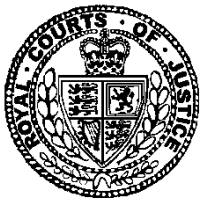

Neutral Citation Number: [2019] EWHC 1234 (Comm)

Claim Nos. CL-2018-000296
CL-2018-000301
CL-2018-000334
CL-2018-000331

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 May 2019

BEFORE:

MR ADRIAN BELTRAMI QC
Sitting as a Judge of the High Court

BETWEEN:

VODAFONE LIMITED

TELEFÓNICA UK LIMITED

HUTCHISON 3G UK LIMITED

EE LIMITED

Claimants

and

THE OFFICE OF COMMUNICATIONS

Defendant

- - - - - - - - - - - - - - - - - - - -

Michael Fordham QC, Emily Neill and Eesvan Krishnan (instructed by Towerhouse LLP) appeared on behalf of Vodafone Limited

Tom de la Mare QC and Tom Richards (instructed by DWF Law LLP) appeared on behalf of Telefónica UK Limited

Brian Kennelly QC and Daniel Cashman (instructed by Hutchison 3G UK Limited) appeared on behalf of Hutchison 3G UK Limited

Steven Elliott QC and Philip Woolfe (instructed by EE Limited) appeared on behalf of EE Limited

Pushpinder Saini QC, Ajay Ratan and Andrew Trotter (instructed by The Office of Communications) appeared on behalf of The Office of Communications

Hearing dates: 1, 2, 3 May 2019

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.

ADRIAN BELTRAMI QC:

Introduction

1. This is the trial of four actions brought under CPR Part 8. The Claimant in each action is a Mobile Network Operator and I refer to them collectively as the **MNOs** and individually as **Vodafone**, **Telefonica** (or **O2**), **Hutchison** (or **Three**) and **EE**. There is no material distinction between the claims in each action, save in respect of the individual quantum of the relevant MNO. The Defendant in each case is The Office of Communications (**Ofcom**). The actions were commenced by Claim Forms dated, respectively, 3 May 2018, 8 May 2018 and 18 May 2018 (x 2). By Orders dated 26 June 2018, Popplewell J directed that the claims be tried together with a time estimate of 4 days, including 1 day pre-trial reading. I am grateful to Counsel for the efficiency of their submissions, which enabled the trial to be concluded within the allotted timescale.

2. By these actions, the MNOs claim restitution of certain payments made by them towards annual licence fees (**ALFs**) for licences issued under the Wireless Telegraphy Act 2006 (**WTA 2006**). The ALFs were calculated, demanded and paid pursuant to The Wireless Telegraphy (Licence Charges for the 900 MHz frequency band and the 1800 MHz frequency band) (Amendment and Further Provisions) Regulations 2015 (SI 2015/1709) (the **2015 Regulations**). In circumstances more fully explained below, the 2015 Regulations amended, or more accurately purported to amend, the previously applicable regime under The Wireless Telegraphy (Licence Charges) Regulations 2011 (SI 2011/1128) (the **2011 Regulations**). By Order of the Court of Appeal dated 22 November 2017, on an application for judicial review brought by EE and in which each of the other MNOs was an Interested Party, the 2015 Regulations were quashed.

3. It is in these circumstances that the MNOs bring their claims for restitution. It is common ground that they are entitled in principle to restitution to the extent that the licence fees were exacted from them by a public body without lawful authority: see *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (***Woolwich No. 2***), a decision discussed in more detail below. The sole issue before me, deceptively simple, is as to the measure of that restitution. It is described as follows in the List of Common Ground and Issues:

   "*What is the appropriate measure of restitution? In particular, are the Claimants entitled to restitution of:*

   a. The difference between (i) the sums paid by the Claimants under the unlawful 2015 SI and (ii) the sums that were properly due under the lawful 2011 SI; or

   b. The difference (if any) between (i) the sums paid by the Claimants under the unlawful 2015 SI and (ii) the sums that would have been due had Ofcom acted lawfully in accordance with the judgment of the Court of Appeal; or

   c. Sums calculated by some other measure."

4. The MNOs argued in favour of (a). Ofcom argued in favour of (b). The respective positions, very broadly stated, were as follows:

    a. The MNOs relied on the fact that the consequence of the quashing of the 2015 Regulations was that the 2011 Regulations had remained in force throughout. Ofcom's sole statutory power to levy fees was accordingly under the 2011 Regulations. The MNOs argued that they should therefore obtain restitution of the difference between the fees in fact charged and the fees which were due under the 2011 Regulations. I shall refer to this as the recovery of the **net sum**.

    b. Ofcom's response was to say that the Court is entitled, indeed required, to ask what could and would have been done in the absence of the 2015 Regulations. In that event, so it contended, there would (or, for present purposes, at least arguably would) have been different, lawful, Regulations in place. Accordingly, the measure of restitution ought to be the difference (if any) between the fees actually charged and the fees which would have been charged under such Regulations. To arrive at any different outcome would be to grant the MNOs a windfall and, correspondingly, to penalise Ofcom for its error. I shall refer to this as the recovery of the **counterfactual sum**, whilst noting (see below) that Ofcom's case might well be that the counterfactual sum is nil or an amount close to nil.

5. There were no disputes of fact in the actions. The amounts in issue, on the MNOs' case, are as follows:

MNO	**Amounts paid under 2015 Regulations**	**Amounts payable under 2011 Regulations**	**Net sum**
Vodafone	£76,245,025.10	£21,865,536	£54,379,489.10
Telefonica	£76,245,025.05	£21,865,536	£54,379,489.05
Hutchison	£44,390,398.53	£17,463,600	£26,926,798.53
EE[1]	£139,823,997	£57,380,400	£82,443,597

6. These figures are agreed by Ofcom, though it disputes the entitlement to claim the net sum. Indeed, it disputes the relevance, or at least the material relevance, of the 2011 Regulations. It invites me, in the event that I find in its favour on the point of principle, that I order that the counterfactual sum be determined as follows:

    a. Ofcom shall first identify the fees it would have charged had it acted lawfully; and

[1] Some of this total may have included amounts levied under the 2011 Regulations but paid before the claim was issued, though the net sum is accurate.

b. Should the MNOs dispute such sums, there be directions given, if and insofar as necessary, for the Court to determine the counterfactual sum, with liberty to the parties to apply.

7. The parties have agreed that simple interest be awarded on whatever sum is due, calculated at 2% above the Bank of England base rate from time to time. Such interest should run from the date of each relevant payment.

Factual narrative

8. As the facts are agreed, I can take the narrative largely from the Agreed Statement of Facts.

Radio spectrum and its licensing for mobile telephony

9. Ofcom is the statutory body responsible for the management and licensing of radio spectrum in the United Kingdom. It is constituted under the Office of Communications Act 2002 and exercises functions under, inter alia, the Communications Act 2003 (**CA 2003**) and WTA 2006.

10. MNOs operate networks of base stations through which they provide mobile communications services. Mobile devices transmit and receive voice calls and data via radio signals sent to and received by antennae on those base stations. Radio spectrum is accordingly an essential input into the MNOs' businesses. Different parts of the radio spectrum may be identified by reference to their frequency, measured in Hertz and typically including a range of frequencies. For example, the 900 and 1800 MHz bands describe frequencies of 880 to 960 MHz and 1710 to 1880 MHz respectively. MNOs in the United Kingdom currently provide mobile communications services using the 800 MHz, 900 MHz, 1400 MHz, 1800 MHz, 2100 MHz, 2300 MHz and 2600 MHz bands.

11. Individual MNOs are granted rights to use blocks of spectrum within these bands by means of wireless telegraphy licences issued by Ofcom. Since 2000, spectrum made available for use for mobile services has generally been assigned via spectrum auctions. Before then, mobile spectrum was allocated according to administrative processes. The licences in question relate to the 900 MHz and 1800 MHz bands only. The former is exclusively held by Vodafone and O2 while the latter is held predominantly by Three and EE. This spectrum was allocated administratively rather than being assigned at auction.

12. The claims relate to the following licences as they stood during the claim period:

    a. Vodafone: licence number 0249664.
    b. O2: licence number 0249663.
    c. Three: licence number 0931984.
    d. EE: licence number 0249666.

The charging regime

13. Section 12 of WTA 2006 provides that wireless telegraphy licence holders must pay as licence fees such sums as Ofcom may prescribe by regulation:

"*(1) A person to whom a wireless telegraphy licence is granted must pay to OFCOM-*

(a) On the grant of the licence, and

(b) If regulations made by OFCOM so provide, subsequently at such times during its term and such times in respect of its variation or revocation as may be prescribed by the regulations,

The sums described in subsection (2).

(2) The sums are-

(a) such sums as OFCOM may prescribe by regulations, or

(b) if regulations made by OFCOM so provide, such sums (whether on the grant of the licence or subsequently) as OFCOM may determine in the particular case."

14. Section 122 of WTA 2006 applies to every power of Ofcom to make regulations under the Act. Such powers are exercisable by statutory instrument. Sub-sections (4) to (6) prescribe the circumstances in which the powers may be exercised:

"(4) Before making any regulations or order under such a power, OFCOM must-

(a) Give notice of their proposal to do so to such persons representative of the persons appearing to OFCOM to be likely to be affected by the implementation of the proposal as OFCOM think fit.

(b) Publish notice of their proposal in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it and are not given notice by virtue of paragraph (a); and

(c) Consider any representations that are made to OFCOM, before the time specified in the notice.

(5) A notice for the purposes of subsection (4) must-

(a) state that OFCOM propose to make the regulations or order in question;

(b) set out the general effect of the regulations or order;

(c) specify an address from which a copy of the proposed regulations or order may be obtained; and

(d) specify a time before which any representations with respect to the proposal must be made to OFCOM.

(6) The time specified for the purposes of section (5)(d) must be no earlier than the end of the period of one month beginning with the day after the latest day on which the notice is given or published for the purposes of subsection (4).”

15. The 2011 Regulations were made pursuant to the exercise by Ofcom of its power under section 12 of WTA 2006. These Regulations came into force on 3 May 2011. Amongst other things, they specified the annual licence fees which were payable for the use of spectrum in the 900 MHz and 1800 MHz bands, such fees being set at the same level as they had been since 1999. The scheme of the 2011 Regulations was that an annual licence fee was due from each licence holder on the anniversary of the grant of its licence, payable at the option of the licence holder in 10 equal monthly instalments. The MNOs paid licence fees in accordance with the 2011 Regulations against invoices and payment schedules provided by Ofcom.

