

INTEREST AND ENRICHMENT, AGAIN

Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2021] UKSC 31; [2021] S.T.C. 1597 (“*FII (3)*”) marks the third occasion on which the Supreme Court has grappled with the FII Group Litigation. Yet further decisions join the ranks if one counts the other cases arising out of the clash between EU law and the Income and Corporation Taxes Act 1988 (“ICTA”). Not since the swaps litigation has the UK’s apex court given unjust enrichment scholars quite so much material. However, despite this repeated scrutiny, *FII (3)* still belies lingering confusion in the law of unjust enrichment.

The case has a complicated background. Fortunately, however, a relatively simple summary suffices to introduce the unjust enrichment issues on which this note focuses.

From 1973 until 1999, a UK-resident company that distributed profits to its shareholders by declaring a dividend was required, by ICTA s.14 and its predecessor, to pay advance corporate tax (“ACT”) on that dividend. Payments of ACT were ultimately set off, under ICTA s.239(1), against the payor’s eventual liability to pay “mainstream” corporation tax (“MCT”). In effect, ACT was corporation tax paid “early”.

The claimants were members of the British American Tobacco group. The group’s ultimate parent company was resident in the UK, but various subsidiaries were resident in other EU Member States. Profits earned by those subsidiaries were distributed to the parent company’s shareholders. This was achieved by the subsidiary declaring a dividend in favour of the parent company; and then the parent company, in turn, declaring dividends in favour of its shareholders. The latter distribution fell within ICTA s.14, and therefore the parent company was required to pay ACT.

The position was different when a UK-resident parent company received dividends from a *UK-resident* subsidiary. On receiving such dividends, the parent company became entitled under ICTA s.231(1) to a tax credit equivalent to the amount of ACT paid by the subsidiary. This tax credit was, under ICTA s.241(1), set off against any ACT the parent might subsequently have to pay. Therefore, a parent company which received dividends from UK-resident subsidiaries *did not* have to pay ACT when it passed those dividends onto its own shareholders. As a result, companies which received dividends from UK-resident subsidiaries were required to pay less of their tax “early” than those which received equivalent dividends from foreign subsidiaries.

The claimants commenced proceedings in 2003. They claimed that the preferential treatment of UK-resident companies was contrary to Arts. 43 and 56 EC and that, therefore, the levying of ACT had been unlawful. The claimants further contended that they had paid ACT in the mistaken belief that it was lawfully due, resulting in the Revenue being unjustly enriched by the early payment of corporation tax. The claimants accordingly sought restitution.

The trial before Park J began on 28 June 2004. His Lordship proceeded to make a reference to the ECJ to determine the underlying issues of Community law. The ECJ held that the ACT regime was unlawful (Case C466-04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753 at [75]–[112]). In 2008, the matter returned to the High Court.

By the FII saga’s eventual third trip to the Supreme Court, only a handful of relatively unconnected questions were left to be decided. Two of those questions involved issues of unjust enrichment:

- (1) Whether the claimants were entitled to interest in respect of their premature payments and, if so, on what basis (the “interest issue”); and
- (2) Whether the Revenue was enriched by the receipt of ACT given that their gain was offset by ICTA s.231(1), which granted shareholders who received dividends a tax credit equivalent to the amount of ACT paid by the paying company (the “enrichment issue”).

The case also raised six other issues, on which this note will not focus:

- (1) Whether the doctrine(s) of *res judicata*, issue estoppel, or abuse of process required the Supreme Court to determine the “interest issue” on the basis of an earlier concession by the Revenue, notwithstanding that permission to withdraw that concession had been granted (see [58]–[84]);
- (2) What remedy is required by EU law in respect of the claimants having utilised various tax reliefs against MCT which was subsequently held to have been unlawfully levied (see [119]–[159]);
- (3) If the “enrichment issue” would otherwise be decided in the Revenue’s favour, whether EU law precludes this conclusion (see [193]);
- (4) Whether the “enrichment issue” is affected in cases where the Revenue was required to give a tax credit pursuant to a double-taxation treaty rather than ICTA s.231(1) (see [194]–[200]);
- (5) Whether the “Case V” tax levied pursuant to ICTA s.18(3) was not in violation of EU law in virtue of the “standstill” provision in Art. 57(1) EC (see [201]–[222]); and

(6) How the allocation of lawfully- and unlawfully-levied ACT should be determined when a parent company elected to “surrender” its payment of surplus ACT (i.e. ACT not subsequently set-off against MCT) to a subsidiary under ICTA s.240(1) (see [223]–[232]).

