable if made to close the transaction or (ii) under a mistake of law. However neither limitation applied because Woolwich had made it clear from the outset that the payments were without prejudice to its claim in law that the Regulations were invalid. The Crown appealed. The House of Lords dismissed the Crown's appeal (Lord Keith and Lord Jauncey dissenting). Money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an *ultra vires* demand by the authority was *prima facie* recoverable by the citizen as of right; and per Lord Goff and Lord Slynn, mistake of law did not provide a defence to a claim for the repayment of money so paid.

47. **The main issues**: The leading judgment (for the majority), dismissing the appeal of the Revenue in *Woolwich* was delivered by Lord Goff. This judgment has over time come to be treated as the compulsory starting point for all subsequent analysis. For present proposes it is convenient to set out Lord Goff's observations in relation to four issues which are of importance in the present litigation: (i) the broad principle to be applied; (ii) the analysis of compulsion; (iii) the resort to the broad principle of "*justice*" as an underpinning for the law; and (iv), the trend in the law.

48. **The broad principle**: Lord Goff articulated the broad principle in terms of "*taxes and other levies*". He stated (*ibid* page [177]):

> "… money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right."

49. **Compulsion:** An issue in the present case is whether *Woolwich* types claim only arise where the payee can invoke coercive statutory powers of enforcement (which it is common ground the Police cannot do). In relation to payments made under "*compulsion*" Lord Goff described the categories of compulsion acknowledged in case law but indicated that the categories were not closed, in particular because of the growing significance and recognition of "*economic duress*". Of some present significance is his description of compulsion *colore officii* which relies upon a weak notion of duress and is not limited to fiscal charges. He stated (*ibid* pages [164G] – [165C]):

> "But money paid under compulsion may be recoverable. In particular:
>
> (a) Money paid as a result of actual or threatened duress to the person, or actual or threatened seizure of a person's goods, is recoverable. For an example of the latter, see *Maskell* v. *Horner* [1915] 3 KB 106. Since these forms of compulsion are not directly relevant for present purposes, it is unnecessary to elaborate them; but I think it pertinent to observe that the concept of duress has in recent years been expanded to embrace economic duress.
>
> (b) Money paid to a person in a public or quasi-public position to obtain the performance by him of a duty which he is bound to perform for nothing or for less than the sum demanded by him is recoverable to the extent that he is not entitled to it. Such payments are often described as having been demanded *colore officii*. There is much abstruse learning on the subject (see, in particular, the illuminating discussion by Windeyer J. in *Mason* v. *Stale of New South Wales* (1959) 102 CLR 108, pages 139-142), but for present purposes it is not, I think, necessary for us to concern ourselves with this point of classification. Examples of influential early cases are *Morgan* v. *Palmer* (1824) 2 B & C 729 and *Steele* v. *Williams* (1853) 8 Ex 625; a later example of some significance is *T. & J. Brocklebank Ltd.* v. *The King* [1925] 1 KB 52.
>
> (c) Money paid to a person for the performance of a statutory duty, which he is bound to perform for a sum less than that charged by him, is also recoverable to the extent of the overcharge. A leading example of such a case is *Great Western Railway Co.* v. *Sutton* (1869) LR 4 HL 226; for a more recent Scottish case, also the subject of an appeal to this House, see *South of Scotland Electricity Board* v. *British Oxygen Co.Ltd.* [1959] 1 WLR 587.

> (d) In cases of compulsion, a threat which constitutes the compulsion may be expressed or implied (a point perhaps overlooked in *Twyford* v. *Manchester Corporation* [1946] Ch 236).
>
> (e) I would not think it right, especially bearing in mind the development of the concept of economic duress, to regard the categories of compulsion for present purposes as closed."

50. Lord Goff expressed support for the expansive view of "*compulsion*" adopted in the US and Commonwealth Courts: see e.g. the judgment of Holmes J. in *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor* 223 US 280 [1912], at pages [285] – [286]; the Australian case of *Mason v. State of New South Wales* [1959] 102 CLR 108; and the majority judgment of the Supreme Court of Canada in *Eadie* v. *Township of Brantford* [1967] 63 DLR (2d) 561 – see the analysis of these cases by Lord Goff (*ibid*) at pages [172] – [173].

51. There are other observations on compulsion which equally suggest that it is to be broadly construed in the judgments of those of their Lordships who agreed with Lord Goff. Lord Browne Wilkinson endorsed a broad view of compulsion and considered that the genesis of the principle lay in cases where the "*payer and payee were not on an equal footing and it was this inequality which gave rise to the right of recovery*" (*ibid* page [198A]). He was also of the view that the doctrine of *colore officii* was merely illustrative of this wider principle. He also construed the *colore officii* cases broadly as encompassing cases where a person could insist on the wrongful payment as a "*precondition to affording the payer his legal rights"* (*ibid* page [198B]). Later he defined as a characteristic of recoverable cases that "*… there was payment for no consideration*" (*ibid* page [198H]). Lord Slynn adopted a similarly wide view of compulsion and *colore officii*. He reviewed the case law and then said: "*Although as I see it the facts do not fit easily into the existing category of duress or of claims colore officii, they shade into them. There is a common element of pressure which by analogy can be said to justify a claim for repayment*" (*ibid* page [20E]). He found it "*quite unacceptable*" that "*in principle*" there should be no recovery in such cases (*ibid* page [204F-G]).

52. **Justice**: In the present case both sides take different views of where "*justice*" lies. In relation to broad principles *of justice*, Lord Goff drew together the threads of a wide range of factors. He observed (*ibid* page [171G] – [172C]):

> "The justice underlying the Woolwich's submission is, I consider, plain to see. Take the present case. The Revenue has made an unlawful demand for tax. The taxpayer is convinced that the demand is unlawful, and has to decide what to do. It is faced with the Revenue, armed with the coercive power of the State, including what is in practice a power to charge interest which is penal in its effect. In addition, being a reputable society which alone among building societies is challenging the lawfulness of the demand, it understandably fears damage to its reputation if it does not pay. So it decides to pay first, asserting that it will challenge the lawfulness of the demand in litigation. Now, the Woolwich having won that litigation, the Revenue asserts that it was never under any obligation to repay the money, and that it in fact repaid it only as a matter of grace.

> There being no applicable statute to regulate the position, the Revenue has to maintain this position at common law.
>
> Stated in this stark form, the Revenue's position appears to me, as a matter of common justice, to be unsustainable; and the injustice is rendered worse by the fact that it involves, as Nolan J. pointed out, the Revenue having the benefit of a massive interest-free loan as the fruit of its unlawful action. I turn then from the particular to the general. Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; *prima facie,* the taxpayer should be entitled to repayment as of right."

53. **The trend of the law**: In relation to possible objections to the extension of the right to recovery to cases such as that issue, in particular that this was inconsistent with the (then) trend in the evolution of the law Lord Goff had two ripostes, based upon the unconstitutional nature of a demand for tax levied without Parliamentary authority, and the fact that given the coercive nature of the Revenues powers a refusal to pay would expose the payor to "*unpleasant economic and social consequences*". He stated (*ibid* page [172E-G]):

> "What is now being sought is, in a sense, a reversal of that development, in a particular type of case; and it is said that it is too late to take that step. To that objection, however, there are two answers. The first is that the retention by the State of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law – enshrined in a famous constitutional document, the Bill of Rights – that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right. The second is that, when the Revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the State and may well entail (as in the present case) unpleasant economic and social consequences if the taxpayer does not pay. In any event, it seems strange to penalize the good citizen, whose natural instinct is to trust the Revenue and pay taxes when they are demanded of him."

(iii) Kleinwort Benson Ltd v Lincoln City Borough Council et ors [1998] UKHL 38; [1999] AC 349 ("Kleinwort Benson")

54. The case concerned the plaintiff bank entering into interest swap transactions with each of four local authorities. Each transaction was performed fully in accordance with its terms and in consequence the bank paid the authorities significant sums of money. Following a judicial ruling which held that such interest rate swaps were outside of the statutory powers of the local authorities the banks sought restitution of the sums they had paid to the banks. It was common ground on the appeal that even though the swap transaction had been entered into by a public body it was, on correct analysis, a "*private transaction*" (*ibid* [1998] AC 349 at page [382E/F]), and therefore was not a *Woolwich* type case.

55. In this judgment the House of Lords held (by a majority comprising Lord Goff, Lord Hoffman and Lord Hope) that the rule precluding recovery of sums paid by virtue of a mistake of law could not be sustained and that general recognition should be accorded to a right to recover money paid under a mistake whether of fact or law. Further that there was no rule of law which precluded recovery of sums paid under a void contract on the basis of mistake of law where the contract had been fully performed according to its terms. The relevant limitation period for such claims was that laid down by section 32(1)(c) LA 1980, namely six years from the date on which the mistake was or could with reasonable diligence have been discovered. Lord Goff summarised the law in the light of *Woolwich* in a passage which subsequently (see paragraph [63] below) became termed the "*debatable passage*" at page [381G-H]:

> "At this point it is, in my opinion, appropriate to draw a distinction between, on the one hand, payments of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions. The former category of cases was considered by your Lordships' House in Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70, in which it was held that at common law taxes exacted ultra vires were recoverable as of right, without the need to invoke a mistake of law by the payer."