16. By section 5(1) of WTA 2006, “*The Secretary of State may by order give general or specific directions to OFCOM about the carrying out by them of their radio spectrum functions*.” Exercising this power, the Secretary of State made the Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 (SI 2010/3024) (the **2010 Direction**). Amongst other things, this dealt with the level of fees which Ofcom should prescribe for the 900 MHz and 1800 MHz bands. Article 6 required Ofcom to do the following, after the completion of an auction of licences for the use of certain other frequencies (which took place in early 2013):

“*(1) After completion of the Auction OFCOM must revise the sums prescribed by regulations under section 12 of [WTA 2006] for 900 MHz and 1800 MHz licences so that they reflect the full market value of the frequencies in those bands.*

(2) In revising the sums prescribed OFCOM must have particular regard to the sums bid for licences in the Auction.”

17. After completion of the 2013 auction, Ofcom conducted a consultation process, following which, on 24 September 2015, it published a statement entitled, “*Annual Licence Fees for 900 MHz and 1800 MHz Spectrum*” (the **2015 Statement**), announcing decisions on revisions to annual licence fees Ofcom contended would give effect to the 2010 Direction. It was these revisions which were implemented by

the 2015 Regulations, which were made on 23 September 2015 and came into force on 15 October 2015[2].

18. The 2015 Regulations did not repeal and replace the 2011 Regulations but instead amended those parts of the 2011 Regulations that related to the 900 MHz and 1800 MHz bands, significantly increasing the level of licence fees that were payable and aligning MNO fee payment dates. In particular:

    a. Regulation 3 deleted provisions in Schedule 2 to the 2011 Regulations specifying the licence fees payable in respect of each channel within the 900 MHz and 1800 MHz bands.

    b. Regulation 4 prescribed the licence fees that would instead be payable in respect of 900 MHz spectrum on 31 October 2015.

    c. Regulation 5 prescribed the licence fees that would instead be payable in respect of 1800 MHz spectrum on the next licence fee payment date following 31 October 2015.

    d. Regulation 6 set out a formula by which licence fees in respect of 900 MHz spectrum were to be determined with effect from 31 October 2016 and provided that the licence fee was to be payable on 31 October 2016.

    e. Regulation 7 set out a formula by which licence fees in respect of 1800 MHz spectrum were to be determined with effect from 31 October 2016 and provided that the licence fee was to be payable on 31 October 2016.

    f. Regulation 8 provided that the annual fee could be paid in 10 instalments payable on 31 October and the last date of each of the following nine months.

19. The new licence fees payable under the 2015 Regulations were phased in from October 2015 to October 2016, with only 50% of the increase added in the first year. Payment dates were also aligned. Due to the phasing-in and payment date alignment, the precise pattern of payments required from each licence holder during the first year differed, but the overall effect on all licences was the same in that monthly instalments payable increased over the course of the year.

20. I was shown a sample invoice issued by Ofcom for the recovery of licence fees. It contains the following warning:

    "*The licence fees for your radio equipment are due on or before the above due date. If you wish to continue to use your radio equipment, payment must be received by Ofcom by the due date shown above. If you fail to do so, you will be in breach of your licence terms and conditions and will be operating illegally. This may result in revocation of your licence(s) and possible enforcement action.*"

[2] The 2015 Regulations were amended by The Wireless Telegraphy (Licence Charges for the 900 MHz frequency band) (Amendment and Further Provisions) (Amendment) Regulations (SI 2016/794).

The judicial review proceedings

21. Throughout the 2013 to 2015 consultation process, the MNOs contended that, when implementing the 2010 Direction to revise the relevant fees to reflect the full market value of the frequencies, Ofcom was required to have regard to what they said were its statutory duties under EU and domestic legislation. By its approach in the 2015 Statement and the 2015 Regulations, Ofcom rejected this argument on the basis that it considered it had no discretion under the 2010 Direction as to whether to revise the fees to reflect full market value.

22. On 11 December 2015, EE issued an application for judicial review. Vodafone, O2 and Three intervened in support. The claim was dismissed by Cranston J: *R (EE Limited) v Office of Communications* [2016] EWHC 2134 (Admin) [2017] 1 CMLR 23. The Court of Appeal allowed the appeal against this decision: *R (EE Limited) v Office of Communications* [2017] EWCA Civ 1873 [2018] 1 WLR 1868, quashing both the decisions as to the amount of annual licence fees for the use of the 900 MHz and 1800 MHz spectrum as set out in the 2015 Decision and also the whole of the 2015 Regulations. The Court of Appeal gave permission to appeal to the Supreme Court but no appeal was pursued.

The aftermath

23. Following the decision of the Court of Appeal, Ofcom issued revised invoices and payment schedules for the year commencing 31 October 2017. These required the MNOs to pay licence fees at the rates set out in the (unamended) 2011 Regulations. Ofcom has since consulted, and issued a final decision, on a new revision to the licence fees to give lawful effect to the 2010 Direction, interpreted in accordance with the decision of the Court of Appeal. On 14 December 2018, Ofcom made The Wireless Telegraphy (Licence Charges for the 900 MHz Frequency Band and the 1800 MHz Frequency Band) Regulations 2018 (SI 2018/1368) (the **2018 Regulations**). The 2018 Regulations revise the licence fees payable with effect, so far as material, from 31 January 2019.

24. A feature of the facts, which was emphasised to me by Mr Saini QC (who, together with Mr Ratan, presented the oral argument on behalf of Ofcom), is that the charging rates payable under the 2018 Regulations are very similar to the rates payable under the 2015 Regulations. This is therefore good evidence, he submits, of the rates that Ofcom would have imposed in 2015 had it not made the public law error which led in due course to the quashing of those Regulations (and he further relies on the fact that Ofcom was pursuant to the 2010 Direction under an obligation to revise the fees). He also suggested that this demonstrated that the MNOs would be the beneficiaries of a substantial windfall, at public expense, should they succeed in their claims for the net sum: the effect would be that they end up paying significantly less for their licences than they should have paid, and that they would have paid, had Ofcom not misconstrued its obligations.

25. The MNOs resist the conclusion that they are seeking a windfall gain, because a judgment in their favour for the net sum would do no more than restore the parties to the economic position obtaining under the extant valid legislation. And, indeed, should they recover less than the net sum, they would be being penalised beyond that

which Ofcom was entitled to charge and could have exacted from them had they simply refused to pay. This is the so-called "*parity*" or "*equivalence*" principle, which I consider below. It is apparent that even the identification of a "*windfall*", which I take to mean an unearned benefit, is itself not straightforward, and may rest in the eye of the beholder.

26. Furthermore, it is doubtful whether, even at the end of the process of analysis, it is of any real relevance to consider whether the proposed outcome provides the claimant (or indeed the defendant) with a windfall. In *Air Canada v British Columbia* (1989) 59 DLR (4th) 161, before the Supreme Court of Canada, La Forest J famously said, at p 193, "*The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss.*" Some care needs to be taken with this, however, and it may be noted that the *dictum* also refers to the question of loss, something which itself has a special meaning in unjust enrichment. Further, it falls to be set alongside the statement of Bastarache J, in a later decision of the Canadian Supreme Court, in *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] 1 SCR 3 at [47], that, "*... restitution is not concerned by the possibility of the plaintiff obtaining a windfall precisely because it is not founded on the concept of compensation for loss.*" This case must be decided as a matter of principle, by reference to applicable rules, rather than by *a priori* assumptions as to the nature, let alone scale, of any supposed windfall.

Common ground

27. According to the Agreed Statement of Facts, the following is common ground:

    a. The MNOs' only statutory obligation to pay annual licence fees in the period 15 October 2015 to 22 November 2017 is to pay annual licence fees at the rates set by the 2011 Regulations.

    b. Ofcom has no statutory power under section 12 of WTA 2006 or otherwise to set annual licence fees with retrospective effect. On Ofcom's case, this is irrelevant because Ofcom does not rely on any such power.

28. Mr Saini also confirmed to me orally, and so I regard this as further common ground, that Ofcom has no claim against the MNOs in counter-restitution in respect of the use of the licences.

The competing positions

29. As described above, there is a single issue for determination, which can be shortly stated. It was summarised by Mr de la Mare QC (who, together with Mr Fordham QC and Mr Elliott QC presented the case orally for the MNOs) in the following way:

    "Does one discount the sums unlawfully demanded, the 2015 charges, by reference to either the 2011 regulation levies or must you include additional sums that Ofcom would and could have charged if they had made lawful regulations? In other words, do the 2011 regulations exhaust the material obligations of the MNOs and the corresponding entitlements of Ofcom?"

30. The resolution of this issue requires the determination of a deeper point of principle. Each side submitted to me that the answer to this deeper point, and therefore to the case as a whole, was simple and obvious, albeit that the opposing solutions provided were radically different. The arguments ranged far and wide and a wealth of authority was referred to in extensive written arguments and oral submissions. I may not do justice to the detail of every single point which has been taken but I have sought to identify all the major issues and to approach them within the framework of a principled scheme.

31. In order to elucidate the point of principle, it is appropriate to begin with the elements of a claim in unjust enrichment. It is well known that there are four questions which a Court must ask when faced with a claim for unjust enrichment: (1) has the defendant been enriched; (2) was the enrichment at the claimant's expense; (3) was the enrichment unjust; and (4) are there any defences available to the defendant: *Benedetti v Sawiris* [2013] UKSC 50 [2014] AC 938 (***Benedetti***) at [10], per Lord Clarke. In *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66 [2016] AC 176 at [19], Lord Clarke also agreed with the earlier observations of Henderson J that the four questions were no more than broad headings for ease of exposition, that they did not have statutory force and that there may be considerable overlap between the first three questions. As will be seen, the reality of overlap is certainly present in this case. Nevertheless, it will still be necessary to consider each in turn as part of a structured approach. See *Investment Trust Companies v Revenue & Customs Commissioners* [2017] UKSC 29 [2018] AC 275 (***ITC***) *at* [41], per Lord Reed:

"They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms. If they are not separately considered and answered, there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability. At the same time, the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements."

32. Within that framework, it is helpful to identify at the outset the legal analysis of what is not in dispute in this action. One of the questions I asked the MNOs was why it was that they were limiting their claims to the net sum. All of the monies in question were paid pursuant to demands made under the (invalid) 2015 Regulations. Why did the *Woolwich No 2* principle not permit claims for the recovery of all sums so demanded? This was not with a view to encouraging larger claims but to teasing out the legal analysis of the claims which have been brought.

