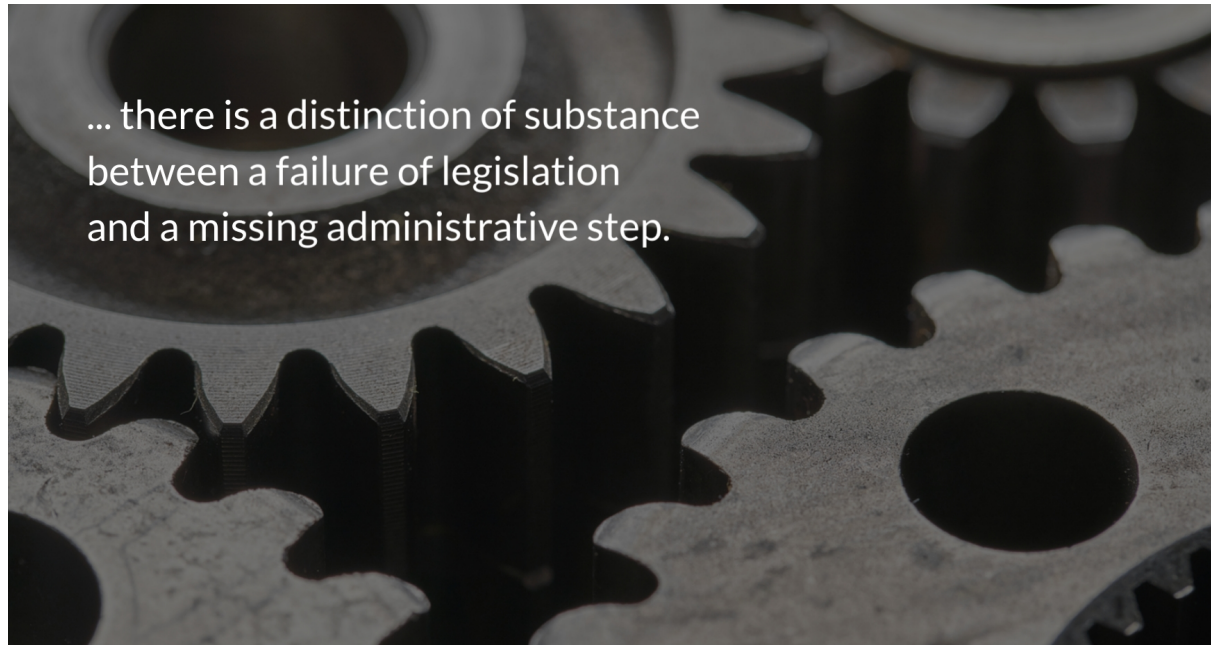


Vodafone v Ofcom: Restitution for unlawfully set charges

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Overview

In *Vodafone Ltd v Office of Communications* [\[2019\] 3 WLR 549](#), the High Court in England ordered restitution of £218 million (plus interest), after the quashing of 2015 regulations that set new fees for spectrum licences. It rejected an argument that the court could assess what charges would have been set had Ofcom acted lawfully (a "counterfactual" approach). Rather, in a *Woolwich* restitution claim, the legality principle means that a court cannot hypothesise different secondary legislation. Thus the mobile network operators (MNOs) were entitled to a refund of all charges in excess of the level set by the previous 2011 regulations.

This outcome differs from what occurred in the New Zealand case *Waikato Regional Airport Ltd v Attorney General* [2004] 3 NZLR 1 (PC). In *Waikato*, the court was prepared to hypothesise the taking of lawful administrative steps that had not in fact been taken, in order to assist its determination of the amount of an appropriate lawful charge. The English High Court distinguished *Waikato* (at [80]) on the grounds that no part of that case required the court to hypothesise the existence of a different law.

Ofcom has appealed the decision to the Court of Appeal, so this will not be the final word on the matter. Meanwhile, this case is significant for two reasons.

- 1) The same approach might potentially apply in New Zealand where the facts are distinguishable from *Waikato*. This might arise, for example, where a legislative instrument is required to impose a new charge.
- 2) The judgment contains a comprehensive discussion about legal principles of unjust enrichment.

Legality principle

The judge's conclusions about the legality principle are summarised in paragraph [90] of the judgment:

(a) ... 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.

The court's reasoning is reflected in the following quotes:

... 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. [65]

... there is a distinction of substance between a failure of legislation and a missing administrative step. [69].

... 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. [71]

Ofcom's case requires the court to hypothesise not the filling of a gap but the replacement of the existing law with something different. [72].

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. [73]

Unjust enrichment framework

After his comprehensive discussion of the legality principle and Ofcom's arguments about adopting a counterfactual approach, the judge went on to analyse the issues within the usual framework for assessing claims of unjust enrichment:

1) Enrichment - has the defendant been enriched? ([92] to [101]): The receipt of money in this case constituted an "enrichment" (an incontrovertible benefit that could not be undermined by Ofcom's arguments about "net enrichment" or by adopting an alternative counterfactual approach).

2) Expense - was the enrichment at the claimant's expense? ([103] to [105]): Correspondingly, the MNOs were "disbenefited", or suffered a loss, by the value of the money paid.

3) Unjust - was the enrichment unjust? ([106]): This question requires a recognised "unjust factor", rather than any more unstructured search for what is "just". The unjust factor in this case was that established in *Woolwich No 2* [1993] AC 70 (HL) (applicable

where public bodies have exacted taxes or other dues without lawful authority). In terms of the arguments raised by Ofcom, the court accepted it is possible 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. That, however, cannot apply if the receipt was itself unlawful, or where the payment represents an unlawful overcharge against an existing and lawful statutory regime.

4) Defences - are there any defences available to the defendant? ([107]): There were no separate defences or counter-restitution claims.

Conclusion

To the extent that this decision is applicable to equivalent circumstances (and pending the English Court of Appeal hearing), this may have significant fiscal implications for public authorities. Litigation can take many years to achieve finality. If a charge-setting decision made through a legislative instrument is ultimately found to be invalid, it may be impossible to retain the incremental charges that ought to have been imposed for those intervening years (depending on whether the previous regime is deemed to have remained in place instead). Validation could only be obtained through legislation of the type discussed in *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2016] 2 NZLR 437 (CA).