56. Later Lord Goff considered the importance of the need "*… to protect the stability of closed transactions*" (*ibid* page [382G]) and, consistent with this need, acknowledged that the defence of change of position should exist in relation to claims for restitution based upon a mistake of law (*ibid*).

(iv) Deutsche Morgan Grenfell Group Plc v Her Majesty's Commissioners for Inland Revenue et ors [2006] UKHL 49 ("DMG")

57. The scope of the *Woolwich* judgment was considered in detail by the House of Lords in *Deutsche Morgan Grenfell Group Plc v Her Majesty's Commissioners for Inland Revenue et ors* [2006] UKHL 49 ("*DMG*"). In that case the Court of Justice of the European Communities had ruled that provisions of the Income and Corporation Taxes Act 1988, in force in April 1999, which governed when certain distributions made by companies resident in the United Kingdom were subject to advance corporation tax were unlawful upon the basis that a tax regime permitting resident parent companies but not non-resident ones to receive dividends from their non-resident subsidiaries without payment of advance corporation tax created a cash flow advantage and was an unwarranted restriction upon freedom of establishment. The Court also held that the breach conferred a right of compensation. In the context of subsequent domestic court proceedings for restitution the scope of the principle in *Woolwich* was described in a variety of ways.

58. Lord Hoffman in *DMG* referred to the recovery of "*taxes and the like*" and he differentiated *Woolwich* type cases from cases involving claims for restitution involving "*private transactions*". Lord Hoffman stated:

> "13. There is no doubt that the regimes are different. Both the Woolwich principle and section 33 apply only to the recovery of money paid as taxes or the like. They do not apply to 'private transactions'. The Woolwich principle is indifferent as to whether the taxpayer paid the tax because he was mistaken

> or, as in Woolwich, for some other reason. And section 33 has its own rules. So the regime for taxes is certainly different. But the question is whether Lord Goff meant to say that the remedies provided by the two regimes are mutually exclusive. Woolwich and section 33 are available only for 'taxes and other similar charges'. Does it follow that the common law rule for recovery of payments made by mistake, as applied to private transactions in Kleinwort Benson, does not apply to taxes? That would be going a good deal further. It is one thing to say that the regimes are different and another to say that their remedies are mutually exclusive."

Lord Hoffman was of the clear view that the two causes of action were not mutually exclusive; they were complements.

59. Lord Hope cited Lord Goff in articulating the basis for his judgment in *Woolwich* as starting from "*common justice*" and in not thereby treating the Revenue as having a *sui generis* status:

> "40. We can see what he made of the argument that the Revenue was in a special position in the Woolwich case at pp 171-172. The Revenue had made an unlawful demand for tax but it was asserting that it was under no obligation to pay back the money. That position seemed to him, as matter of common justice, to be untenable – a position made worse by the fact that it involved the Revenue having the benefit of a massive interest-free loan as the fruit of its unlawful action: 'Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right'."

In paragraph [45ff] Lord Hope summarised his understanding of Lord Goff's judgment in terms which could be taken to endorse the Club's submissions. He pointed out that the key passage in the judgment of Lord Goff in *Kleinwort Benson* (at pages [381G-H]) had become described as the "*debateable passage*" and it drew a distinction between two categories of restitutionary claim. Lord Goff had distinguished between, on the one hand, "*payments of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions*". Elaborating on this distinction (*ibid* page [382B-D]) Lord Goff stated that there were now to be found "*two separate and distinct regimes*" in respect of the repayment of money paid under a mistake of law: (i) cases concerned with repayment of "*taxes and other similar charges*" exacted *ultra vires*, recoverable as of right at common law under the *Woolwich* principle; and (ii) other cases broadly to be described as concerned with the repayment of money paid under private transactions, governed by the common law.

60. In paragraph [46] Lord Hope spoke of the lack of precision in the expression "*taxes and other similar charges*" used by Lord Goff: "*The phrase 'taxes and other similar charges' lacks the precision that would be needed if it was intended to define the extent of an exception to the general right of recovery*".

61. In paragraph [48] Lord Hope considered that *Woolwich* covered all *ultra vires* demands:

> "It also fails to take account of the fact that in the Woolwich case there was no error of law by the taxpayer. So the House was not called upon to consider the effect of a mistake of law in that case at all. Lord Goff's use of the phrase 'or other similar charges' is perfectly intelligible it is understood as referring to the case of an ultra vires demand. All statutory charges which are the subject of an ultra vires demand fall easily within this category."

62. Lord Hope was also sceptical that the law should evolve by singling out claims against the Revenue for special treatment:

> "44. The submission that the restitutionary remedy for payments made under a mistake is subject to an exception in favour of the Revenue where the mistake was one of law runs into difficulty as soon as it is articulated. It seeks to build in two exceptions, not just one, into the generality of the remedy that was recognised in *Kleinwort Benson.* … The second would involve treating the Revenue differently from all other public authorities which receive payments made under a mistake of law. If this argument were to succeed it would have a significant impact on the law's taxonomy. English law has been moving step by step towards a principled statement of the law of restitution. The carving out of exceptions which are not clearly based on principle would risk reversing this process."

63. Lord Walker when considering the scope of *Woolwich* drew attention to a number of "*basic matters of principle*" to be borne in mind. First, there was the "*Constitutional principle of equality*" whereby under the rule of law the Crown was in general subject to the same common law obligations as ordinary citizens (*ibid* paragraphs [132] and [133]). Second, there was the need for "*coherence in the development of English law on unjust enrichment*" (*ibid* paragraph [132]). At paragraph [140] he rejected the suggestion that *Woolwich* only concerned cases where there was a statutory regime governing recovery. He was also clear that *Woolwich* was not limited to taxes in their strict sense. He summarised the case law in a way which indicated that recovery extended well beyond fiscal changes. He observed:

> "If the Woolwich principle is to be an exhaustive and exclusive regime for unlawfully exacted taxes, set apart from the general law of unjust enrichment, legal certainty would require the limits of the exception to be ascertainable with a fair degree of precision. In the debatable passage in his speech in Kleinwort Benson Lord Goff referred twice to 'taxes and other similar charges', which is imprecise. Mr Glick suggested that the similarity was to be found in the existence of a special statutory regime regulating recovery. This suggested test was not fully explored in argument but it seems unlikely to be a satisfactory means of setting a clear dividing line within a spectrum which stretches from central government taxes and duties through rates, community charge, drainage rates and charges, special

> levies and licence fees imposed by statute on different industrial and commercial activities, and charges made by statutory undertakers (as to the last category see *South of Scotland Electricity Board v British Oxygen Co Limited (No 2)* [1959] 1 WLR 587). This point was touched on, inconclusively, by the Privy Council in *Waikato Regional Airport v Attorney-General of New Zealand* [2003] UKPC 50 at para 80 (discriminatory charges levied on New Zealand airports in respect of official biosecurity services)."

(v) Waikato Regional Airport Limited v A.G. [2003] UKPC 50 ("Waikato")

64. In the citation above Lord Walker referred to the judgment of the Privy Council in *Waikato Regional Airport Limited v A.G.* [2003] UKPC 50 ("*Waikato"*) which concerned the charging of border control services to certain regional airports in New Zealand. The Privy Council held that the *Woolwich* principle was not restricted to tax cases but it did not define the principle solely by reference to the existence of an *ultra vires* demand:

> "79. In the *Woolwich* case Lord Goff of Chieveley stated its principle as follows [1993] AC 70, 177:
>
> > '… that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right.'
>
> The *Woolwich* case was concerned with income tax, and it is not clear whether Lord Goff of Chieveley intended his reference to other levies to be limited to levies similar to taxation. The Court of Appeal thought it unnecessary to invoke the *Woolwich* principle, but did not explain their reasons for that view. In particular, the Court did not express the view that MAF had provided consideration for the charges which it imposed. The absence of consideration was given some passing references in the *Woolwich* case (see the speech of Lord Goff of Chieveley at page 166C and G, and that of Lord Browne-Wilkinson at page 198). But those references were not necessary to the decision, and Professor Burrows among others has suggested (The Law of Restitution, Second Edition (2002) page 441) that they are unhelpful.
>
> 80. It was not suggested in argument that MAF's charges to the appellants constituted a tax. The charges were however levied under statutory powers (indeed, in performance of a statutory duty under section 135 (1) of the 1993 Act) and those who paid the charges obtained no commercial benefit from doing so, beyond the bare fact that biosecurity controls were applied in respect of incoming flights in which they were interested. There was no consideration in any normal commercial sense, and their Lordships can see no reason to deny a restitutionary remedy on that ground. Their Lordships also note (without basing their decision on it, since it was not cited or discussed in

> argument) that one of the cases referred to with apparent approval by Lord Goff of Chieveley in *Woolwich, South of Scotland Electricity Board v British Oxygen Company Ltd* [1959] 1 WLR 587, was a case of a public board overcharging for electricity supplies which were of commercial benefit to the recipient, but the House of Lords did not doubt that excessive charges were recoverable by the company which had paid them."