33. The answer to the question is to be found in the observations of Lord Sumption in *DD Growth Premium 2X Fund (in liquidation) v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36 [2018] Bus LR 1595 (***DD Growth Premium***) at [62]:

"It is fundamental that a payment cannot amount to enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right. As Professor Burrows has put it in his Restatement of the English Law of Unjust Enrichment *(2012), para 3(6), "in general, an enrichment is*

not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation". The proposition is supported by more than a century and a half of authority."

34. So, the reason why, notwithstanding demands made under an invalid Regulation, the MNOs cannot claim the recovery of those sums which were in fact due under the 2011 Regulations is either that there was no enrichment because the payment was made for consideration or because any enrichment was not unjust because it was made in satisfaction of a legal entitlement. As it appears to me, it may equally be said that any enrichment was not sensibly at the expense of the MNOs as the 2011 Regulations fees were paid in return for the licences. So this is an example of the overlapping nature of the questions.

35. What then of the claims for the recovery of the net sum, namely the amounts over and above those due under the 2011 Regulations? This is analytically different because those sums were not paid for consideration, did not satisfy a legal entitlement and, for as long as the sums were not due, could not be said to have been paid in return for the licences. So, if the claims are to be successfully resisted by Ofcom, there needs to be a different model. The model which is advanced by Ofcom is that which it has termed a or the "*counterfactual principle*". In short form, its contention is that the legal analysis must carry a hypothetical question, so as to expand each of the enquiries to accommodate the position not just in fact but also in a counterfactual world, in which Ofcom would have acted differently if it had been aware of the public law error which it subsequently discovered that it had made. In that event, so it maintains, it could and would have made lawful Regulations instead of the unlawful 2015 Regulations. Reverting to the unjust enrichment enquiries, what this submission means, for example, is that Lord Sumption's words "*in satisfaction of a legal right*", should be read as embracing both a legal right in fact and a hypothetical legal right which could have been but was not in fact available under the law.

36. The MNOs oppose Ofcom's case at a fundamental level, and counter with their own principles, which they identify as a "*principle of legality*" and a "*principle of parity*". Shortly stated, the principle of legality is said to be that a public authority can only ever exact by way of taxes or levies sums which are lawfully authorised, with the consequence that there can be no question of hypothesising levies which are not in fact lawfully authorised and thereby permitting an authority to retain that which it could not lawfully have obtained. The principle of parity was described as mandating an equivalence from the point of view of the paying party who successfully mounts a judicial review claim. If, so it was said, such a party had not paid the unlawful levies, then such levies could not have been claimed from him. A party who had in the meantime paid the levies pending his successful judicial review claim should be in no worse position when he sought to recover them in an unjust enrichment action.

37. There is an interesting question, which was touched on from time to time in the argument, as to whether there is a difference of substance, for these purposes, between claims in unjust enrichment (i) against a public authority brought under *Woolwich No. 2* principles; (ii) against a public authority brought on a mistake of law (see *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 [2007] 1 AC 558); and (iii) against an individual or private company. Mr Saini

suggested that the fact that the present claims are against a public law body facilitates the cause of action by reference to the unjust factor in *Woolwich No. 2*. However, thereafter, the public law aspect of the case is "*spent*". Going forward, the remainder of the claims are to be analysed simply as private law actions and it is wrong to inject public law considerations into the debate. I agree that there is only one law of unjust enrichment and so the same analysis ought to carry through whether the defendant is a public authority or not. Nevertheless, there is a factor of importance in this case, and which may not arise in other cases, which is that the 2011 Regulations constituted a piece of secondary legislation, or "*the law of the land*", as Mr Fordham put it. This Judgment is necessarily focussed on the particular circumstances of the actions before me and is not intended to have wider scope.

38. Before considering the rival positions, there is one further point to note, which I do consider to be of significance. As I have already mentioned, Mr Saini confirmed to me that Ofcom had no claim for counter-restitution in respect of the use of the licences. It follows from this that, had the MNOs refused to pay fees beyond those set by the 2011 Regulations, Ofcom would have had no independent claim for restitution in respect of any excess. I consider that this concession was rightly made. Even before addressing the various principles relied upon, the situation in which these parties found themselves was distinct. Specifically, this was not a case (such as would not be difficult to imagine) where the subsequent quashing of a statutory charging regime led to a situation where there was no charging regime at all. Instead, the effect of the decision of the Court of Appeal was that the 2011 Regulations had remained in force throughout. That is of course why, as above, the MNOs have no claim for the return of the fees due under the 2011 Regulations.

39. At least one reason why Ofcom has in such circumstances no claim for counter-restitution is that there is on the present facts no legislative vacuum. There is an existing regime which remains in place. As a general rule in unjust enrichment, a claim for restitution will fail if it undermines the contractual arrangements between the parties. This was explained by Etherton LJ in *MacDonald Dickens & Macklin (a firm) v Costello* [2011] EWCA Civ 930 [2012] QB 244 at [23] (***Costello***):

"The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation. The following cases support its application to the present case."

40. The licences issued to the MNOs were not contracts but public law instruments: *Data Broadcasting International Ltd v The Office of Communications* [2010] EWHC 1243 (Admin). Mr Saini and Mr Ratan both sought to emphasise this distinction, pointing out that they did not reflect the consensual allocation of risk to be found in a contract, nor the parties' assessment of value. That may or may not be so but the significance of the fact that sums were paid in consideration of valid licences and in satisfaction of valid existing Regulations remains. As it appears to me, any claim for restitution or

counter-restitution by Ofcom would undermine the legally binding arrangements by which the parties defined and thereby restricted their mutual obligations, and there is to this extent an equivalence with the contractual analysis.

41. Be that as it may, the outcome is an agreed position before me, namely that Ofcom has no such claim against the MNOs. I shall return to this point below, when considering the elements of the unjust enrichment enquiry. It is also worthwhile pausing to consider the overall legal position in which Ofcom now finds itself. On its case, it has no claim (whether under statute or for restitution) for the payment to it of fees for the material period beyond the fees due under the 2011 Regulations, yet it should be entitled to retain fees unlawfully charged and which were by definition overpaid. Hence, if one of the MNOs had refused to pay more than the 2011 Regulations fees, it would end up in a materially better position than those who paid, because it would be immune to any further claim by Ofcom. Furthermore, if any or indeed all of the MNOs had paid, say, the 2015 Regulations fees for the first year but had then refused to pay any fees for the remainder of the period, then the resulting claims and cross-claims would be peculiar, in that Ofcom would be able to recover only 2011 Regulations fees but could at the same time resist a claim for restitution of the overcharged 2015 Regulations fees. These outcomes suggest an incoherence in Ofcom's approach, which is likely to be inimical to a principled scheme. They also point to the importance of adherence to the existing, lawful regime by which the parties' rights and obligations were in fact regulated.

The MNOs' points of principle

42. In *Woolwich No. 2*, the House of Lords identified a special rule of unjust enrichment applicable to claims against public bodies, where such bodies have exacted taxes or other dues without lawful authority. Prior to that decision, it was necessary for a claimant to point to a conventional "*unjust factor*" to support its claim in unjust enrichment, and there was a sequence of cases, referred to as *colore officii*, where unlawful payments made to a government officer or other state actor in the exercise of his office, even if ostensibly made voluntarily, could be characterised as made under compulsion or duress in order to support a claim for recovery as money had and received. In more modern terminology, this was developed, albeit not always consistently, as an unjust factor to support a claim for restitution. Following *Woolwich No. 2*, such distinctions became unnecessary, on the basis that the wrongful exaction of unlawful dues was its own unjust factor.

43. In support of their position, the MNOs refer to a "*principle of legality*" and a "*principle of parity*". The principle of legality is described in terms that the right of recovery in unjust enrichment on the *Woolwich No. 2* basis "*rests on a principled rule of law rationale, namely that a public authority cannot retain a tax or duty or levy which it has collected without lawful authority.*" This fundamental principle is said to be linked to ideas about State action needing to be in accordance with or prescribed by law and to be underpinned by a policy justification enshrined ultimately in article 4 of the Bill of Rights.

44. That there is a principle of legality cannot be in dispute, nor that this underpins the special rule in *Woolwich No. 2*. In *Test Claimants in the FII Group Litigation v*

Revenue and Customs Commissioners [2012] UKSC 19 [2012] 2 AC 337 (***Test Claimants***) at [74], Lord Walker referred to the "*high constitutional importance of the principle that there should be no taxation without Parliament*." He then cited the following passage from Professor Mitchell, *English Private Law* (2nd ed) [18.156]:

"One policy justification for the Woolwich entitlement mentioned by Lord Goff is that a general right to recover payments of tax levied without the authority of Parliament is needed to give full effect to the constitutional principle enshrined in article 4 of the Bill of Rights 1689, that the Crown and its ministers may not impose direct or indirect taxes without Parliamentary sanction. Another, latent in their Lordships' speeches, is the related but wider public law principle of legality, that bodies invested with power by the state must respect the rule of law, and adhere to the limits of the jurisdictions conferred upon them."

To the same effect, Lord Sumption, at [173], said that, *"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…"*.

The MNOs' case is that this principle of legality operates not only to preclude the exaction by a public authority of an unlawful charge but to compel the conclusion that the public authority cannot retain an unlawful charge (and so achieve the same illegitimate outcome) by resisting a claim for unjust enrichment. There can, therefore, in such circumstances be no question of hypothesising a different legal entitlement, whether by "*counterfactual*" analysis or otherwise.