By way of background to the “interest issue”: before Henderson J, the Revenue had conceded that the claimants were entitled to restitution of the “unlawfully levied ACT, together with associated interest and loss of use” (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893; [2009] S.T.C. 254 at [238]). This concession was based on the then-authoritative decision in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 A.C. 561, which had recognised a restitutionary claim for the “time value” or “use value” of money. However, by the time *FII (3)* reached the Supreme Court, the law had moved on. In *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2019] A.C. 929 the Supreme Court held (at [73]) that “there is no right to interest [i.e., claim for time value] on the basis of unjust enrichment”. Although *Prudential* concerned a claim for compound interest on the time value itself, the claimants in *FII (3)* conceded (at [103]) that *Prudential* also precluded recovery of compound interest on ACT for the period of prematurity. Instead, the case focused on the claimants’ potential claims for *simple* interest.

The claimants contended that they were entitled to simple interest under the Senior Courts Act 1981 s.35A, as a corollary of the claims they would have had to recover unlawful ACT before it was set off against MCT. Obversely, the Revenue argued that the claimants could only recover interest for the period of prematurity under the Finance Act 2019 s.85(3). The important difference was that s.85(2)(a) of the 2019 Act imposed a stringent limitation period: interest was recoverable only on payments of ACT made after 1 January 1996. In contrast, if the claimants could recover under s.35A, the Limitation Act s.32(1)(c) potentially allowed them to recover interest on payments dating back to 1973.

The Supreme Court decisively rejected the claimants’ arguments.

Their first argument was that the limitation period under the 2019 Act retrospectively denied them an accrued right to interest on the premature payments. However, their Lordships affirmed (at [105]–[107]) that *Prudential* meant that the claimants had no unjust enrichment claim for interest and, therefore, no accrued right of which to be denied.

The claimants’ second argument was that *Prudential* implicitly recognised a right to claim simple interest on premature payments under s.35A. But the relevant statements were, as their Lordships in *FII (3)* noted (at [108]), mere obiter dicta.

The claimants’ third argument was that s.35A created a free-standing claim for interest over the period

of prematurity. However, the Supreme Court held (at [110]–[114]) that interest under s.35A was not itself the proper subject-matter of a claim; instead, it could only be awarded ancillary to “proceedings... for the recovery of a debt or damages”. Accordingly, since: “[t]he set off... of unlawfully charged ACT extinguishes the claimant’s cause of action... there is... no debt, within the meaning of section 35A, for the recovery of which proceedings can be brought” (at [114]).

Finally, the court held (at [115]) that it had no power to award interest under its equitable jurisdiction because ‘a suitable remedy [had] already been provided by Parliament’; and, moreover, there was ‘no common law claim in aid of... which equity can act’.

In the “enrichment issue”, the Revenue argued that it was not “enriched” by receipt of ACT “because the value of their gain was matched by the value of the loss that they suffered as a result of their obligation to recognise the shareholder tax credits [under ICTA s.231(1)]” (at [160]). The Supreme Court held (at [170]) that, in determining the extent to which a payee is enriched, “the court may... have to have regard to liabilities which the defendant incurs as a consequence of receipt of the money”. However, it concluded (at [190]) that there was no causal relationship between the payment of ACT and the obligation to grant the shareholder tax credit: both were independently triggered by payment of the dividend. The tax credit was, therefore, irrelevant to whether the Revenue had been enriched.