(vi) South of Scotland Electricity Board v British Oxygen Company Ltd [1959] 1 WLR 587 ("South of Scotland Electricity")

65. Both Lord Goff in *Woolwich* (see paragraph [49] above) and Lord Walker in *DMG* (see paragraph [63] above) and in *Waikato* (above) have endorsed the older judgment in *South of Scotland Electricity Board v British Oxygen Company Ltd* [1959] 1 WLR 587 so it is worth setting out the salient statements made therein about restitution of charges overpaid to a public authority. The overcharge in that case related to a portion of the levies demanded by the Defendant statutory electricity supplier; the sums to be repaid were not the totality of the sums paid. Not surprisingly in the case of commercial statutory monopolists who overcharge the basis for the duty to repay sums overcharged was unrelated either to a categorisation of the charges as taxes or analogous levies. The logic was simply that the authority had no right to retain the overcharge. The basis for this was earlier case law on overpaid railway charges and the explanation given was that by Willes J in *Great Western Railway Co v Sutton* [1869] LR 4 HL 226: "*… that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess…"*. This principle deems compulsion to have arisen where a public power is exercised *ultra vires* to induce a person to pay over a sum.

66. The Lord Chancellor (with whom Lord Tucker agreed) stated:

> "The second point of the appellants is that, on the assumption that the first appellants have exercised undue discrimination against the respondents, the latter have no remedy by way of recovery of any sums paid under a tariff which has been brought into force. … In my opinion, the first governing principle is that a tariff which imposes a charge upon the respondents, involving their being unduly discriminated against, is contrary to section 37 (8) of the Electricity Act, 1947. The respondents were charged more than is warranted by the statute… In principle, the appellants should not be permitted to retain payments for which they have no warrant to charge. The respondents, may, therefore, recover whatever sum they may be able to prove was in excess of such a charge as would have avoided undue discrimination against them. I do not understand it to be disputed that the charges to the low-voltage consumers are correct. It is fully within the competence of a Court on the evidence before it to estimate the amount by which the respondents have been overcharged, and the respondents have, in my view, averred with sufficient specification the standard by which that amount should be estimated."

67. Lord Merriman held in similar vein:

> "As regards the claim for the repayment of moneys overpaid, it is unnecessary to refer at length to *Parker v Great Western Railway Co.* or to *Great Western Railway Co. v Sutton* or *Lancashire and Yorkshire Railway Co. v Gidlow*, *per* Lord Chelmsford. It is sufficient to say that in *Maskell v. Horner* Lord Reading, C.J., referring to these authorities, and in particular to the advice given by Willes, J., in *Great Western Railway Co. v. Sutton* – where that learned Judge said that he had "always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received – said that 'such claims made in this form of action are treated as matters of ordinary practice and beyond discussion'."

(vii) FII Group Test Claimants v Revenue and Customs Commissioners [2012] UKSC 19 ("FII")

68. In *FII Group Test Claimants v Revenue and Customs Commissioners* [2012] UKSC 19 ("*FII*") Lord Sumption, in the context of analysing what was meant by a "*demand*" in *Woolwich* (at paragraphs [171] - [174]) sought to identify the "*mischief*" which he considered was being addressed by Lord Goff. In paragraphs [173] and [174] he expressed the broad principle as "*a special rule for unlawful charges by public authorities*":

> "173. It is fair to look for the reasoning of the House of Lords mainly in the classic analysis of Lord Goff, although similar points were made by Lord Browne-Wilkinson, who agreed with Lord Goff in terms and by Lord Slynn, who agreed with him in substance. It is apparent that the mischief which justified in Lord Goff's eyes a special rule for unlawful charges by public authorities was (i) that no tax should be collected without Parliamentary authority, and (ii) that citizens did not deal on equal terms with the state, and could not be expected to withhold payment when faced with the coercive powers of the Revenue, whether those powers were actually exercised or merely held in reserve: see pp. 172. At pp. 175-176, Lord Goff adopted the dissenting judgment of Wilson J in the Supreme Court of Canada in *Air Canada v British Columbia* [1989] 59 DLR (4th) 161. In her judgment, Wilson J had expressed the view that there was a general right to recover money paid under unconstitutional legislation, and deprecated any suggestion that it must have been paid under protest. The reason, as she pointed out at p 169, was that the legislature holds out its legislation as valid and that any loss resulting from payment under it "should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due". The emphasis in this reasoning was on the unlawful character of the legislation, with which in practice the citizen was bound to

> comply even if it might subsequently be shown to be void. This approach has subsequently been adopted by the Supreme Court of Canada in *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3, to which I have already referred in another context. Lord Goff not only found the reasoning of Wilson J 'most attractive' (p 176D), but expressed his own conclusions in very similar terms. 'In the end', he said (p 173), 'logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was exacted unlawfully should prima facie be enough to require its repayment'. The 'exaction' of which he is speaking here is not confined to demands by any particular administrative agency of the state. It includes exaction by the state by enacting void legislation, which taxpayers are likely to pay because they know that the state will act on the footing that it is valid. It is not a condition of the taxpayer's right of recovery that it should have put the matter to the test by waiting until the Inland Revenue insisted. In a passage at p 177 which strikingly foreshadows some of the issues in the present appeals, Lord Goff assimilated the rule of English law as he had formulated it to the absolute right of recovery recognized by the European Court of Justice in *San Giorgio* (Case 199/82) [1983] ECR 3595 in cases where tax was charged contrary to EU law. Although the majority of the appellate committee stopped well short of adopting a concept of 'absence of legal basis' as a general ground of recovery even in cases of taxation without lawful authority, Lord Browne-Wilkinson's analysis of the legal basis of recovery in such cases was also very similar to that of the case law of the Court of Justice. Money unlawfully 'demanded' was recoverable because it was paid for no consideration: see p 198.
>
> 174. The word 'demand' as it was used in the speeches in Woolwich Equitable referred in my view simply to a situation in which payment was being required of the taxpayer without lawful authority. Nothing in the principle underlying the decision turned on the mechanism by which that requirement was communicated to the taxpayer. It is therefore a matter of supreme indifference whether it was communicated by assessment, or by some other formal mode of demand, or by proceedings for enforcement, or by the terms of the legislation itself coupled with the knowledge that the Inland Revenue would be likely to enforce it in accordance with those terms."

69. In *FII* Lord Walker, also citing *Air Canada* (supra) on "*payments made under unconstitutional legislation*" used reasoning which focused as its essence upon the fact that a payment was made pursuant to an unlawful statutory demand. Though it has to be recognised that the predicate for the analysis was "*Where tax is purportedly charged without lawful parliamentary authority*". He stated:

> "79. In these circumstances it is in my view open to this court (whether or not it was strictly open to the Court of Appeal) to

> state clearly that where tax is purportedly charged without lawful parliamentary authority, a claim for repayment arises regardless of any official demand (unless the payment was, on the facts, made in order to close the transaction). The same effect would be produced by saying that the statutory text is itself a sufficient demand, but the simpler and more direct course is to put the matter in terms of a perceived obligation to pay, rather than an implicit demand. That is how it was put by Wilson J in her well known dissent in *Air Canada v British Columbia* [1989] 59 DLR (4th) 161, 169:
>
> > 'It is, however, my view that payments made under unconstitutional legislation are not 'voluntary' in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments "under protest". Any taxpayer paying taxes eligible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.'
>
> Lord Goff stated in Woolwich that he found this reasoning 'most attractive'. The Supreme Court of Canada has in recent years, in a judgment of the Court delivered by Bastarache J, unanimously approved this passage from her dissenting speech: *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3, para 55. In my view English law should follow the same course."

70. Lord Walker then went on (also in paragraph [79]) to "*restate*" the *Woolwich* principle in terms which associated it to tax cases:

> "We should restate the Woolwich principle so as to cover all sums paid to a public authority in response to (and sufficiently causally connected with) an apparent statutory requirement to pay tax which (in fact and in law) is not lawfully due."

(viii) Analysis: Conclusions

71. There are six main reasons why I have come to the conclusion that the present case is a *Woolwich* type case.

72. **Case law extends beyond tax/fiscal charges**: Case law extends *Woolwich* type recovery to *ultra vires* demands for charges which cannot be categorised as fiscal: See *Waikato* and *South of Scotland Electricity Board*. In the present case the charge

levied by the Police was not fiscal, albeit that there is a loose nexus with tax in that the central rationale for the rule that the police cannot charge is that the services in issue have already been paid for by the recipient *qua* taxpayer. At all events these cases show that a limitation of the *Woolwich* principle strictly to tax and like cases is unwarranted. It is also clear that cases of demands made *colore officii* are not limited to fiscal charges.