45. The principle of parity, advanced in support of the principle of legality though also as an additional string, is said to be that there should be symmetry between the positions of (a) a person who paid the charge but challenged it by judicial review and is subsequently seeking restitution; and (b) a person who refused to pay the charge but challenges it by defending an enforcement action. This is said to be supported by legal policy, exemplified by the observation of Lord Goff in *Woolwich No. 2* at p 172F that it would seem "*strange to penalise a good citizen, whose natural instinct is to trust the revenue and pay taxes when they are demanded of them.*"

46. The principal cases relied upon by the MNOs were the following.

47. *Dew v Parsons* (1819) 2 B & Ald 562. A statute empowered the Sheriff of Hereford to charge 4d for the making of any warrant of precept. The Sheriff in fact charged the defendant attorney 3s 6d for each of four warrants. The attorney had paid for three of them. The Sheriff claimed 3s 6d for the fourth. The Court held that the attorney would have been entitled to recover the excessive charges (3s 2d for each warrant) and so could set off those sums against the claim. Further, the Sheriff's only claim for recovery was at the rate of 4d. As explained by Best J, at pp 567-8:

"*Where the sheriff makes a claim for fees he is to be strictly confined to the limits allowed by the law… No Act of Parliament authorises the fees claimed in this case;*

and it is quite clear, at common law, that the sheriff is entitled to no compensation… The case stands thus: if it be within the [applicable statute] the sheriff is entitled to 4d; if it be not, he is entitled to nothing. Then as to the question of set-off, I am clearly of the opinion that the defendant is entitled to set off what he has overpaid to the sheriff…".

48. *Steele v Williams* (1853) 8 Ex 625. A parish clerk was empowered by statute to charge for supplying public access to the register of burials and baptisms, at the rates of 1s for each search and 2s 6d for each certified copy of a particular record. The plaintiff attorney had applied to conduct certain searches, making his own extracts. He was charged 4*l* 7s 6d, a sum calculated as if his extracts were certified copies. This was contrary to the statute and the attorney recovered the excessive charge, over and above the lawful amount, as money had and received. Baron Martin said, at p 632:

    "If a person is authorised to receive money by virtue of an act of Parliament, it is like a contract between the parties that the sum allowed shall be all which he is to receive, and he is as much bound by the entirety of what he is authorised to take as he would be by the entirety of a sum in contract.. It is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more."

49. *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884 (CA) affd. (1922) 127 LT 822 (HL) (***Wilts Dairies***). A 1916 statute created The Ministry of Food, with obligations to regulate and supply the consumption of food. Relevant powers were conferred on the Minister, known as the Food Controller, under Regulations made by way of delegated legislation. The Food Controller granted licences for the purchase of milk which required, in the case of the defendant dairy, a fee of 2d a gallon, this for the purpose of equalising prices between regions. Although the Food Controller succeeded in his claim for unpaid fees before Bailhache J, this was overturned in the Court of Appeal, whose decision was affirmed by the House of Lords. The fee had the character of a tax for which there was no power under the relevant legislation.

50. Certain specific points may be noted from this case:

    a. It was contemplated, certainly in the Court of Appeal, that the Food Controller might have adopted a different method of securing a payment so as to achieve the equalising effect and to which no objection could have been taken. But a hypothetical enquiry of that nature was not sufficient to save the claim.

    b. Although the claim was for recovery of an unpaid fee rather than a claim for restitution of a paid fee, Atkin LJ treated these as two sides of the same coin (albeit without any more detailed exposition of the point). At p 887, he said:

        "*It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use."*

51. *Atchison, Topeka & Santa Fe Railway Co v O'Connor* (1912) 223 US 280 (***Atchison***), a decision of the US Circuit Court for the District of Colorado. The plaintiff railway company had paid a tax to the State of Colorado which was unconstitutional. It sought the recovery of the tax and succeeded, notwithstanding the defence that the payment had been made voluntarily and so should not be returned. In a passage cited repeatedly in *Woolwich No.2* , Holmes J said at pp 285-6:

"It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the state's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognise the implied duress under which payment is made. But even if the state is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms."

52. *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 (***Bell Bros***). This was a decision of the High Court of Australia, following ultimately from an earlier decision of the same Court, *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572. Starting with the earlier decision, the defendant Road Board made by-laws purportedly under enabling primary legislation requiring the payment of a fee at a certain rate per cubic yard for a quarrying licence. This was declared to be invalid, albeit that the primary legislation did contemplate that the Board might have been able to levy a fee referable to its costs of administration. In the later case, a contractor who had paid the fee for the grant of a licence sought and obtained its full recovery as money had and received.

53. Pausing here, I make the following observations in respect of the above sequence of cases:

    a. Some of the cases are concerned with the situation where the public authority seeks to recover a charge which is held to have been unlawfully imposed. Such charges, whether characterised as taxes or other levies, will not be recoverable by the public authority if imposed unlawfully. As in *Wilts Dairies*, it should not matter that a different, lawful fee, might have been imposed if it was not in fact imposed.

    b. The cases in which a fee payer seeks to recover (or set-off) an overcharge against the lawful fee were, prior to *Woolwich No. 2*, generally discussed under the rubric of *colore officii*. But that does not render the value of the reasoning in these claims of any less relevance.

c. There is nothing in these cases to lend any support for the suggestion that, in a claim for restitution on the grounds that a public authority has been unjustly enriched by the receipt of unlawfully demanded fees, the amount of the claim should be reduced in order to accommodate the possibility or even probability that the authority might have been able to demand additional fees by a lawful route. Whilst it might be the case, as I put to Mr Fordham, that the authorities in question did not appear to seek to resist the claims made against them on such a ground, with the result that there is no direct statement rejecting a defence along such lines, the clear intimations of the constitutional limitations on the revenue collecting powers of a public authority do not encourage an outcome whereby the authority can keep by the back door of a defence to a claim in unjust enrichment what it could on no conceivably legitimate basis receive by the front door of an enforcement action.

d. This ties in also with the MNOs' suggested principle of "*parity*". I doubt that there is any such absolute principle applicable to the law of unjust enrichment. Nevertheless, in both the *colore officii* line of cases and in *Woolwich No. 2* itself, the Courts do make frequent reference to the disparity of power between payer and public authority payee, and to the practical reality that the payer will have no realistic option but to pay first and argue later. That reality can be seen in the present case, where Ofcom's invoices carried the explicit threat of enforcement action. I agree that an outcome in which (following, it must be remembered, an unlawful demand) a public authority could resist a claim for restitution on grounds which it could not have relied upon had it sought to enforce the demand, would increase rather than diminish the impact of that disparity of power. The invocation of Holmes J in *Atchison* that the payer is entitled to exercise his supposed right on reasonably equal terms, adopted in the English cases, points in a different direction.

54. That then leads to *Woolwich No. 2* itself, though it is necessary to start with its predecessor, *R v Inland Revenue Commissioners, ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400 (***Woolwich No. 1***), because the detail has a significance to the arguments before me. Prior to the assessment year 1986-87, building societies accounted to the revenue for tax in respect of dividends and interest paid under voluntary arrangements referable to the accounting year of the society. In the case of Woolwich, the accounting year ran to 30 September. In 1985, the legislation was amended so as to terminate these arrangements as from 6 April 1986 and, by section 343(1A) of the Income and Corporation Taxes Act 1970, the revenue was given power to make regulations to introduce a new system of accounting so that tax was to be calculated on the actual interest paid during the year of assessment. Section 47 of the Finance Act 1986 then amended section 343(1A) to give it deliberately retrospective effect, with a view to including sums paid or credited by a society before the beginning of the assessment year and which had not previously been brought into account. Regulation 11 of the Income Tax (Building Societies) Regulations 1986 accordingly purported to require building societies to account for the tax relating to payments of interest made after the end of their last accounting period but before 1 March 1986 and Regulation 3 dealt with payments made between 1 March 1986 and 5 April 1986. By this means, the revenue sought to ensure that tax

was paid in respect of the "*gap period*" between the end of a society's accounting year (the relevant date under the old system) and the operative date under the new system. Woolwich applied for judicial review.

55. Nolan J held that the Regulations violated fundamental principles of tax law, and so were void insofar as they purported to bring into charge payments prior to 6 April 1986. Before the Court of Appeal, the revenue accepted that one specific provision, Regulation 11(4), was invalid because it purported to apply, to the gap period, the rate of tax applicable to a subsequent year of assessment. The Court of Appeal, reversing Nolan J, held that the rest of the Regulations were valid. The House of Lords (Lord Lowry dissenting) varied the decision of the Court of Appeal on the grounds that the invalid Regulation 11(4) could not be severed from the charging paragraphs 11 and 3, such that those paragraphs of the Regulations were also void.

56. In understanding *Woolwich No. 1*, for the purpose of its application to the present case, the following points must be noted:

    a. This was a case involving primary and secondary legislation. Both the Court of Appeal and the House of Lords considered that the primary legislation empowered the revenue to make secondary legislation so as to recover tax on interest paid during the gap period. This had been the initial dispute and the reason for the judgment of Nolan J. The Judge had been concerned that the Regulations violated the presumption that income tax was an annual tax payable only on the income of that year. The higher Courts concluded that Parliament could by its own primary legislation permit the taxation in respect of previous years and that it had done so by section 47 of the Finance Act 1986.

    b. The difference between the Court of Appeal and the House of Lords was a relatively narrow and context-specific one, namely as to the severability of the admittedly invalid Regulation 11(4). Given the power under the primary legislation, the revenue could have passed lawful Regulations which enabled them to collect the tax, at a compliant rate, but did not do so, and so this was irrelevant for the purpose of judicial review. As Lord Oliver said (at p 1416):

        "*The whole regulation would have to be rewritten and it is entirely a matter of speculation what form the rewriting would take if the draftsman had appreciated the error into which he was falling.*"

57. Following the decision in *Woolwich No. 1*, the revenue paid back to Woolwich the entirety of the principal which it had received under the unlawful paragraphs of the Regulation, though contended that this was *ex gratia*. In *Woolwich No. 2*, the society claimed interest on the amounts paid, from the dates of payment. Hence it was necessary to determine whether the principal sums had in fact been recoverable. The claim was dismissed by Nolan J, but this was overturned by a majority in the Court of Appeal. The House of Lords, by a further majority (Lord Keith and Lord Jauncey dissenting) dismissed the appeal. As appears from the speeches, much of the debate centred on the question whether a payment to the revenue was properly analysed as one made under compulsion or whether the true analysis was that it was voluntary.

Another question was whether it could be treated as a payment made without consideration. This led to, amongst other things, a discussion of the *colore officii* cases.

58. In his leading speech, Lord Goff swept aside previous artificial distinctions in favour of broader principle which he summarised at p 177F:

"I would therefore hold 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."

Lord Browne-Wilkinson expressly agreed with Lord Goff (at p 196H) and Lord Slynn arrived at the same conclusion (at p 204F). For present purposes, it is not just the conclusion which is of interest but the reasoning which led to it, in particular the appeal to the underlying justice of the claimant's case and to the constitutional implications. At p 171G-172G, Lord Goff articulated this as follows:

"The justice underlying 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, 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 [1989] 1 WLR 137, 140, 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.