Given the concession that *Prudential* precluded a restitutionary claim for interest, the Supreme Court’s analysis of the “interest issue” is legally unimpeachable. The courts have consistently recognised that s.35A interest cannot be awarded on payments made before the commencement of proceedings (*President of India v La Pintada Compania Navigacion S.A.* [1985] A.C. 104 at 124; [1984] 2 All E.R. 773 at 785; *I.M. Properties Plc v Cape & Dalglish (a firm)* [1999] Q.B. 297 at 303–304; [1998] 3 All E.R. 203 at 207); However, the decision leaves the law in a sorry state. Suppose Charles mistakenly pays Danielle £100. Two years later, Charles commences proceedings to recover the payment. If successful, the court has the power to — and likely will — award interest on the £100 under s.35A. Conversely, if Danielle returns the money two years later *without* Charles having commenced proceedings, there is no means by which Charles can recover interest. Clearly, however, whether Charles has come before a court is irrelevant to whether he ought to receive interest.

The fundamental problem is that the denial of a restitutionary claim for interest reflects continued confusion over the concept of “enrichment”. In *FII (3)*, the Supreme Court viewed “enrichment” as a measure of counterfactual betterment. Lord Reed and Lord Hodge treated enrichment and benefit as synonyms (at [169]). Their Lordships also stated that, although a payee is *prima facie* enriched by the amount of money received, the court must “have regard to liabilities which the defendant incurs as a consequence of the receipt of the money” (at [170]); this makes sense only if enrichment is a measure

of counterfactual benefit. While the court does advert (at [170]) to *Benedetti v Sawiris* [2013] UKSC 50; [2014] A.C. 938 — which held that the extent to which receipt of a service is “enriching” is, prima facie, the market value of that service — their Lordships seemingly assumed that this was simply identical to the recipient’s counterfactual betterment.

Respectfully, the Supreme Court’s equation of “counterfactual betterment” and “market value of right/service received” must be incorrect. These measures will often diverge. For example, suppose Danielle hires Charles to dye her priceless collection of Monets violet (a service which surely commands some non-zero market price). Alternatively, suppose Charles gives Danielle £100; causing Danielle’s far-wealthier friend not to give her the £3,000 they otherwise would have given. In both cases Danielle received something of market value but is left counterfactually worse off.

As others have noted (e.g. Stevens (2018) 134 L.Q.R. 574, 578–581), much of this area of law has actually focused on the defendant’s receipt of something with market value, rather than their counterfactual betterment. For example, in *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36; [2020] AC 1111, the Privy Council advised (at [92]) that “a trustee is enriched by the receipt of money in that capacity” even though trustees derive no benefit from rights they hold on trust. Similarly, in *Planché v Colburn* (1831) 8 Bing. 14; 131 E.R. 305, the defendant hired the claimant to write a book for a periodical publication. Before the work was completed, the defendants abandoned the publication. The claimant sought *quantum meruit* for the work done despite never delivering anything to the defendant — the defendant received a service with a market value, but derived no benefit therefrom. The Court of King’s Bench allowed the claim.

Quantification based on market value is already well established. This was recognised in the context of the receipt of services in *Benedetti v Sawiris* by both Lord Clarke (at [15]) and Lord Reed (at [100]). The same rule also applies to the receipt of rights: see e.g. *Weatherby v Banham* (1832) 5 Car. & P. 228; 172 E.R. 950 (claim for mistakenly transferred Racing Calendars quantified by “the price of the... Calendars”) and *Harrison v Madejski* [2014] EWCA Civ 361 (claim for mistakenly transferred car registration mark quantified, applying *Benedetti*, by the market value of the mark). As Sir Terence Etherton stated in *Harrison* (at [57]): “[the defendant] received something for which there was a ready market... That was therefore the starting point for calculating the amount by which he was enriched”.

In *FII (3)*, Lord Reed and Lord Hodge stated (at [170]) that these “complex questions” about market value do not arise in relation to transfers of money. But, if unjust “enrichment” is in fact concerned with market valuation, these questions are unavoidable. There is a “ready market” for the acquisition of money: it is the market for loans. And, in that market, no one “sells” money for its face value alone; the price of money always includes interest (usually compounded) on top of the principal sum. If it is to

treat restitution of money consistently, the law must also adopt a market value measure in this context. That is to say: when money is mistakenly paid to another, a claim should lie to recover the cost they would have to pay to obtain the amount transferred for the time for which it was in their hands (rather than merely the face value of the money).