73. **Compulsion**: The Police argue that *Woolwich* type cases are characterised by a high level of compulsion that is lacking in this case. Whilst it is true that compulsion has played a part in the analysis in case law, it is less clear whether this has been as part of the definition of the test for liability, i.e. that restitution can only arise if the demand was backed by a legally sufficient degree of compulsion or coercion. Mr De Marco argued that a degree of compulsion was no more than a characteristic of any *Woolwich* type case because by its nature it was confined to the purported exercise of statutory powers, which was itself sufficient to create a momentum (or "*pressure*" to use Lord Slynn's language, see paragraph [51] above) on the part of the counterparty to pay. He contended in the light of the authorities that the essential and elemental underpinning to *Woolwich* was simply the rule of law – the State and its emanations should not be allowed to take (by whatever means) a citizen's money and then escape a duty to restore it to its lawful owner. He cited *Goff & Jones*, "The Law of Unjust Enrichment" (8th edition, 2017) at paragraph [22-16]:

> "If the rule in *Woolwich* is underpinned by broadly conceived rule of law considerations, then this suggests that claims should lie not only against government bodies who have demanded tax but also against any other sort of public authority which has acted beyond its powers to demand duties, fees and other levies."

That quotation from *Goff & Jones* then proceeds to argue that the concept of a "*public authority*" should be construed widely to embrace not only governmental bodies but also bodies such as public service providers and universities whose authority to charge is subject to and limited by public law principles. The authors also argue (ibid paragraph [22-17]) that it matters not ("*probably*") whether the services are of value to the recipient citing *South of Scotland Electricity Board* (*ibid*) where the House of Lords ordered restitution of excessive charges for electricity supplies. If this analysis is correct then whilst compulsion may be a trait of a *Woolwich* claim it is not part of the test. As developed in case law the notion of compulsion extends beyond the paradigm example of the coercive and penal statutory enforcement powers of the Revenue. In *Woolwich* Lord Goff viewed the Revenue's coercive powers as relevant because they can be deployed to inflict "*unpleasant economic and social consequences*" on the payers (see paragraph [53] above). Lord Slynn referenced the "*… common element of pressure*" which existed in the case law (see paragraph [51] above). It was certainly not suggested that the absence of coercive or penal powers in *Waikato* or *South of Scotland Electricity Board* disqualified those cases from being treated as *Woolwich* type cases. In *South of Scotland Electricity Board* (*ibid*) there is no suggestion that the cause of action was dependent upon the statutory undertaker possessing coercive enforcement powers to demand payment for the electricity supplied. The power for the statutory undertaker to recover unpaid charges was by civil action for breach of contract. In the present case, in all practical senses, football clubs, including those with good records of crowd control, cannot do without reactive, operational, policing. If they are denied such services they will face the very real risk

of match cancellation. This gives to the Police a tangible economic (monopoly) power to compel adherence to terms. In my judgment, and insofar as it is relevant as a free standing condition at all, when the facts of the present cases are compared with those in other acknowledged *Woolwich* type cases, they reveal a sufficient degree of compulsion to bring the case into the *Woolwich* category.

74. **The comparison with cases where the payor is required to pay for services rendered**: In *Waikato* and in *South of Scotland Electricity Board* the claimant (for restitution) had no right to receive the service in question unless paid for. This fact however was no bar to a right of recovery which was not contingent upon either mistake or compulsion. In *Waikato* at first instance the Judge had held that the restitutionary claim in issue was a claim *colore officii* and hence a *Woolwich* type claim (see *ibid* at paragraph [47]); though the Court of Appeal later disagreed (see paragraph [51]). Lord Walker concluded that the absence of any consideration on the part of the payor "*… in any normal commercial sense"* was not a reason to disallow a *Woolwich* cause of action (*ibid* paragraph [80]) and his analysis is consistent with that of the first instance judge. Both cases have been categorised as *Woolwich* type cases. In the present case the Club *prima facie* had a "*right*"[2] (see paragraph [10] above) to receive policing services but – importantly – had no obligation to pay for the performance of the policing service provided to it. This is not therefore a case of a payee overpaying for a service that, otherwise, had to be paid for. This case is much more akin to a claim *colore officii* which includes cases where payment is demanded by a public authority for a service that it is not in law entitled to charge for (as described by Lord Goff in *Woolwich* – see paragraph [49] above). This indicates that the present case is on the right side of the *Woolwich* line and, indeed, is closer to the core of the principle than either of these two other cases. Put another way if *Woolwich* can apply in principle where the payor is required to pay for the service provided by the payee then, *a fortior*i, it should also apply where there is no such requirement.

75. **Parliamentary authority**: The Police argue that *Woolwich* is confined to cases where the charges are governed by Parliamentary authority. Reference was made in *Woolwich* to the principle that people should not be taxed save without the authorisation of Parliament (see paragraph [53] above). See also Lord Sumption in *FII* cited at paragraph [68] above. In the present case Parliament, through Section 25(1) PA 1996, did empower the Police to charge for SPS but otherwise there is no sanction to demand fees. In relation to non-SPS services citizens have already paid through taxes and rates and receive such services as their "*right*". As Viscount Cave said in *Glasbrook* the charging for non-SPS services was to be "*firmly discountenanced by the Courts*" (see paragraph [10] above). The policy articulated in *Woolwich* resonates in the present case.

76. **Principle of common justice**: In *Woolwich* itself Lord Goff considered that the principle was governed by "*common justice*". It is difficult to see why "*common justice*" does not indicate the same result in the present case.

77. **Public v private cases**: Mr Basu QC argued that the transactions in issue were straightforward contracts. It is correct that the mere fact that a defendant is a public body is not decisive. The thinking behind the evolution of the case law has been to carve out a category of "*public*" case which is distinguishable from private

[2] For the avoidance of any doubt in referring to the "*right*" of the recipient I am not in this judgment intending to beg any question about the discretion that the Police have to choose how they perform their duty: See Judgment paragraph [129].

transactions but the distinction is not clean cut since in a typical mixed economy, public bodies may engage in private transactions (e.g. *Kleinwort Benson*) and, conversely, undertakings performing essentially commercial operations may engage in quasi public functions such as the provision of essential economic services regulated in some degree by statute (e.g. *South of Scotland Electricity*, *Waikato*) and they have a degree of public hue to them. The law thus recognises a continuum between public and private transactions where, somewhere along the spectrum, the rules change. To analyse the law in this way assists because it suggests that if a case which is somewhere upon this particular spectrum can be excluded from acquiring a "*private transaction*" label then it would follow that it falls within the *Woolwich* type case. In the present case the Defendant is a public body. It purported to exercise a statutory power. It did so to demand payment for services that it had a public duty to provide without charge and for which recipients had already paid through the taxation system. In my judgment this places the present case on the public and not the private side of the line.

78. For all of the above reasons I have concluded that the present claim is a *Woolwich* claim.

(ix) Absence of a defence based upon change of position / quantum meruit

79. In *Woolwich* cases there is no defence based upon change of position or which, by reference to some notion of *quantum meruit*, entitles the police to re-write the agreements under which payments were made. The conceptual basis for this was discussed by Henderson J at first instance in *FII Group Litigation v HMRC (No2)* [2014] EWHC 4302 (Ch) at paragraphs [309] – [315]. He had, hitherto (*Test Claimants in the FII Group Litigation v HMRC* [2008] EWHC 2893 (Ch) at paragraph [339]) concluded that the conceptual basis for the absence of such a defence was that the Defendant had unlawfully levied a tax and had thereby committed a "*legal wrong*". After the return of the litigation to the United Kingdom following a ruling of the Court of Justice, and on reflection in the light of academic comments, the Judge's final conclusion was that the rationale was embedded in the "*stultification principle*", namely that: "*… to allow scope for the defence would unacceptably subvert, and be inconsistent with, the high principles of public policy which led to recognition of the Woolwich cause of action as a separate one in the English law of unjust enrichment, with its own specific 'unjust factor'*", (*ibid* paragraph [315]). It is not necessary for me to examine this in any greater detail since Mr Basu QC for the Police did not seek to argue for any defence based upon change of position or *quantum meruit* to a *Woolwich* cause of action and he accepted the reasoning given by Henderson J, set out above.

D. The claim for restitution based upon mistake

(i) Existence of mutual mistake agreed

80. The second way in which the Club advances its cause of action for restitution is based upon mistake. This is not an alternative to a *Woolwich* claim but a parallel route which allows, once the right has been established, the claimant to choose between such causes of action as it has that which is most favourable to it, taking into account defences and limitation.

81. During the oral hearing it was accepted by the Police that there *was* a mutual mistake by both parties as to the state of the law and that in principle this entitled the Club to

seek restitution of sums overpaid *but* subject to defences. Accordingly the analysis of the Police focused upon defences.