"To the simple call of justice, there are a number of possible objections. The first is to be found in the structure of our law of restitution, as it developed during the 19th and early 20th centuries. That law might have developed so as to recognise a condictio indebiti - an action for the recovery of money on the ground that it was not due. But it did not do so. Instead, as we have seen, there developed common law actions for the recovery of money paid under a mistake of fact, and under certain forms of compulsion. 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 1688 - 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 penalise the good citizen, whose natural instinct is to trust the revenue and pay taxes when they are demanded of him".

It was in this context that Lord Goff went on to quote the passage from the judgment of Holmes J. in *Atchison*. Lords Browne-Wilkinson and Slynn also quoted the same passage.

59. Taken as a whole, the analysis in *Woolwich No. 2* provides emphatic support for the underlying principle of legality, apparent in the earlier cases I have referred to, and advanced by the MNOs. I remain doubtful about a principle of parity at least in any formal sense, but there is no doubt that Lord Goff was attuned to the especially disadvantageous position of a taxpayer faced with a demand which he (rightfully in the event) considers to be unlawful and of the need to provide an effective remedy for a party in that situation. I accept also that the underlying facts in *Woolwich No. 2* have a resonance for the purpose of the present case. The unlawfulness was to be found in Regulations made by way of secondary legislation in circumstances in which a different regime could have been implemented in accordance with the primary legislation, had the revenue been aware of its own mistake. Yet it appears to have been no part of the revenue's case that either the existence of the broader power in the primary legislation or the hypothetical positing of alternative but lawful secondary legislation could have provided a defence to the claim. Whilst it again may be the case that such a defence was simply not taken, it is hard to imagine that, in the face of Lord Goff's approach, it would have fared well.

Ofcom's response

60. At the level of principle, Ofcom's response is threefold:

    a. It relies on what it describes as its "*counterfactual principle*" as entitling it, and so the Court, to hypothesise as to the fact and consequences of compliant secondary legislation.

    b. It equates the Regulations in the present case as something akin to an administrative act.

    c. It claims that its position is on all fours with the approach in previous cases, especially the decision of the Privy Council in *Waikato Regional Airport Ltd v Attorney General* [2004] 3 NZLR 1 (***Waikato***) and of the Court of Appeal in *R (Hemming) v Westminster City Council* [2013] EWCA Civ 591 [2013] PTSR 1377 (***Hemming***). Ofcom submits that I should follow the Privy Council and that I am bound by the Court of Appeal.

The "counterfactual principle"

61. Ofcom contends that the answer to this case is found in a "*simple and familiar test in private law*", namely the "*counterfactual principle*". In its skeleton argument, Ofcom goes on to describe the answer produced by the application of this principle as being that "*Ofcom must return any difference between the fees it charged and the fees that it would have charged had it acted lawfully in accordance with the judgment of the Court of Appeal.*" There is an immediate, and possibly insuperable, difficulty with this mode of argument, in that Ofcom has provided no definition of this "*counterfactual principle*". In a panoramic section of the skeleton argument, entitled "*The Counterfactual Principle across Private Law as a Whole*", Ofcom provides various examples of cases, in tort, contract, equity and unjust enrichment where Courts address issues of causation or loss, insofar as they arise under specific causes of action, by considering a variation of a "*but for*" question, something which takes the investigation from the factual into the counterfactual.

62. The MNOs criticise this mode of argument because, amongst other reasons, the majority of the situations discussed involve claims for compensatory damages, which are conceptually different from claims in unjust enrichment. I agree with that but there is also a more general objection. What Ofcom's analysis shows, at its highest, is that, in many areas of "*private law*" (although I doubt that the point is so limited), Courts may adopt if appropriate a "*but for*" analysis for assisting in the determination of particular issues, especially involving causation and loss. But I do not accept that there is any broader "*counterfactual principle*" (especially one that has not been defined) of uniform and compulsory application in every case. And if (as I suspect) the reality of the submission is a more mundane case that "*counterfactual reasoning*" is a useful tool which may be adopted by the Court when it is appropriate to do so, then this begs rather than answers the question in the present case.

63. As an illustration of the problem in this submission, Ofcom relied upon a section in Goff & Jones, *The Law of Unjust Enrichment* (9th ed), headed "*Counterfactual Arguments against Woolwich Liability"* (at [22-26] to [22-38]). In this section, the authors discuss a number of cases, including cases considered in more detail below, in which some form of "*counterfactual*" reasoning was or may have been applied to resolve a particular issue. In fact, the authors consider that, at least in tax cases, "*it is a significant problem with counterfactual arguments of the kind discussed here that they require the courts to make assumptions in HMRC's favour, to the detriment of the rule of law."* But of more immediate significance, the context of the discussion is of "*arguments*", which may or may not be appropriate in any given case (and in none of which do the facts approximate to the present case), rather than of any overriding and automatic principle.

The significance of Regulations

64. Ofcom's case is that the "*counterfactual principle*" means that the Court can hypothesise a lawful charging regime and must restrict a claim for restitution to the excess over such a regime, had it been put in place. Such a case raises an immediate question as to the legitimate parameters for any such hypothesising. Mr Saini confirmed that, on his client's case, there were no conceptual parameters. It was all a matter of degree and evidence, the task being to determine what could and would have been done in the alternative lawful world. So, in the purest form of that case, it

would be possible in theory to hypothesise even new primary legislation granting a different (and so potentially unlimited) set of powers, though he conceded that this would be likely to be difficult to prove in any given case.

65. No authority was cited to me which contemplated even the possibility of an enquiry into the hypothetical passing of different primary legislation. I do not believe that the reason for this is that there would be an evidential difficulty. In my judgment, certainly where a party seeks to recover from a public authority an unlawfully exacted payment under *Woolwich No. 2* principles, it would not be a defence to say that a different piece of primary legislation could have been passed and which would have produced a different outcome. That would be to subvert the principle of legality, because it would provide almost unlimited scope to justify and benefit from the unlawful by hypothesising the lawful.

66. Perhaps anticipating this difficulty, Ofcom's alternative submission was to focus on the source of the problem in this case, namely the 2015 Regulations themselves. Mr Saini submitted that the source of Ofcom's power to charge licence fees was in truth section 12 WTA 2006 itself, and that there was no question of this needing to be changed. The statute provided that the mechanism by which the fees would be set was by way of Regulations made by Ofcom. But (i) it need not have been so; and (ii) the mechanism in fact chosen, namely a Regulation made by Ofcom was "*actually a pretty weak form of legislative instrument*". He cited the observations of Lord Neuberger in *Regina (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)* [2016] UKSC 39 [2016] AC 1531 at [21-23] concerning the differences between primary and secondary legislation.

67. Mr Fordham's response was that secondary legislation is as much the law of the land as primary legislation. He directed me to the *dictum* of Lord Reid in *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 341F:

> *"It must be borne in mind that an order made under statutory authority is as much the law of the land as an Act of Parliament unless and until it has been found to be ultra vires."*

I did ask why it was that WTA 2006 required that Ofcom lay down its charges in the form of Regulations rather than, for example, a more obviously administrative step such as mere publication, if WTA 2006 alone was sufficient to create the lawful authority. No-one was able to provide any certain reason, although the MNOs suggested that it might be linked to the need for specific lawful authority to make the charges raised. I should not and do not need to speculate. All that matters, as it seems to me, is that the regime did in fact require the making of Regulations and this case is concerned with the legal consequences of the Regulations that were in fact made.

68. Given that both primary legislation and secondary legislation do indeed constitute "*the law of the land*", I am unable to draw a distinction between them for the purpose of the issues in dispute in the present case. It would not be possible to develop a coherent law of unjust enrichment were differences in outcome to turn on whether the payment in question was unlawfully exacted by reference to a stronger or weaker form of legislation. In this respect, Mr Saini's argument ends up seeking to prove too

much. In my judgment, hypothesising secondary legislation offends the principle of legality as much as hypothesising primary legislation.

69. In contrast, I do consider that there is a distinction of substance between a failure of legislation and a missing administrative step. One of the scenarios discussed in argument involved the following situation. There are initial Regulations which require the taking of an administrative step before a lawful fee is actually due. That could be a purely formal step, for example the sending out of an invoice making reference to the Regulations, or a more substantive step such as the making of a particular assessment or evaluation. The initial Regulations are then replaced by subsequent Regulations which are in due course declared invalid. In the meantime, because the payee had acted under the subsequent Regulations, it had not carried out the administrative step which would have been required under the initial Regulations. On such facts, could the paying party recover all fees charged or could the payee retain the fees which would have been due under the initial Regulations had the administrative step been taken in time? Instinct would suggest that, at least absent a particular reason why not, the retention ought to be allowed, if the recovery is not to be seen as adventitious and penal in nature.

70. This is a satisfactory explanation of the decision of the House of Lords in *South of Scotland Electricity Board v British Oxygen Co Ltd* [1959] 1 WLR 587 (***South of Scotland Electricity Board***). Under section 37(8) of the Electricity Act 1947, electricity boards were required, in setting tariffs, not to show undue discrimination. In a case brought in Scotland, the pursuers were industrial consumers of electricity, who contended that the tariffs were discriminatory. They made claims for what they alleged were overcharged amounts and the question for the House of Lords was whether the action should proceed. At p 596, the structure of the claim was set out by Viscount Kilmuir LC:

"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. The appellants seek to draw a distinction between the effect of an equality section and an undue preference section. I do not think that they succeed. 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. Then it is clear that, until a court so declares, the respondents have no alternative but to continue to pay the charges demanded of them. 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 did 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."

71. I was taken by Mr Ratan, for Ofcom, to section 37(3) of the Electricity Act 1947. This provided for a regime to be adopted when fixing electricity tariffs, which regime included the adequate publication of both the prices and the methodology adopted. It may be assumed (or it is at least one possible version of the facts) that, if indeed the actual tariffs were discriminatory, adequate steps had not been taken at the time to calculate and publish non-discriminatory tariffs. Yet Viscount Kilmuir LC appeared to see no difficulty in the task of assessing the overcharge. That is, to my mind, an unexceptional outcome, and indeed one which contemplates, expressly or implicitly, a measure of "*counterfactual*" reasoning. It is also an approach which is arguably consistent with that in *Waikato* and *Hemming*, discussed below. But I do consider that there is a difference in principle between hypothesising the completion of an administrative step, if and to the extent that this is necessary, and hypothesising a change in the law. I should also point out that, as it appears to me, the hypothesising in such a case is not an end in itself. There is no intrinsic need to recreate past administrative action. The ultimate purpose is to arrive at an appropriate figure to represent the proper lawful cost (or, as appropriate, value) of whatever it is that has been obtained, in order to enable a calculation of the excess. That also serves to highlight the difference between administrative action and legal change. Where the charge was in fact unlawful, then the hypothesising would need to be an end in itself, so as to create a world in which that which was in fact unlawful could be treated as if it had been lawful.