Although these conclusions are broadly consistent with the now-overruled *Sempra Metals*, the underlying reasons are markedly different. Lord Nicholls in *Sempra* wrongly considered (at [102]) that an “opportunity to use” money was a distinct benefit transferred in addition to the money itself; his Lordship ought instead to have focused on identifying the market value of the sums transferred.

One potential objection to this analysis is that, since the cause of action arises immediately upon receipt, there cannot be a claim for “the value of £X for N days” (as the relevant duration is not yet determinable). However, courts often use hindsight to quantify claims which are indeterminate when the cause of action accrues (*Golden Strait Corp v Nippon Yusen Kubishika Kaisha; The Golden Victory* [2007] UKHL 12; [2007] 2 A.C. 353). For example, where “user damages” are awarded for the temporary detention of a chattel, the court awards a sum reflecting the cost of hiring that chattel for the period of detention notwithstanding that that period was unknowable at the time the chattel was first converted (*Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246 at 252; [1952] 1 All E.R. 796 at 799).

Alternatively, it might be objected that this approach will leave innocent defendants worse off (see e.g. *Prudential* at [80]). Why should the faultless recipient of a mistaken payment who leaves the money untouched have to pay interest when they eventually return it? But, if unjust enrichment is not concerned with factual benefit, then the absence of benefit cannot be a denial of the claim. Ensuring that innocent defendants are not left worse-off can instead be achieved by recognising a defence (i.e. a new countervailing reason against liability). Indeed, in both *Sempra Metals* (at [119]) and *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] EWHC 4302; [2015] S.T.C. 1471 (at [414]), it was suggested that there could be a change of position where a recipient derives no benefit from the payment.

Finally, one might argue that this approach disproportionately disadvantages the already impecunious. *Benedetti* held (at [17] and [100]) that “market value” should be calculated by reference to the reasonable person in the position of the particular defendant. Consequently, an impecunious recipient will, prima facie, be liable for a higher amount. Precisely this happened in *Kowalishin v Roberts* [2015] EWHC 1333. However, this problem is more apparent than real. In *Kowalishin*, the defendant made beneficial use of the money and would have taken a loan had there been a willing lender (see [97]); it is therefore not problematic to make them pay. And, as mentioned, change of position might protect a

high credit-risk defendant who does *not* make beneficial use of the money.

The claimants' *Prudential*-based concession that they were not entitled to a restitutionary claim for interest might ordinarily have meant that it would not have been appropriate for the Supreme Court to delve into these questions in *FII (3)*. However, the nature of enrichment also remained live in the "enrichment issue", and so there was no reason for the Court not to take the opportunity to clarify matters.

Understanding enrichment in market value terms casts doubt on the correctness of the Supreme Court's reasoning of the "enrichment issue". While the court was right to conclude that the Revenue were enriched by the receipt of ACT, this ought not to have turned on the precise drafting of ICTA. Whether ICTA created a causal link between the payment of ACT and the granting of tax credits is irrelevant to whether the sums paid as ACT have market value. In fact, if the law truly *were* concerned with counterfactual betterment, then the Supreme Court arguably reached the wrong answer. It is artificial to say that the Revenue were made counterfactually better off by receiving ACT because the tax credit was triggered by the payment of the dividend (rather than payment of ACT) — payment of ACT was itself only required because of payment of the dividend.

FII (3) was a welcome opportunity for the Supreme Court to re-examine the relationship between interest and enrichment. Unfortunately, its focus on counterfactual betterment led it to overlook important questions about the market value of money. The result is a law of unjust enrichment in which the availability of interest turns on the arbitrary timing of the commencement of proceedings, and which anomalously fails to treat money claims like claims concerned with services or other rights. But, with vast sums of public money on the line, it is unlikely that this will be the last time the Supreme Court takes an interest in interest in unjust enrichment.

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