(ii) Defences to mistake of law: Unravelling the contract

82. In a case based upon mistake the Police are entitled in principle to raise defences such as change of positon or *quantum meruit*. In this case the total sum paid over by the Club includes an element which properly amounts to consideration for SPS, as well as sums wrongly extracted for the provision of operational services. The task for the Court is to unravel this single, composite, figure to identify the sums that has been wrongly charged.

83. In doing so the Police argue that from the sum actually paid they are entitled to net off a sum equivalent to the "fair market value" of the services that they actually lawfully provided as SPS and, critically, they argue that in performing this task they are entitled to revert in history to the point in time when the contract was first negotiated and then work out what, in an ideal world, they would and should have charged. I use the phrase "*would and should*" because the Police argue that in fact at the time (2008) they mistakenly undercharged the Club and so by time-travelling back they can correct their error and, in effect, increase the amount they would have charged for the SPS to the point where, in actual fact, it *exceeds* the total sum actually levied for all of the composite services. If this is allowed then the consequence is that in principle the Club *is still* in debt to the Police. Mr Basu QC sought to avoid this ostensibly unattractive proposition by pragmatically accepting that it would be wrong to do more than treat the actual contract price as a cap. In short the sum to be restored by the Police to the Club would be zero; but the Police would not now seek to recover the undercharge.

84. Before turning to the merits of the arguments I should deal with one issue which was raised briefly during argument. It was contended by Mr Basu QC that restitution only arose if the contracts under which the payments arose were void in their entirety. As to this, in so far as it is relevant at all, it is my conclusion that the contracts would fail in their entirety as void. The sums charged were not contractually differentiated according to the services provided: there is thus no distinction drawn between SPS and non-SPS services. It is trite law that if any unlawfulness in an agreement is either not severable from the agreement (according to the classic "*blue pencil*" test), or, goes to the consideration payable under the contract that the whole agreement then fails and is void. In such a case the Court then considers restitution of any sums wrongly paid. Without going into detail my conclusion is that the unlawfulness of the contract cannot be severed from the remainder; there is no way by which, upon taking up the mythical blue pencil, a court could strike through (using the blue pencil) offending unlawfulness leaving a complete and workable contact. In this case, because the unlawful component is contractually admixed to a lawful component it is impossible to save the agreement through blue pencilled excisions. Equally, since the unlawfulness goes to the heart of the consideration this is a yet further reason why the agreement fails. The agreement thus fails in its entirety; but this is an artificial and academic analysis since the contract fully performed and has long since expired, there is nothing to sever. But even if, to test the argument, the unlawful charges were contrary to my above conclusion severable this would simply reinforce the conclusion that restitution should be paid. In other words restitution arises irrespective of the continued effectiveness of the agreement. Ultimately it was not suggested that any formalistic analysis of the effectiveness of the contract was relevant to the issue whether restitution lay: In *Kleinwort Benson* (*ibid*, see paragraph [55] above) the

majority of the House of Lords rejected any distinction based upon fully performed or part performed contracts.

(iii) What was/is the fair market price?

85. I turn now to address the merits of the Police's argument. The problem in practical terms arises because the various contracts in issue do not separate out the total charge to be paid upon the basis of SPS and non-SPS provided: (i) in the stadium; (ii) in the TCO; and (iii), elsewhere. On the contrary, and reflecting the fact that the police considered that they were able to charge for the entirety of the services they provided, the Club was invoiced for a single figure which included within in it components for policing across each of those three areas. One possible and straightforward way to perform the allocation exercise is to identify where, on each match day, the police deployed their officers and then perform an apportionment based upon the stipulated contract price. I am informed by Mr Basu QC for the Police that in actual fact this is possible to identify with a reasonable degree of accuracy. So if one assumes in relation to a given match that the total charge stipulated in the contract was £100 and in fact the police deployment was 60% in the stadium and TCO, and 40% elsewhere (outside the TCO) then the amount overcharged on a straightforward apportionment would be £40. This operates upon the assumption that the contract price of £100 was a fair market price and (importantly) remains the benchmark against which to calculate and apportion the overcharge. Indeed this is the basic methodology which the Club advances as the correct means by which the overcharge should be calculated. If this is the basis upon which the calculation of the overcharge occurs then the only difficulties arising are practical and mathematical.

86. The Police do not however endorse this approach. Their case is that the contracts must be treated as being void and that the unravelling of the charges to separate the SPS from the other charges should be re-performed conducting a hypothetical exercise whereby the Court assumes (i) that when the parties entered into the contracts they were fully aware of the true position in law; and (ii) the Police then adopted an approach based upon full cost recovery for the SPS. The reason that the Police advance this is that there is some evidence to suggest that when the contracts were entered into the Police omitted to base their charges upon full costs recovery. Spread sheets prepared at the time which purport to show how the contract charges were computed indicate that certain costs were not taken into account. The main example referred to is pension provision for officers and, there is also some evidence which I glean from comparing the various spread sheets that other costs, such as insurance, might also have been omitted. The Police contend that the Court should transpose itself back to 2008 and sanction a retrospective full costs recovery exercise which would have the effect of entitling the Police to remedy their past error and increase the charges they levied for the provision of SPS. On this basis the Police mistakenly undercharged the Club and on a true *quantum meruit* the Club owed the Police money, and not vice versa. Though Mr Basu QC did accept as observed above (at paragraph [83]) that this would not be a proper end result to arrive and the Police would not seek to go beyond the total amount involved under the disputed contracts, i.e. the Club would not recover from them but they would not seek the undercharge for the SPS from the Club.

87. I do not accept the analysis advanced by the Police. Neither counsel could advance any authority which provided precise guidance on how the Court should address this issue. It was accepted that the task of the Court was to derive from normal economic

principles what the fair market value was and that this was essentially an evidential issue, not to be overly complicated by nuanced points of principle.

88. My attention in this regard was drawn to the judgment of the Supreme Court in *Benedetti v Sawiris* [2013] UKSC 50 ("*Benedetti*"). That case concerned the calculation, by reference to principles of *quantum meruit*, of the value of a service only part of which was provided for under a contract. The Court had to grapple with what was meant by fair market value. Lord Reed JSC set out a broad analysis at paragraphs [104] – [108], with which Lord Neuberger agreed. None of the Justices articulated a test which is capable of being described with precision. In the present case, when asked how fair market value could be identified Mr Basu QC said it was like the proverbial elephant: One recognised it when one saw it. At paragraph [178] of *Benedetti* Lord Neuberger described the principle in terms of what was "*deserved*": "*In this appeal, the quantum meruit refers to the value of the services rendered by Mr Benedetti in circumstances where there was no contract which expressly provided how the price he was to be paid for the Services was to be quantified. In awarding a quantum meruit for a benefit, the court is essentially deciding how much is deserved for the conferment of that benefit (and, as Arden LJ pointed out in the Court of Appeal, the literal translation of quantum meruit is 'as much as he deserves' – [2010] EWCA Civ 1427, paragraph [2]*". Later he observed (at paragraph [180]): "*Where, as is agreed to be the position here, a claimant is entitled to a quantum meruit based on the fact that he has enriched the defendant by the provision of benefits, which have an assessable market value it seems to me pretty clear that the sum prima facie to be awarded is the market value of those benefits. That conclusion is consistent with commercial common sense, the authorities, and the leading academic works on the topic of unjust enrichment*" – evidently market value means market value.

89. Of potential relevance is the definition, approved of by Lord Reed in *Benedetti* (at paragraph [104]) as capturing "*the essence of the concep*t", given by the Royal Institution of Chartered Surveyors (RICS):

> "The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

90. In my judgment on the facts and evidence before the Court the price actually paid for services under the contracts in dispute reflects the best and most compelling evidence of market value. I do not accept the argument of the Police that in some way the Court should seek to unravel history back to 2008 and then attempt to reconstruct contractual prices this time remedying purported negotiating errors committed then by the Police with the consequence that the analysis now assumes that the Police would have charged much more than they actually did.

91. First, the parties have not argued this point upon the basis of a detailed trawl through disclosed documents chronicling how the negotiations leading up to the contracts evolved *at the time* in order to draw out the relevant factors that informed the contract price. *Prima facie* the evidence indicates that the contract price set in 2008 was a fair market price. It was negotiated between unconnected counterparties and it was advanced by the Police at the time as reflecting a proper allocation of relevant costs.