72. A further, and independently significant, element of the present case is that the application of the *"counterfactual principle*", as articulated by Ofcom, requires the Court to hypothesise not just a new law but a change in the existing law. In my judgment, even where the effect of quashing a set of Regulations would be to create a legislative vacuum, there would still be no scope to hypothesise a new and different law. But that is in any event not this case. The quashing of the 2015 Regulations created no legislative vacuum as the 2011 Regulations remained in force throughout. Hence, Ofcom's case requires the Court to hypothesise not the filling of a gap but the replacement of the existing law with something different. Ofcom was able to identify no case in which such a step had ever been taken or envisaged and in my judgment it would be wrong to do so. Mr Saini characterised the fact of the continuation of the 2011 Regulations as an "*accident*", by which he meant that similar circumstances could have arisen in which there were no preceding Regulations or in which the preceding Regulations were validly terminated even if their purported replacement was subsequently quashed.

73. I do not agree with the premise that, because circumstances could have been different, it is therefore an "*accident*" that they have turned out as they have. In any event, this cannot be a guiding factor and would not lead to a principled approach. The parties' rights are to be governed by the legislative framework in which they in fact operated, whether or not a different framework might have obtained in other circumstances. Where, as here, the MNOs have operated licences under a statutory scheme pursuant to which there was, in law, an existing and applicable fee structure, I consider that it would be contrary to principle to seek to regulate their respective rights and obligations on the hypothesis of a different, altered structure. As is evident from *Costello*, the law of unjust enrichment should not be used to undermine existing contractual relations. This postulate is to my mind all the more powerful in the case of

existing relations regulated by legislation. Indeed, I can see both logical and constitutional dangers in arriving at an outcome which means that (a) a legislative scheme has been in force throughout; (b) the parties (and, I expect, other parties) have had their rights and obligations governed by that scheme; but (c) solely for the purpose of a claim in unjust enrichment, the parties' rights and obligations are to be determined not by that existing legislative scheme but by what it might have been. This would in effect be to proceed on alternative versions of the law.

74. This point may also be tested by turning the hypothesis around. It is Ofcom's case, as I have explained, that, had it known of its public law error, it could and would have introduced much higher charges than under the 2011 Regulations. If that were an available argument, then it would, in a different case, be open to the paying party to argue that the payee authority could and would have introduced lower charges than under the preceding and extant Regulations. If that argument were successful, the claim in restitution would be for the difference between the sum paid and the counterfactually lower sum, which would therefore include an amount to which the authority had been legally entitled under the extant Regulations. But it is clear, indeed fundamental (as *per* ***DD Growth Premium***), that there can be no claim for restitution of sums to which the payee was legally entitled. If the fact of an existing legal regime precludes the introduction of a counterfactually lower sum it must equally preclude the introduction of a counterfactually higher sum. Both would undermine the actual legal relations by which the parties' rights and obligations were governed.

Waikato and Hemming

75. Ofcom submits that both of these cases "*stand for the proposition for which Ofcom contends*" and that they, or at least *Hemming*, constitute "*binding authority*".

76. In *Waikato,* the New Zealand Director General of Agriculture and Forestry was required by section 135 of the Biosecurity Act 1993 to take steps to recover the costs of administering the Act (which was concerned with the exclusion, eradication and effective management of pests and unwanted organisms) in accordance with principles of equity and efficiency. Two decisions were made which imposed charges on regional airports rather than metropolitan airports. The decisions were challenged and at first instance ([2001] 2 NZLR 670) they were held by Wild J to be unlawful. There were therefore claims for restitution of the sums paid. In considering these claims, Wild J proceeded on the basis that there were two separate routes to recovery: under *Woolwich No. 2* and by reference to the doctrine of *colore officii.* He considered that both routes were available. However, and as I read his judgment, he took the view that (i) *Woolwich No. 2* applied where there was "*no lawful authority*" for the payment (see at [175]); but (ii) *colore officii* applied "*where a demand could lawfully have been made* (see at [174]). In the event, the Director General had not made a proper costs assessment under s 135 of the statute but he could lawfully have done so. This reasoning in turn led to Wild J's summary, at [177]:

"*It would be unjust not to allow MAF to retain a reasonable portion of WRAL's payments to it (reasonable based on a proper s 135 assessment). Section 135 was enacted specifically to enable MAF to recover any shortfall in Crown funding*

appropriated for the enforcement of the Biosecurity Act. It follows that, on a "reverse-restitutionary" view, it would be unjust for WRAL to succeed on a claim for full repayment."

77. As the Director General had not in fact made a proper section 135 assessment, the Judge said that he was not in a position to assess quantum, though he gave various directions, which contemplated that the question might revert to him if it could not be agreed. By the time the matter came before the Court of Appeal ([2002] 3 NZLR 433), a figure of just over $1 million had been ordered. The Court of Appeal allowed the appeal and reversed the decision. However, the Privy Council allowed the further appeal and so re-instated the Judgment.

78. The Privy Council having concluded, in line with Wild J, that the assessments of the Director General were invalid, the question of restitution resurfaced for consideration. The conclusion, ultimately, was that the original decision of Wild J would stand unchanged (at [84]):

"*There is no injustice in their claims to partial recovery being allowed. But their Lordships can see no ground for departing from the Judge's decision to allow partial recovery only (that is, of the excess over what would have been a fair and proportionate charge).*"

79. The MNOs submit that *Waikato* is a case about the retrospective exercise of a power. What they mean by that is that, as they contend, the Director General had an ongoing power to make a legally compliant assessment with retrospective effect, so that, for example, if he made an unlawful assessment in years 1, 2 and 3, he could correct that defect in year 4 by make a new legally compliant assessment taking effect for the preceding years. It certainly appears to have been the view of the Court of Appeal (see eg at [135] and [136]) that the Director General possessed such a power. But it does not seem to me that that was the analytical route taken by Wild J or the Privy Council. Wild J did not order the Director General to make retrospective assessments and indeed it appears that the exercise may have been made by the Judge. I see nothing in his Judgment to suggest that Wild J was seeking to impose a new charge with retrospective effect, as opposed to working out the value of the excess charge by reference to what could lawfully have been assessed. And the reference at paragraph [177] to a "*reverse-restitutionary view*", which I take to mean a reference to counter-restitution, would have been inapposite had he been envisaging a statutory debt created with retrospective effect (as there would be a claim for such a debt not for restitution). Equally, the reference by the Privy Council at [84] to what *"would have been a fair and proportionate charge*" is not apt to describe an actual charge. And at [81] the Privy Council expressed doubt as to the existence of a retrospective power. Moreover, in the previous paragraph, there was reference to *South of Scotland Electricity Board*, which was not a case of such a retrospective power (I note for the record that Mr Fordham submitted that it was but I see nothing in that case to suggest that that is right).

80. In summary, I reject the MNOs' submission that *Waikato* involved (or, at least, could only have involved) the exercise of a present power with retrospective effect for the

purpose of correcting an earlier error. I do consider, in line with the reasoning in *South of Scotland Electricity Board*, that this was a case where the Court was prepared to hypothesise the taking of lawful administrative steps which had not in fact been taken, in order to assist its determination of the amount of an appropriate lawful charge. However, no part of the case required the Court to hypothesise the existence of a different law.

81. The second case relied upon by Ofcom is the decision of the Court of Appeal in *Hemming*. This concerned licence fees imposed on the claimant sex shop operators under Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982. Paragraph 19 of the Schedule provided that a licence holder should pay a reasonable fee determined by the appropriate authority. The claimants challenged the fee demanded for 2011/12 on the basis that there had been no determination by the council in accordance with paragraph 19. They sought a mandatory order to determine that fee (which determination, they said, ought to reflect certain surpluses based on errors in the previous years). They also made a claim for restitution in respect of payments made in the previous five charging years. The alleged defects were not only that there had been no proper assessment at all but that (from 28 December 2009) part of the fee charged was prohibited under the Provision of Services Regulations 2009. This second claim was described at first instance by Keith J ([2012] EWHC 1260 (Admin) [2012] PTSR 1676) at [5]:

"*The claimants accept that they should not be able to recover the whole of the sums they paid for those years. They claim the difference between the sums they paid and whatever would have constituted reasonable fees for those years."*

The claimants succeeded before Keith J and, although this was reversed in part in the Court of Appeal, the main issue of dispute concerned the precise methodology of the recreated assessment for previous years, the detail of which does not matter for present purposes.

82. As with their analysis of *Waikato*, the MNOs contend that *Hemming* is a case in which the Court was concerned with the exercise of a power, in this case by the local council, retrospectively to fix fees in respect of past years. Indeed, so it is said, this is what the Court in fact ordered to be done. At [49] of his Judgment, Keith J did order the council "*to determine, within three months of the handing down of the final judgment in this case, a reasonable fee for the years ending 31 January 2007, 31 January 2008, 31 January 2009, 31 January 2010, 31 January 2011 and 31 January 2012…".* The Court of Appeal merely varied the Judge's Order in respect of the basis on which restitution was to be made but otherwise dismissed the appeal. Further, Mr Fordham directed me to various passages in the Judgment of Beatson LJ which support the view that what was being envisaged was the exercise of a retrospective power. For example, at [132]:

"*As far as the first period is concerned, the council failed to determine the fee it was entitled to determine. Although it will now have to determine a lawful fee retrospectively, it is entitled to do this on the basis that it would have been entitled to do at the time.*"

I also record that Mr Fordham reserved the right in a higher Court to contend that, if he was wrong about what *Hemming* did decide, then it was wrongly decided.

