THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

17 May 2019

(1) VODAFONE LIMITED
(2) TELEFÓNICA UK LIMITED
(3) HUTCHISON 3G UK LIMITED
(4) EE LIMITED
-and-
THE OFFICE OF COMMUNICATIONS

[2019] EWHC 1234 (Comm)

BEFORE: ADRIAN BELTRAMI QC sitting as a Judge of the High Court

CASE SUMMARY

The correct measure of restitution where regulations setting fees had been quashed was the difference between fees paid and those owed under surviving, lawful regulations. Hypothesising alternative, lawful legislation was contrary to principle. An administrative act differed.

This was a Part 8 claim by mobile network operators ("**MNOs**") against Ofcom. The MNOs claimed partial restitution of licence fees calculated under regulations ("**the 2015 Regulations**") which the Court of Appeal had quashed (*R (EE Limited) v Office of Communications* [2017] EWCA Civ 1873 [2018] 1 WLR 1868). The claim for restitution was based on *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 ("***Woolwich No. 2"***).

The issue was the amount of restitution. The MNOs sought the difference ("**Net Sums**") between the fees paid and the lower fees due under preceding regulations ("**the 2011 Regulations**"), which remained in force in light of the Court of Appeal judgment. It was agreed that if Net Sums were the correct basis, Vodafone and Telefonica would be entitled to some £54m each, Hutchison some £27m and EE some £82m.

Ofcom called this a windfall. However, the case had to be decided as a matter of principle rather than on assumptions as to the nature or scale of any windfall. The relevance of "*windfall*" arguments in the restitution context was dubious (*Air Canada v British Columbia* (1989) 59 DLR (4th) 161; *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] 1 SCR 3).

The MNOs limited themselves to the Net Sums because the remainder was due even under the 2011 Regulations. It was not enrichment, unjust or at their expense (*DD Growth Premium 2X Fund (in liquidation) v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36 [2018] Bus LR 1595).

Ofcom sought to limit restitution to the difference between the fees paid and the sums which would have been due if Ofcom had set fees under hypothetical, lawful regulations replacing the 2011 Regulations. New regulations since the Court of Appeal's decision set very similar rates to those under the 2015 Regulations. Ofcom considered this evidence of the rates it would have imposed lawfully had it been aware that the 2015 Regulations were unlawful. This would give a lower award than the Net Sums.

The court used the fourfold structured approach to unjust enrichment from *Benedetti v Sawiris* [2013] UKSC 50 [2014] AC 938 and *Investment Trust Companies v Revenue & Customs Commissioners* [2017] UKSC 29 [2018] AC 275.

There is only one law of unjust enrichment; whether a defendant is a public authority or private entity, the analysis should not differ.

Ofcom rightly did not claim counter-restitution for use of the licences. If MNOs had refused to pay more than the 2011 Regulations prescribed, there would have been no claim for that excess. Any such claim would undermine the legally binding arrangements defining and restricting the parties' obligations (the 2011 Regulations) by analogy with the contractual position (*MacDonald Dickens & Macklin (a firm) v Costello* [2011] EWCA Civ 930 [2012] QB 244). Ofcom had no claim for fees beyond the 2011 Regulations but claimed it should retain fees that were overpaid, which was inimical. This would mean that a company that had not paid in the first place would be better off than the MNOs.

There is undoubtedly a principle of legality that a public body cannot exact a sum charged without lawful authority (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19 [2012] 2 AC 337 at [74] and [173]; *Woolwich No.2* at 171G to 172G). There were four point to draw out of the further case law: (i) where a public authority charges an unlawful fee, it does not matter that a lawful fee might have been imposed; (ii) the reasoning in cases prior to *Woolwich No.2* remained good; (iii) there was no support for the reduction, to accommodate fees that might have been demanded lawfully, of a claim for the restitution of unlawful fees; (iv) the cases do discuss the imbalance between payers and public-authority payees and the practical reality of "*pay first and argue later*".

Ofcom relied on an undefined counterfactual principle by analogy with "*but for*" analyses to indicate that it could hypothesise compliant secondary legislation. These largely involved claims for compensatory damages, which were conceptually different from restitution. Further, the judge did not accept the existence of a counterfactual principle of universal application. If the counterfactual was merely a useful tool or argument then it begged the question. Hypothesising either primary or secondary legislation (there was no difference) had no basis in the authorities and offended the legality principle. Even if quashing the 2015 Regulations had left a legislative vacuum, there would be no basis for hypothesising a new, different law. A fortiori in cases where there was legislation governing the parties' acts at the time.

Hypothesising an administrative act differed (*South of Scotland Electricity Board v British Oxygen Co Ltd* [1959] 1 WLR 587; *Waikato Regional Airport Ltd v Attorney General* [2004] 3 NZLR 1; *R (Hemming) v Westminster City Council* [2013] EWCA Civ 591 [2013] PTSR 1377).

It was not necessary to decide whether receiving money was always enrichment, though it undoubtedly had value (*BP Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 78; *Goff & Jones*).

Ofcom's argument that it could have got higher fees "*for free*" was flawed, relying on its counterfactual analysis. Subjectively devaluing the total received was a different way of expressing the same point. An argument on "*net enrichment*" based on the benefit of the licences to the MNOs was unsustainable because it, too, depended on the counterfactual; Ofcom admitted there was no counter-restitution claim (*Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890). The argument that enrichment was not at the MNOs' expense if it was what they would have paid under different regulations again presupposed the counterfactual. Enrichment under unlawful legislation was unjust.

Obiter, finding against the MNOs would not necessarily deprive them of an effective remedy in breach of EU law, even if *Case C-398/09 Lady & Kid A/S v Skatteministeriet* [2012] 1 CMLR 14 applied.
