Press Notice

HIGH COURT VERDICT Delivered 19-4-02

BAA Fails in High Court Bid to Stop Levy But Government Criticised

The High Court granted the BAA permission to challenge the lawfulness of the aggregates levy, but ultimately found against the BAA. In giving his judgement, Mr Justice Moses made a number of helpful comments in our favour, criticised some of the Government's actions and gave leave to appeal against his judgement.

The BAA argued that the discriminatory treatment of different aggregates and minerals under the legislation violated EU State aid law and the Human Rights Act. In relation to these arguments, the judgment included the following points: · The Government could not avoid the legal challenge simply by arguing that it had made a policy choice to tax some materials and not others. This approach would present serious dangers. · The levy was intended to discourage quarrying for the purpose of extracting "virgin" aggregate, and to encourage the use of recycled aggregate and other alternative materials. · It was accepted that the levy would have effects which would distort competition and affect trade in the EU.

In relation to the environmental justifications for the levy, the judgment included the following points: · Moses J appeared to have some sympathy for the BAA's criticisms of the London Economics methodology upon which the levy was based. He noted that the London Economics survey suggested that recycling – which the Levy aims to encourage – inflicts a much greater environmental cost than most quarrying operations. · Moses J accepted that the levy might mean that waste piles at china clay and slate quarries were simply replaced by waste piles at other quarry sites as their secondary aggregates become unmarketable. · Moses J also accepted that there had been no research on the costs of imposing the levy. · Ultimately, however, the judge considered that these were matters on which Parliament had made social and economic policy decisions which he was not prepared to question.

In relation to the uncertainty which has surrounded the legislation, the judgment contained a number of helpful observations: · It noted that the Government had recognised that there were defects in the Finance Act 2001, and that details of the legislation had been under discussion up to the last minute before implementation. · Moses J noted the BAA's arguments concerning the problems caused by the uncertainty over various features of the levy, including the position in Northern Ireland and the treatment of moisture. · Moses J agreed with the BAA that, in these circumstances, it was unsatisfactory for the Government to ask the industry to rely on the benevolence of Customs officials in deciding whether to apply penalties.

Finally, although Moses J accepted that the BAA had started its claim outside the three month time limit for judicial review, he was prepared to extend the time limit in this case for the following reasons: · The BAA had spent the time since the passing of the Finance Act 2001 participating in consultation which had been of benefit to both the industry and the Government. · The issues raised by the case were of great importance. · It was far better to raise these important issues in a judicial review claim than to wait until Customs tried to enforce the levy in Court.

The BAA takes heart from many of the judge's comments. Moses J recognised the BAA's great commitment to protecting the quarrying industry, and the enormous efforts that it had put into preparing its evidence and legal arguments. However, the BAA believes that it was not helpful to its case that the proceedings did not receive positive support from a wider range of quarry and quarry-products business. Indeed, the Government lawyers were able to use this to suggest that the majority of companies within the industry were not uneasy about the levy and the judge said that it was difficult for him to ignore this.

Association director Robert Durward comments, "It seems reasonable to conclude that if the QPA had stood shoulder to shoulder with BAA on the legal action, when they were asked, instead of acting in this unfortunate manner [note 5] then the outcome might have been very much different."

A written version of the judgement should be available shortly. It will then be necessary to reach a decision on whether to lodge an appeal by 3 May 2002.

Our political effort continues unabated and problems with the levy are now coming to the surface on a regular basis.

NOTE: Collecting the levy. BAA is now advising any of its members who have been withholding invoices, to go ahead and charge out the tax to protect their viability. Although we have been given leave to appeal this will take at least 6 weeks.

ENDS:

Notes to Editors.

- Any appeal would have to be made to the Court of Appeal in London, although the Court of Appeal could refer the matter to the European Court of Justice in Luxembourg for a final decision.

- The effects of the levy have not yet been fully appreciated as most quarry operators have yet to charge out the levy to their larger customers.

- A number of disputes are already brewing between suppliers and contractors, many of whom are locked into fixed price contracts.

- Section 43 of the 2001 Finance Act (which allows contracts to be revised to take account of the levy) does not apply to added value products such as ready-mixed concrete, blocks and asphalt.

- It emerged during the case that the QPA had copied a confidential proposed joint BAA / QPA policy document to the Government. This was produced in court along with a critical letter from QPA director general Simon van der Byl and used to undermine the BAA position

Contact Robert Durward - Director, British Aggregates Association