83. Ofcom submits that the Court in *Hemming* was not ordering the exercise of a retrospective power but seeking to achieve the result of quantifying the fee which would have been charged on a proper assessment. It says, and I agree with this, that care must be taken over the use of the word "*retrospective*" in this context, as whilst it could signal the exercise of a retrospective power, it could equally be intended merely to reflect the fact that an assessment in respect of an earlier period has to be done at a later date. It also points to passages in the Judgment (which were of significance to the extent that there were arguments about interest) which expressed the understanding that the cause of action in unjust enrichment would be complete even before a further assessment had been made, which is not consistent, so it says, with the idea of a retrospective power creating a new legal relationship. See eg at [121]:

"*Even before any new and lawful decision, the payee will only be regarded as unjustly enriched to the extent of the excess of what might have been lawfully demanded."*

84. I am of the view that the MNOs are probably right in their interpretation of the Judgment of the Court of Appeal, within the context also of the original Judgment of Keith J. It does appear that the expectation was that the assessment exercise which was ordered to be done would have the result of actually setting the lawful charge for the previous years. I do consider that this is what was meant by the use of the word "*retrospective*". And even the passage at [121] does not assist Ofcom, as the reference to a "*new and lawful decision*" is surely a reference to a retrospectively new and lawful decision; a hypothetical assessment of what could and would have been done is not aptly described in such a way.

85. Nevertheless, and perhaps this explains why this distinction is not spelt out in clearer terms, I believe it unlikely that either Keith J or Beatson LJ considered that it was a distinction which made any difference. The claim, as explained by Keith J, was for the difference between the fees paid and what would have constituted reasonable fees. Subject to the dispute as to precisely how the exercise was to be done, the council was to undertake replacement assessments, so as to crystallise the differential. For the purpose of the claim in restitution, I do not see that it matters, and of more significance I can detect nothing to suggest that either Keith J or Beatson LJ thought that it might matter, whether the product of the council's exercise was the creation of an actual new fee for the preceding years or the identification of a notional fee that would have been charged. The quantum of the claim would not have differed.

86. Ofcom also directed me to [110] in Beatson LJ's judgment. In this paragraph, and having set out the general principle of recovery stated by Lord Goff in *Woolwich No. 2*, that 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, Beatson LJ observed that:

"It also has the practical attraction of entitling the person who overpaid in circumstances in which the public authority is able to levy the fee or part of it lawfully to recover only the excess. In this way it reflects the economic reality of what happened notwithstanding the public law flaw in the circumstances of the original payment."

87. Ofcom submits that this passage is directly applicable to the present case, in circumstances where the "*public flaw*" was the fact that the 2015 Regulations were *ultra vires*. However, care needs to be taken here. First, Beatson LJ was merely summarising the existing state of the law, in particular by reference to the passage in *Woolwich No. 2*. He was not purporting to expand, or indeed provide any new interpretation on, the law. Second, in those circumstances if, in accordance with the analysis that I have set out, there is an underlying principle of legality which prevents a public authority from hypothesising a new law, then this was certainly not the occasion to change that. Third, the case concerned an administrative omission and so any "*counterfactual*" (if there was one) did not contemplate the making of new legislation. Fourth, I am warned by Mr Elliott to be cautious about the touchstone of "*economic reality*" in the context of unjust enrichment, this being described by Lord Reed in *ITC* at [59] as "*not only a 'somewhat fuzzy concept'... but one which is difficult to apply with any rigour or certainty in this context, or consistently with the purpose of restitution on the ground of unjust enrichment."*

88. I am, accordingly, of the view that the Courts in *Hemming* probably did have in mind the exercise of a retrospective power but without needing to draw a distinction between this and a counterfactual assessment without retrospective legal effect. Either would have served the same purpose in dealing with the claims made. But, even if the counterfactual analysis were the correct one, this would not directly touch on the present case as the Courts were not being asked to hypothesise a new piece of legislation in order to treat that which had been and remained unlawful as hypothetically lawful. Certainly, I reject the submission that *Hemming* is binding authority on the case before me.

89. I am fortified in my interpretation of these two cases by the analysis of Morgan J in *Lindum Construction Co Ltd v Office of Fair Trading* [2014] EWHC 1613 [2014] Bus LR 681 at [87]-[88]:

"I think it is likely that the court which grants relief in a Woolwich claim will need to quash the earlier charge or levy to enable the public body to impose a new charge or levy (if it would be lawful for it to do so); alternatively, it may be sufficient for the court to declare that the earlier charge or levy is void in public law and therefore has no legal effect; one or other of these steps was taken in both the Waikato Regional Airport Ltd case and Hemming's application.

"Where it is held that the original charge or levy was not lawfully imposed but the public authority would be able lawfully to impose a lower charge or levy, the court takes the view, in favour of the public authority, that the public authority is not necessarily unjustly enriched to the full extent of the first charge or levy but only to the extent that the first charge or levy exceeds the second possible lawful charge or levy: see the Waikato Regional Airport Ltd case and Hemming's application."

The distinction here drawn, as I read it, is between charges which could lawfully have been imposed and those which could not. *Waikato* and (possibly, if not retrospective) *Hemming* fall on the lawful side of the line. The present case falls on the other side.

Conclusions on points of principle

90. To summarise the above, my conclusions are as follows:

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

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

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

    d. There is no warrant for hypothesising a new legal entitlement in order to render that which was unlawful notionally lawful, which would be to undermine the principle of legality; it would also tilt the balance unfairly towards public authority payees making unlawful demands.

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

91. In such circumstances, I am satisfied that the MNOs are entitled to succeed in their claims for the net sum, as I consider that they are supported by general principle and, conversely, that Ofcom's alternative principle is flawed. Nevertheless, and as both sides accepted, it is necessary also to go on to consider how the claims fit within the unjust enrichment schema, both to confirm the legal route to recovery and to address further specific responses raised by Ofcom. In the same way that the four questions are often overlapping rather than self-contained, these further specific responses also overlap. Indeed, it may fairly be said that all of them presuppose the application of the "*counterfactual principle",* with the result that if, as I have found, it is inapplicable each of the responses already has a fatal flaw. I shall therefore deal with this aspect of the case as concisely as I am able.

Unjust enrichment

(1) Has the defendant been enriched?

92. The MNOs submit that Ofcom has inevitably been enriched in the amount of money it received. Mr Elliott directed me to the analysis of Goff J in *BP Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 783 at p 799F-G:

"Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited; and (subject to problems arising from such matters as inflation, change of position and the time value of money) the loss suffered by the plaintiff is generally equal to the defendant's gain, so that no difficulty arises concerning the amount to be repaid."

93. Whilst, as Ofcom correctly observes, Goff J was not purporting to lay down a rule of universal application, the preponderance of academic opinion is that the receipt of money does indeed carry its own incontrovertible benefit. For example, in *Unjust Enrichment* (2nd ed), Professor Birks viewed the matter, at p 53, as follows:

"*It is barely necessary to say anything about money received. There is no room for argument as to the value of money… Money has value and is the measure of value."*

And at p 59:

"*Money is incontrovertibly enriching. It is the measure of enrichment."*

To the same effect is Goff & Jones, *The Law of Unjust Enrichment* (9th ed) at [4-28]:

"In some situations, the courts are highly unlikely to hold that a defendant's freedom to make his own spending choices would be compromised by ordering him to repay the objective value of a benefit. The most obvious example is where defendants receive money. Money is a universal means of exchange and defendants invariably desire things that money can buy. Hence the court is certain to find that he has been enriched by the receipt of money, and that its face value is a reliable measure of his enrichment at the time when he received it."

94. To these broad statements must be attached some *caveats*:

    a. In some cases (not related to the present) there may be specific questions as to the value of money, particularly as foreign currency.

    b. Professor Burrows, in *The Law of Restitution (3rd ed)* at pp 50-51, suggests that there may be examples of situations where, in exceptional circumstances, money might not be treated as an incontrovertible benefit. See also *A Restatement of the English Law of Unjust Enrichment* (by Professor Burrows and others) at [7]. I was invited by Mr Elliott to say that Professor Burrows is wrong about this but I need not consider that invitation as his tentatively expressed scenario does not approach the present case.

c. Lord Sumption's analysis in *DD Growth Premium* indicates that even a payment of money will not constitute an enrichment if made for full consideration. At one point in the argument, Mr Elliott suggested that Ofcom's enrichment was measured by the full amount of the fees received but that cannot be right.

95. Ofcom contends that the question of benefit is rather more complex. Specifically, it submits that "*a defendant is not enriched by receiving something that they could and would otherwise have obtained for free.*" Further, the test for identification and valuation of objective enrichment looks to the price which a reasonable person in the defendant's position would have had to pay: *Benedetti* at [17] per Lord Clarke. On Ofcom's case it could have made Regulations increasing the licence fees, and it would have done so, and so the correct analysis is that it could and would have obtained the increased fees "*for free*". Mr Ratan also took me to the decision of Henderson J in *Littlewoods Retail Ltd v Revenue and Customs Commissioners* [2014] EWHC 868 [2014] STC 1761 where the Judge made reference, at [433], to the views expressed by Professor Burrows. At [434(5)], he continued:

"The benefit of the payment of that money may not be strictly incontrovertible, but the presumption that the Government was thereby enriched by the full amount of the receipts must be a very strong one."

I asked Mr Ratan whether Ofcom at least accepted the strength of the presumption articulated by Henderson J and he did not dissent.

96. I do not accept Ofcom's case. It is flawed because it is premised on the application of the "*counterfactual principle*" to hypothesise new, compliant and replacement legislation. Beyond that, it is not necessary for me to determine whether or not the benefit of money is strictly incontrovertible. The conclusion from both the *dicta* and the commentaries that I have cited suggests that that will be the answer in at least the vast majority of cases. That is for the simple reason that money as a medium of exchange has its own undoubted value. Whether or not there are cases on the fringes where an unusual set of facts opens up the possibility of a different outcome (on which I express no view), the present facts do not constitute such an exceptional case, even leaving aside the difficulties of the counterfactual principle. It became apparent during the argument that Ofcom's approach, if valid, would be applicable in many cases where a public authority, or indeed any private party, in receipt of a sum of money following a normatively defective transfer, could claim that, if only things had been different, it would have been able either to reduce the cost to it of achieving the payment in question or to increase that payment. And it may be remembered that Mr Saini's case, in its purest form, allowed for the possibility (subject only to questions of evidence) of postulating different primary legislation and so, in effect, an open-ended power to justify the reduction in the benefit of any unlawful receipt. Mr Ratan showed me no case, and no commentary, to support such a proposition and I reject it.