92. However, when one stands back there is one singular feature about the facts which militates against the argument advanced by the Police. In modern parlance the notion

of a *fair* market price tends to assume two parties at arm's length with comparable negotiating power. The quotation from RICS (*supra*) which was approved of by Lord Reed in *Benedetti* refers to an arm's length transaction "*after proper marketing*" entered into "*without compulsion*" which reflects an assumption that the market is open and competitive and all prices can be road-tested against comparables to ensure that they are not supra-competitive, i.e. above the normal market price. In this case there was inequality of bargaining power and the inequality strongly favoured the Police who are a monopoly supplier. The Club did not have any competitive alternative for the provision of security and policing outside the TCO and it could not seek competitive tenders. In the case of a match where policing was required then for all sensible and practical purposes if the Club did not agree to pay the charges set by the Police then in accordance with Football League rules the match could have been cancelled and the Club exposed to substantial financial and reputational prejudice. Indeed, as was pointed out by Mr De Marco for the Club, such was the absolute dependence of the Club upon the Police that in December 2015 the Club had to seek injunctive relief in the High Court before (in an out of court settlement) the Police would agree to maintain the provision of services pending the outcome of the litigation. Had this not occurred then the real risk was that the game could have been cancelled. Putting these facts into the context of a fair market price leads to the conclusion that the starting point must be that the price set at the time and reflected in the contract was a fair one and that the benefit of the doubt must be accorded to the Club and not to the Police. If it was not fair then the unfairness benefited the Police and not the other way around.

93. Second, Mr Basu QC referred to evidence given during the trial by ACC Sarah Hamlin, on behalf of the Police, that had she been in post at the relevant time and had she known of the true state of the law then she would have ensured that the officers providing SPS were charged out at full costs recovery rates, in accordance with published ACPO rates. I find this unconvincing either as evidence or in logic. This was evidence given with the benefit of hind sight and was not supported with any contemporaneous corroborating internal strategy or other documentation from 2008. Mr Basu QC in submissions argued that the Police made a mistake in 2008 when omitting to extract full costs recovery. But there is no evidence that this was in fact a mistake and in any event a "fair" market value as understood in normal economic language does not necessarily or always involve full costs recovery and nor does it mean that a price is "unfair" simply because one party made a commercial mistake about something it would otherwise like to have seen reflected in the contract. Further, and in any event, there is no evidence to establish that ACPO rates are themselves fair market rates. There is, for instance, no explanation as to how those rates were calculated, or whether, for instance, they represent an amalgam of different local or regional costs or whether costs in Suffolk are above or below the national average. And I am not prepared to accept that simply because those rates are set by a national body that they are necessarily proxies for a market rate. Years of experience suggest that centrally set rates, unconstrained by market force, rarely reflect rates that might be set in a genuine market. I note that in *Waikato* (*ibid*) at paragraph [81] Lord Walker in expressing the opinion of the Privy Council felt considerable unease with the idea that the Defendant could cure its earlier error and put in place a new system of charging with retrospective effect. The Privy Council concluded that the approach of the trial judge which was to require the defendant to refund to the Claimant "*… as money exacted colore officii so much of [the Claimants] payments… as were excessive*" was not "*inappropriate*". This was based upon the actual sums paid and not upon some reconstituted version of history (*ibid*, paragraph [47]).

94. Third, and finally, the argument advanced by the Police does not sit easily with the way in which defences in this area have evolved. The development of a defence to a claim for restitution based upon change of positon was stated to be a consequence for the need to "*… to protect the stability of closed transactions*": See the comment of Lord Goff in *Kleinwort Benson* set out at paragraph [56] above. The defence thus emerged to protect those recipients of money (especially under fully executed contracts) who had relied upon the stability of the contract and had altered their position in expectation that the stability would not be undermined, possibly many years later. But in the present case it is the recipient who wishes to disturb the stability of the contract. The Police do not argue that they changed their position in reliance upon the subsistence (stability) of the agreement and that the contract should remain undisturbed. On the contrary it is the Police that say they committed a unilateral mistake (understating their own costs) and now wish to exhume and then resurrect and then rewrite the contract. This act of destabilisation seems to me to be the opposite of the rationale of the defence of change of position.

(iv) Conclusion

95. In short, the basis of the calculation that must occur are the contractual rates themselves. It was agreed between the parties that once the broad principles were established the actual process of computation and apportionment would be conducted by the parties themselves. I therefore complete my analysis of this particular point at this stage.

E. Limitation

(i) The issue

96. I turn next to limitation. The *Woolwich* cause of action is subject to the normal six year period of limitation. A cause of action based upon mistake is subject to the more generous test in section 32(1) LA 1980 (see paragraph [13] above) pursuant to which in the case of any action where the "*… the action is for relief from the consequences of a mistake*" then limitation does not commence "*… until the plaintiff has discovered the… mistake or could with reasonable diligence have discovered it*".

97. The Club argues that time only began to run in 2012 with the judgment of the High Court in *Leeds United Football Club Ltd v The Chief Constable of West Yorkshire Police* [2012] EWHC 2113 ("*Leeds*"). On this basis when it issued its Claim in 2014 it was well in time to recover all past overpayments. The Police argue that the Club *at the least* could have with reasonable diligence discovered the mistake as from the date of the judgment of the High Court in *West Yorkshire Police Authority v Reading Festival* [2006] EWCA Civ 524 on 3rd May 2006 ("*Reading Festival*").

98. On the facts of the present case I agree with the Police, for the following reasons.

(ii) The evolution of the law on section 25(1) PA 1996

99. The law, as expressed in general terms, has been well established since the 1920's: See Judgment paragraphs [93] – [95] and its applicability to major sporting events including football matches has been a readily discernible issue since 1988 and at the latest 2006. It is for this reason that I accept the analysis of the Police which takes 2006 as the latest relevant point in time. This can be seen by tracing the chronology of the case law.

100. The general law, as it applied to football matches, has been the subject of judicial analysis since the High Court in *Harris v Sheffield United Football Club* [1988] 1 QB 77 ("*Harris*" – set out and discussed in the Judgment at paragraphs [96] – [99]). In *Harris* the Court of Appeal upheld the first instance judgment of the High Court which was handed down on 26th March 1986. The Court of Appeal gave judgment on 19th March 1987. It declined to lay down hard and fast rules making it clear that the answer in any given case depended upon all of the facts. The Court however did lay down various possible indicia (cf Judgment paragraph [97]) for use in particular cases. As I explain below (see paragraphs [104] below) the judgment in *Harris* has been treated as laying down good law ever since.

101. The Judgment in *Harris* was then applied by the High Court in respect of pop festivals in *Reading Festival.* The judgment was handed down on 11th October 2005 and was upheld by the Court of Appeal on 3rd May 2006. The Court of Appeal endorsed the old law and in particular the judgment in *Harris* (cf *ibid* paragraphs [22] – [32]). Mr Basu QC relied generally upon the evolution of the case law but he made especial reference to paragraph [63] of the judgment in *Reading Festival* which indicates how the principles under debate might apply to the policing of football matches. Paragraphs [63] and [64] state:

> "63. Police operations conducted on the public highway or in villages will not ordinarily be conducted for the benefit or protection of particular persons such as those organising occasions like sporting events or music festivals and their attendees. Rather, their purpose will be for the protection of the public at large. That, in my judgment, was their predominant purpose in this case albeit this was occasioned by the existence of the festival.
>
> 64. The distinction in *Harris* between policing outside the football ground and within the football ground has been picked up in a number of Home Office circulars and documents, for example Home Office Circulars 36/1991 and 34/2000. While these documents cannot determine the law, they are a useful guide to how it has been pragmatically applied."

102. Issues as to the scope of *Harris* as it applied to football were again raised in *The Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Limited* [2007] EWHC 3095 ("*Wigan Athletic*"). Judgment was handed down on 21st December 2007. The case did not concern the difference between an SPS and a non-SPS but the much narrower issue as to the meaning of a "*request*" under section 25(1) PA 1996. The High Court ruling was overturned by the Court of Appeal on 19th December 2008 (EHCA Civ 1449). The case shows that the scope and effect of *Harris* was a justiciable issue by 2007.

103. In *Leeds* (which is the case the Club seeks to rely upon), the High Court was concerned with the issue of the scope of SPS and in particular an attempt by the Police to broaden the footprint for recovery beyond stadiums themselves. In paragraphs [8] – [10] the Judge records that as of 2009/2010 ACPO were seeking deliberately to alter the basis of charging but that issue was already, by then, one of existing debate and discussion. It was accordingly by no means novel as of 2009/2010; as the Judge noted the debate had been ongoing after 2007 in the light of the judgment in *Wigan Athletic.* The judgment of the High Court was on 24th July

2012. The Court of Appeal upheld the judgment on 7th March 2013 ([2013] EWHC Civ 115). The Court of Appeal recognised that the "*starting point*" was *Glasbrook* in 1925 (ibid paragraph [4]) which "*remained good law*" (*ibid*, paragraph [25]). Further *Harris* had also been "*treated as good law for 25 years*" and there was no need to alter the law (*ibid* paragraph [29]).

104. In the light of the above: the principles to be applied are long established dating back to 1910/1920's; they have been applied to football for over 25 years (cf *Harris* in 1986); the scope and effect of section 25(1) PA 1996 has been justiciable for a long time and were considered relatively settled by 2006 – *Reading Festival*; within the police generally and (I have no doubt) within the circle of football clubs the issues have been a matter of debate for a similar length of time. I accept that there has not been a case squarely on the facts of the present case but the "*mistake*" (as to the law which the Club made along with the Police) for the purposes of section 32(1) LA 1980 is one which the Club with "*reasonable diligence*" could readily have discovered when the contracts were entered into.