97. Ofcom's next submission is that it could subjectively devalue the money which it had received. Mr Elliott's response was that there is no support for the concept of subjectively devaluing money. He referred, for example, to Professor Virgo, *The*

Principles of the Law of Restitution (3rd ed) at p 73: "*... it is never possible for defendants to rely on the subjective devaluation principle and argue that they do not value the money which has been received."* Whether or not that is, again, a rule of universal application, I can deal with this point shortly as it is in this case no more than a different way of expressing Ofcom's point about enrichment. As described above, Mr Ratan's submission on enrichment was that the value of the fees to Ofcom was worth less than the sums received because of the special characteristics of Ofcom's situation. Having rejected that argument, I see no scope for a distinct, additional argument about subjective devaluation.

98. Finally, and as appears to me under the same head, Ofcom advances a theory of "*net enrichment*", the submission here being that, even if Ofcom was enriched by the amount of the fees it received, the MNOs were also enriched by the licences which they obtained and operated. Hence, any measure of recovery would need to reflect the hypothetically true price which the MNOs would have had to pay for those licences had different Regulations been put in place. So there has to be a netting off of respective enrichments.

99. As with the rest of Ofcom's case on enrichment, this argument is dependent on the application to the facts of the "*counterfactual principle*" and so is unsustainable. I am also of the view that it is structurally flawed. It contemplates, in substance, the taking of an account between the parties so as to set off benefits and arrive at a net figure. That is, of course, what may need to be done when working out the consequences of a void contract such as a swap. But what are being set off in such a case are respective claims against each party. In unjust enrichment terms, and, this appears to have been what Wild J was contemplating in *Waikato* at [177], this is the province of counter-restitution. Yet, Ofcom has accepted that it has no claim in counter-restitution. That being the case, what is it that is said to be set off so as to arrive at a "*net enrichment*"? I do not know.

100. Ofcom relied in support of this aspect of its case on the decision of Hobhouse J in *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890. This was an interest rate swap case, where there needed to be an accounting of payments going both ways but where there was a dispute as to which payments should be included. This was because a number of the payments were made more than 6 years before the claim was commenced and so would have been the subject of a limitation bar if they had been independently claimed. Hobhouse J included all of the claims in the accounting exercise. Ofcom submitted that this shows that the netting process is not restricted to claims, or at least enforceable claims, but I do not agree.

101. First, as a matter of principle, *Sandwell* does not help me to identify what species of legal right, short of a claim in counter-restitution, is said to be sufficient to trigger the "*net enrichment*" approach. Second, I accept, as submitted to me by Mr Elliott, that the exercise in which Hobhouse J was engaged in *Sandwell* involved the equitable set off of payments made at the time of the transfers, rather than at the time of the action. Hence, there was no notional limitation bar in any event. Third, I regard *Sandwell* as directly inconsistent with Ofcom's case because the very exercise that Hobhouse J was conducting was one of counter-restitution. This is apparent from pp 929F-H:

"Where payments both ways have been made the correct view is to treat the later payment as, pro tanto, a repayment of the earlier sum paid by the other party. The character of the remedy, both in law and equity, is restitution, that is to say putting the parties back into the position in which they were before. Accordingly, the remedy is only available to a party on the basis that he gives credit for any benefit which he has received. He must give credit for any payments which have been made by the opposite party to him and, where the court thinks appropriate, pay a quantum meruit or quantum valebat."

I read the reference to the payment of a *quantum meruit* or *quantum valebat* as an articulation of a putative claim in counter-restitution, and there is no reason to think that a claim for payments would fall into a different category. I note also that Professor Burrows (*The Law of Restitution* 3rd ed, at pp 570-571) treats this as a case of counter-restitution. If that is right, which I consider that it is, then this argument must fail, again independently of the problems over the "*counterfactual principle*", because Ofcom has no claim in counter-restitution.

(2) Was the enrichment at the claimant's expense?

102. Ofcom submits that this element has two aspects: (a) the claimant must have suffered a relevant loss; and (b) that loss must be relevantly linked to the defendant's enrichment. On that basis, it contends that, if and insofar as there was found to be enrichment, then that enrichment was not at the MNOs' expense if and to the extent that they were only paying what they would have being paying if different Regulations had been passed.

103. I struggle to see how this is an independent point, distinct from the question of enrichment. It suffers from the now familiar flaw that it is dependent on the application of the "*counterfactual principle*". But even on its own terms, there is a direct overlap with the question of enrichment. I accept the proposition that there must be a loss which is linked to the enrichment. Lord Reed explained the point in *ITC* at [43]:

"The nature of the various legal requirements indicated by the "at the expense of" question follows from that principle of corrective justice. They are designed to ensure that there has been a transfer of value, of a kind which may have been normatively defective: that is to say, defective in a way which is recognised by the law of unjust enrichment (for example, because of a failure of the basis on which the benefit was conferred). The expression "transfer of value" is, however, also too general to serve as a legal test. More precisely, it means in the first place that the defendant has received a benefit from the claimant. But that is not in itself enough. The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant's also having suffered a loss through his provision of the benefit."

104. Lest there be any confusion about this, though, there is a difference between "*loss*" in unjust enrichment and "*loss*" for the purpose of compensatory damages. Lord Reed immediately clarified this at [45]:

"It should be emphasised that there need not be a loss in the same sense as in the law of damages: restitution is not a compensatory remedy. For that reason, some commentators have preferred to use different terms, referring for example to a subtraction from, or diminution in, the claimant's wealth, or simply to a transfer of value. But the word "loss" is used in the authorities, and it is perfectly apposite, provided it is understood that it does not bear the same meaning as in the law of damages. The loss to the claimant may, for example, be incurred through the gratuitous provision of services which could otherwise have been provided for reward, where there was no intention of donation. In such a situation, the claimant has given up something of economic value through the provision of the benefit, and has in that sense incurred a loss."

105. In certain cases, including in particular *ITC,* the Courts have closely examined the "*at the expense of*" requirement in circumstances where there was no direct transfer of benefit from claimant to defendant; instead, the actual transfer came from a third party. Those cases present particular complications and may be fact specific. Where the transfer of value is made directly from claimant to defendant, the case is much more straightforward, at least as regards this aspect. Certainly, there still needs to be a transfer of value and a loss through the provision of the benefit. But where the transfer is of money, I agree with the MNOs that the position is simple. In the same way that the payee is benefited by the value of the money received, so the payer is disbenefited, or suffers a loss, by the value of the money paid. This element of the test responds to the respective addition and subtraction of the funds transferred. As Professor Burrows says (*The Law of Restitution 3rd ed,* at p 570), "*Where one has an exchange of money, the defendant's loss and the claimant's gain are equivalent.*" So, in the present case, in circumstances where I have already found that Ofcom was enriched by the face value of the fees paid (over and above the amounts due under the 2011 Regulations) it follows that this was at the MNOs' expense.

(3) Was the enrichment unjust?

106. Although Ofcom runs this as a separate point, it is really the culmination of all of their other arguments. Ofcom contends that it is not unjust to retain the fees that it would and could have charged under alternative Regulations, but that argument presupposes the application of the "*counterfactual principle*". I consider that the correct position is as follows. This question responds to the need to identify an "*unjust factor*" rather than any more unstructured search for what is "*just*". As has already been noted, there is no unjust factor where a party receives a payment to which he is legally entitled. It is possible (although an alternative analysis could be in counter-restitution) that an explanation of *South Scotland Electricity Board*, *Waikato* and (unless entirely retrospective) *Hemming* is that there is no unjust factor where a party receives a payment to which he would have been legally entitled had he completed an administrative step to make good that entitlement. But there is no support for the proposition that there is no unjust factor where either (i) the receipt of the payment was itself unlawful; or (ii) the payment represents an unlawful overcharge against an existing and lawful statutory regime.

(4) Are there any defences available to the defendant?

107. Ofcom does not suggest that there are any separate defences available to it. In my view, the absence of a claim in counter-restitution to set off against the MNOs' claim signals a wider problem in the analysis of Ofcom's position.

EU Law

108. The last part of the case concerns the application of EU law. The MNOs contend that the Court of Appeal determined that the 2015 Regulations breached both domestic law and EU law. Further, where, as they say, payments by way of tax or other levies were exacted pursuant to a breach of EU law, the English court must provide an "*effective remedy*" for that breach: see the decision of the Court of Justice in *Case C-398/09 Lady & Kid A/S v Skatteministeriet* [2012] 1 CMLR 14 (***Lady & Kid***). Any remedy which allowed for the operation of the "*counterfactual principle*" or of Ofcom's approach to "*net enrichment*" would not, the MNOs contend, be an effective remedy. In other words, they say that, even if they lose as a matter of pure domestic law, they must win as a matter of EU law.

109. This aspect of the case, which featured only lightly in oral argument, raises some profound issues. There is an initial question as to whether the Court of Appeal did in fact find that Ofcom acted in breach of EU law. Ofcom says that it did not. There is then a question as to whether the principle in *Lady & Kid* applies beyond unlawfully paid taxes. I note in passing that, in *R (Hemming (trading as Simply Pleasure Ltd)) v Westminster City Council (No 2)* [2017] UKSC 50 [2018] AC 676 at [8], Lord Mance, with whom the other members of the Supreme Court agreed, expressed the view that it "*may be significant*" that *Lady & Kid* related to tax rather than a fee for a service. I was invited by Mr Elliott to conclude that Lord Mance was mistaken about this, armed as I am (and as the Supreme Court might not have been, though it is impossible to tell) with extracts from the Danish language version of the Judgment. Finally, there is then a further question as to how, even if the principle does apply, it responds to the various issues which have been raised in this case. Contrary to the way that the argument was put by the MNOs, I do not regard it as necessarily obvious that, should I have found for example that Ofcom had not been enriched, or that there was no unjust factor, such that the claims for the net sum failed, this would as a matter of course mean that the MNOs had thereby been deprived of an effective remedy in unjust enrichment. In order fully to address this latter issue, it would be necessary to test each of the bases on which I have not found that the claims failed, with a view to enquiring whether, had I reached a different decision, the reasoning which I might have adopted would have meant that the MNOs were thereby being deprived of their EU law rights to an effective remedy, in the event that the principle in *Lady & Kid* applied and in the event that the Court of Appeal has found a breach of EU law.

110. As I have found that the MNOs' claims succeed, none of these points arises for determination. Nor do I consider it helpful, and indeed I think it positively unhelpful, for me to express views on these issues against a backdrop of conclusions that I have not reached.

Determination

111. I give Judgment for the MNOs in the net sum claimed by each respectively.