(iii) Evidence as to the state of knowledge of the Club

105. Indeed, by February 2009 the Club had received advice from the Football League which led it to believe that the agreement embodied in the MOU was based upon a mistake of law. This advice was consistent with the principles set out in *Reading Festival*. Yet the Club thereafter continued to pay the fees agreed under the MOU. This was notwithstanding that Mr Martin Pitcher, the Club's Director of Corporate Development, emailed Mr Phillip Clayton of the Police on 9th September 2009 saying:

> "Our position has to be that we will only accept a footprint for the Club that consists of the ITFC premises and the roads immediately adjoining the stadium which are closed on match day. We can not [sic] accept that the neighbouring Council car park, the road leading to the train station or any other areas are part of our footprint, whether for an A, B or C grade match."

(iv) Case law on section 32 LA 1980

106. For a party to discover, or to be able, with reasonable diligence, to discover, a mistake of law, it is not a pre-requisite that an authoritative ruling has been made on the point of law in issue. Everything will depend on the facts. In *DMG* (*ibid*) at paragraph [144] Lord Walker stated:

> "144. I think the judge and Jonathan Parker LJ were correct in their views that the mistake was not discovered until the ECJ gave judgment in *Hoechst* [2001] Ch 620. Perusal of the report in that case suggests that the United Kingdom government tenaciously defended the ACT regime on every available ground. At no time before the judgment did the government concede that the ACT regime was (in discriminating between national and multi-national groups) contrary to EU law and unlawful. It was the judgment that first turned recognition of the possibility of a mistake into knowledge that there had indeed been a mistake. I agree with the view of Lightman J in *First Roodhill Leasing Limited v Gillingham Operating Company Limited* (5 July 2001) para 22 that there may be cases

> 'where a party may be held to have discovered a mistake without there being an authoritative pronouncement directly on point on the facts of that case by a court, let alone an appellate court.'
>
> It all depends on the facts. But in this case it is, in my opinion, clear that the judgment of the ECJ on 8 March 2001 was the decisive moment."

107. It is however true that their lordships in *DMG* were not of one mind as to the how to apply section 32(1). Lord Brown identified some of the imponderables in his judgment at paragraph [163] – [176]. He expressed doubt as to the correctness of the observation of Lord Walker at paragraph [144] (supra). He was of the view that the relevant event for section 32(1) was *not* when the judgment of the Court of Justice occurred but was earlier:

> "171. Lord Hope too left open for another day cases where payments are made in a state of doubt about the law. The Revenue on the present appeal understandably place some reliance on what Lord Hope said at p 410B-C:
>
> 'Cases where the payer was aware that there was an issue of law which was relevant but, being in doubt as to what the law was, paid without waiting to resolve that doubt may be left on one side. A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong – and that is so whether the issue is one of fact or one of law.'
>
> 172. On the present appeal, however, Lord Hope concludes his judgment on 'the discovery issue' (paragraphs 63-71 of his speech) with the view that, when DMG paid the ACT, '[i]t was not then obvious that the payments might not be due.' I confess to some difficulty with that conclusion. Surely, when DMG learned in July 1995 that there was a serious legal challenge to the legality of the ACT regime, it must then have been obvious to them that these payments might not after all be due. Of course they could not be sure and of course nothing short of a final judgment from the ECJ would have persuaded the Revenue to accept any claim by DMG here for group income relief. But it does not seem to me to follow that DMG paid under a mistake of law – any more than *Woolwich* would be regarded as having paid under such a mistake simply because the Revenue in that case were insisting on the validity of the contested regulations.
>
> 173. I have the same difficulty with paragraph 144 of Lord Walker's opinion. Again, I see no good reason why the Revenue's tenacious defence of their position and their refusal to concede its unlawfulness means that DMG's mistake must be treated as undiscovered prior to the *Hoechst* judgment. The passage quoted by Lord Walker from Lightman J's judgment in

First Roodhill Leasing Ltd v Gillingham Operating Company Ltd (5 July 2001) para 22, continues:

> 'For this purpose it cannot be necessary that the party knows of the mistake as a certainty. There are gradations of knowledge. It may well be sufficient to constitute the necessary discovery when the claimant has good reason to believe that a mistake has been made (consider *Earl Beatty v IRC* [1953] 1 WLR 1090) or has been given "a line" on this question (see *G L Baker v Medway* [1958] 1 WLR 1216 at 1224).'

174. To much the same effect is Maurice Kay LJ's judgment in *Brennan v Bolt Burdon* [2004] EWCA Civ 1017; [2005] QB 303, 315:

> 'This [the plaintiff's extreme difficulty in obtaining permission to appeal and "small chance" of persuading the Court of Appeal], it seems to me, falls short of the unequivocal but mistaken view of the law which underlay the *Kleinwort Benson* case [1999] 2 AC 349. As Lord Hope observed, at p 410B, the House of Lords was not dealing with the case where there is doubt as to the law –"'a state of doubt is different from that of mistake. An appeal might have been correctly perceived as an uphill struggle but not as an inherently insuperable one – as subsequent events were to prove".'

175. Lord Hoffmann suggests (at paragraph 26) that: 'The real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money.' But my thesis is not that, if someone pays money knowing that he may not be under any liability to do so, he cannot recover it. Rather it is that he cannot recover it as money paid under a mistake of law so as to benefit from the longer limitation period available under section 32. Certainly he can recover the money provided only that he sues in time and has some other cause of action, such as total failure of consideration. Clearly the quiz contestant who, in doubt whether Haydn or Mozart wrote the eine kleine nachtmusik answers Haydn, made a mistake. Suppose, however, that, making that mistake, he had paid out money legally due only if Haydn had been the correct answer. To my mind he, no less than the quiz contestant, took the risk that he might be wrong: he could not recover his payment as money paid under a mistake of law (or fact) although, provided he sued within six years, he could well recover it on another basis.

176. The precise point at which a party may be said to be, or to cease being, under a mistake of law is, I acknowledge, by no means easy to formulate. Just when a party comes to recognise he has 'a worthwhile claim' (the touchstone I have suggested in paragraph 163 above) will not always be obvious. Essentially,

> however, I am in broad agreement with Lightman J's and Maurice Kay LJ's approach in the cases mentioned above, as indeed I am with the views of the majority of the Court of Appeal on this issue in the present case – see Rix LJ's judgment at para 262 and Buxton LJ's judgment at paras 281-283."

108. In my judgment the analysis in *DMG* is illuminating. In that case the issue was whether the true legal position in relation to a complex piece of tax legislation was discernible until a definitive ruling of the Court of Justice. That ruling gave to the provision in issue a meaning which, it is proper to infer from the tenor of the judgments in the case, was not evident or clear to anyone prior to that ruling. This was not a case about the application of a well-established principle to novel facts. In the present case however (i) the law was settled (albeit not without nuances requiring elaboration) and (b) the issue of the application of the law to football matches and the right of the police to charge for services provide outside the ground was a live one long before the High Court ruled in *Leeds* in 2012.

109. Applying section 32(1) LA 1980 "*… 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*": I have held that the mistake made in this case could with reasonable diligence have been discovered by at least 1988 and if not then by 2006. Time was capable of running from then. The facts giving rise to the cause of action of course arose later in 2008 when the contracts in issue were entered into.

F. Interest: Compound interest or simple interest under Section 35A?

(i) The issue

110. I turn now to the question of interest. The Club claims compound interest, and if not that then simple interest. The Police strongly reject any suggestion that they pay compound interest. They very faintly (indeed) suggested that as an alternative simple interest should also not be ordered. I have decided that compound interest is not appropriate but that simple interest is.

(ii) Sempra Metal Ltd v Inland Revenue Commissioners et or [2007] UKHL 34 ("Sempra")

111. The starting point is to consider the jurisdiction and the test. Both were considered by the House of Lords in *Sempra Metal Ltd v Inland Revenue Commissioners et or* [2007] UKHL 34 ("*Sempra*"). In this case the House of Lords held that compound interest may be ordered in any claim based upon tort, contract or restitution. The Court had jurisdiction to award compound interest where a claimant sought restitution of moneys paid under a mistake (per Lord Hope, Lord Nicholls and Lord Scott) in the exercise of the Court's common law discretionary jurisdiction; or (*per* Lord Walker and Lord Mance) in the exercise of the Court's equitable discretionary jurisdiction. Their Lordships were not *ad idem* as to the conceptual basis pursuant to which a payee might not be required to pay compound interest but all were agreed that even where a *prima facie* case for recovery of compound interest arose it could be defeated depending upon the circumstances of the case including whether the Defendant benefited from the receipt and holding of the moneys in question. Notwithstanding the absence of complete consensus there is sufficient commonality for me to determine this issue in favour of the Police.

112. The main points of relevance, for present purposes, are as follows.

113. Lord Hope (at page [581] Paragraph [17]) stated the broad proposition: "*… the loss on the late payment of a debt may include an element of compound interest*". However, he emphasised the limitations including that the claimant bore the burden of proof of establishing actual loss and that this would exceed simple interest under Section 35A:

> "But the claimant must claim and prove his actual interest losses if he wishes to recover compound interest, as is the case where the claim is for a sum which includes interest charges. The claimant would have to show, if his claim is for ancillary interest, that his actual losses were more than he would recover by way of interest under the statute. In practice, especially where the period over which interest is sought is short or where the claimant does not have to borrow money to replace the debt, simple interest under section 35A of the Supreme Court Act 1981 is likely to be the more convenient remedy."

114. Lord Nicholls (whose judgment was endorsed by Lord Hope) at page [606] paragraphs [118], [119] held that there would be no injustice in not requiring a payee to pay compound interest where that person has not benefited and would be "*out of pocket*" if compound interest were ordered:

> "… a recipient of a payment made by a mistake shared by both parties might make no actual use of the money. He might pay the money into a current account at a bank yielding little or no interest. When the mistake comes to light he repays the money. In such a case, depending on the circumstances, it might well be most unfair that he should be out of pocket by having to make an additional payment, whether as compound interest or even simple interest, in respect of the 'time value' of the money he received."

115. Lord Nicholls emphasised that the law was "*flexible*" and set out to achieve a "*just result*". He commented that the benefit to the recipient might not always reflect the "*market value*" and it might be unjust simply to assume that the benefit to the recipient is that which the money might have had in the hands of others::

> "119. … To avoid what would otherwise be an unjust outcome the court can, in an appropriate case, depart from the market value approach when assessing the time value of money or, indeed, when assessing the value of any other benefit gained by a defendant. What is ultimately important in restitution is whether, and to what extent, the particular defendant has been benefited: see Professor Burrows, The Law of Restitution, 2nd ed, (2002), page 18. A benefit is not always worth its market value to a particular defendant. When it is not it may be unjust to treat the defendant as having received a benefit possessing the value it has to others. In Professor Birks' language, a benefit received by a defendant may sometimes be subject to 'subjective devaluation': An Introduction to the Law of Restitution (1985), page 413. An application of this approach is to be found in the Court of Appeal decision in *Ministry of*

> *Defence v Ashman* [1993] 2 EGLR 102. Whether this is to be characterised as part of the 'change of position' defence available in restitution cases is not a matter I need pursue."

116. Lord Walker essentially agreed with Lord Hope and Lord Nicholls. He did however "*feel some apprehension*" (*ibid* page [63] paragraph [187]) about the proposal of those two judges to "*… cut through the thicket of problems by recognizing a restitutionary remedy available as of right at common law, subject to the Court's power to resort to 'subjective devaluation' in order to avoid injustice in hard cases*" (*ibid* page [629] paragraph [184]). Nonetheless he also was clear that given the discretionary nature of the remedy its application should be unproblematic (*ibid* paragraph [187]): "*The discretionary nature of an equitable award of interest provides the necessary flexibility, though I would expect the principles for the exercise of the discretion to develop along familiar and predictable lines*". And he was also of the view that compound interest should not be awarded if the facts were such that the Defendant would not have earned interest (*ibid* paragraph [186]).

117. Lord Scott agreed with much of the historical analysis set out by other judges, including Lord Hope and Lord Nicholls, but he disagreed that the jurisdiction lay in the common law, as opposed to in equity. Nonetheless he was quite clear that (even if equitable) the right to compound interest had significant limits and was subject to, *inter alia*, change of position and evidence that the recipient had not benefited: See pages [608] and [609] paragraph [132]. Lord Mance also disagreed that the power was derived from common law as opposed to equity, given that the basis for restitution in cases of mistake was not premised upon a tortious or contractual breach by the payee but, rather, by reference to broader principles of unjust enrichment: See, for example, *ibid* page [649] paragraph [231]. But, yet again, he was also clear that the existence of a *prima facie* right to recover was subject to significant limits based upon the principles of unjust enrichment (of the payee). At paragraph [231] he thus observed: "*In my view (and in agreement with my noble and learned friend Lord Scott of Foscote), if any claim to restitution is to be recognised in relation to the use of money had and received, at common law or in equity, it must refer to any actual benefit obtained by the recipient, here the Revenue. The critical point is that Sempra's restitutionary claims - based on the Revenue's demand or on Sempra's own mistake - are not for damages or in respect of any wrong*". And later in the same paragraph: "*… restitution on the basis of unjust enrichment looks, carefully and advisedly, at the recipient's actual benefit*". He was also unpersuaded of the concept of "*subjective devaluation*" (*ibid* page [650] at paragraph [233]). (The concept has been considered in some detail by Lord Reed JSC in *Benedetti v Sawiris* [2014] UKSC 50 at paragraphs [110ff]).

118. The majority view was that the jurisdiction was under the common law. But, in any event, it is evident that the test is one of fairness and justice and that a court takes into account a variety of factors which would include: whether the claimant has actually sustained a loss (over and above loss of the principal sum) or can prove whether it has sustained such a loss; and whether even if the claimant has sustained such a loss the defendant has benefited from the time value of the money or would, otherwise, be "*out of pocket*" if required to pay compound interest on the principal.

(iii) Analysis

119. In my judgment this is not a case where I should order compound interest.

120. First, I accept the analysis of the Police that there can be no assumption that it has benefited from receipt and possession of the overcharge in any conventional sense. I accept the submission that the Police are subject to budgetary constraints (and there was no serious challenge to this from the Club) and that it had not used the overcharge to make a profit. The Police are not equivalent to a bank or, for that matter, central government which has the ability and incentive to use funds received to generate further funds. Mr Basu QC argued that the proper inference to draw was that the overcharge would simply have been used to defray ordinary operational or preventative policing measures, which would benefit the public and amount to a discharge of its public duties and responsibilities. If forced to pay compound interest it would be "*out of pocket*" and this would impact prejudicially upon the performance of its present public duties which were being performed under conditions where difficult decisions were made daily as to the allocation of resources.

121. Second, there is no evidence before the Court that the Club has in actual fact sustained any real or tangible loss from being deprived of the time value of the money in question (and certainly over and above simple interest). If a court is to order that a claimant be paid compound interest then at the very least the claimant must adduce some evidence which establishes the loss of the time value which is used to quantify the claimed for loss.

122. The position is thus: (i) that the Claimant has either not sustained a time value loss or has not proved it; but in any event (ii), any *prima facie* claim that might arise is defeated on the justice/fairness/unjust enrichment grounds, namely that the Police have obtained no incremental benefit from possession of the overcharge, and, they would be out of pocket if required to pay compound interest and this would adversely impact upon the provision of an important public service. Nor is there any other public interest reasons to order payment of compound interest.

123. This then raises the question of simple interest under Section 35A. Although this is also discretionary it is recognised in the case law that the much more carefully performed scrutiny of where the benefits and burdens lie is reserved for claims of compound interest. Where simple interest is being sought the gist of the judgments in *Sempra* was that if compound interest was not awarded (because for instance "*the Claimant does not have to borrow money to replace the debt*") then the award of simple interest was likely to "*be the more convenient remedy*": See per Lord Hope in *Sempra* page [581] paragraph [17]. In this case Mr Basu QC did not argue strongly or with any real conviction that <u>if</u> I did not award compound interest I should also not award simple interest. I order that interest on the sums overpaid attract simple interest pursuant to section 35A.

G. Admissions

124. I propose finally to address the Clubs arguments about admissions (set out at paragraphs [25] above) briefly. I am not attracted to this argument. This case cries out for substantive answers to be provided to the parties on the points arising, given their possible wider ramifications. It would not further justice were I to adopt a short cut and find for the Club on a range of issue by virtue of the alleged admissions. Mr De Marco did not ultimately push the point very strongly in oral submissions. At all events had I been forced to determine this matter although on the pleadings there are admissions, in actual reality the common understanding between the parties was that the merits of the points would be fought out and decided. The point has at one level technical force; but not in the context of the overriding objective or of the task of the

Court to determine justice as between the parties on issues which may have wider implications.

H. Conclusion

125. In conclusion. First, the Club has a cause of action in restitution based upon both (a) the fact that the payment was made in response to a demand for payment made by a public authority that had no lawful power to make the demand which was therefore *ultra vires* and (b) because the payment was made pursuant to a mistake of law. Second, the causes of action are complementary and not mutually exclusive; the Club may choose which of the two causes of action is most advantageous to its position. Third, there are no defences available to the Police (based upon *quantum meruit* or change of position) which would defeat the restitutionary claims. The claim for restitution is to be calculated upon the basis that the sums actually paid under the contracts in issue constituted fair market prices. Fourth, that the Club is entitled to simple interest under section 35A Senior Courts Act 1981 but not compound interest.