



**Herbert Smith Freehill's note of the judgment and order given in the oral directions hearing of British Aggregates Association's application that the appeal of Moses J's judgment in R(British Aggregates and Others) v HM Treasury [2002] EWHC 926 no longer be stood out of the list**

Presided over by: Longmore LJ, Beatson LJ

Counsel for the appellants: David Anderson QC, Kelyn Bacon

Counsel for the respondent: Melanie Hall QC, Gerry Facenna

1. **LONGMORE LJ**

1.1 **Overview**

This is an application by the appellants that a stay imposed on the appeal for which they were given permission when Moses J gave judgment in April 2002 be lifted in order that the appeal may proceed. The application is resisted by the respondent, HM Treasury, who contend that the stay should continue, despite the stay lasting so far for approximately ten years.

1.2 **Background**

There is no need for an extensive explanation of the background.

It concerns the aggregates levy, which was introduced by the Finance Act 2001, effective April 2002, with the aim to incorporate the environmental cost of aggregates into the market price and promote recycling. The levy is presently £2 per tonne.

The appellants are an association representing the interests of independent quarry companies along with two quarries who are subject to the levy.

Shortly before the levy was to come into force the appellants brought a judicial review claim challenging the levy under EU law, as well as other human rights and public law grounds. Interim relief was applied for and Moses J decided that in place of interim relief, a speedy judicial review was best. There was a 3 day hearing in March 2002 and his judgment was handed down on 19 April 2002. Moses J held that in broad terms, on the issue of state aid (which is the only question now remaining) the levy did not constitute state aid because it derived from the basic principles which underlay the scheme.

The European Commission (the '**Commission**') were also invited to consider the question on state aid and on 24 April 2002, nine days after the complaint was made to them, adopted a decision not to raise any objections to the levy – it did not comprise any state aid as it was justified by the logic and nature of the tax system.

Moses J gave the appellants permission to appeal. The appellants appealed both Moses J's judgment and challenged the decision of the Commission in the Court of First Instance ('**CFI**') (as it then was, now the General Court). They proposed a stay of the proceedings in the Court of Appeal pending resolution at EU level. This was requested by a letter from Herbert Smith Freehills (then Herbert Smith) to the court dated 16 May 2002, stating the appellants' intention to apply to the CFI for the Commission's decision to be annulled. The same letter notes that:

*"There is a very considerable overlap between the issues which our client intends to raise in its application to the CFI and the issues which will fall to be considered by the Court of Appeal in relation to our client's appeal on State aid. A favourable decision from the CFI would require the Commission to reach a new decision either as to whether the scheme of the Levy confers State aid or [which I think means and] as to whether such State aid is compatible with the EC Treaty. The decision of the CFI, and any consequential decision of the Commission, would bear directly on the State aid issues raised in our client's appeal."*



It also estimated that the CFI's judgment could be obtained within ten months. The appeal was stood out by Master Venn for ten months. The standing out has continued to now.

The CFI took cognisance of the matter, which resulted in agreement with the Commission's first decision. The appellants appealed that CFI decision to the European Court of Justice which in 2008 set aside the judgment of the CFI and remitted the matter back to the General Court. The General Court then in March 2012 annulled the Commission's original decision and remitted it to the Commission. The Commission is now reprised of the matter. It has been explained to us what the Commission's options are but there has, as yet, been no decision despite preliminary investigation. It is felt that they are likely to open a formal investigation.

The appellants made an application that the stay on the appeal be lifted which was heard in July 2012 by Stanley Burnton LJ but, at that time, it was anticipated that the Commission position would be known by Spring this year. A directions hearing was ordered to determine how to proceed.

The current position is that the Commission have reached no decision. A formal investigation is anticipated. There is no way of predicting the results of the formal investigation.

### 1.3 **Contentions**

The appellants say that the time has come to lift the stay and proceed. The respondent says the stay should not be lifted, but accepts that it is for the discretion of this court to decide.

Ms Hall QC for the respondent has emphasised matters which should govern this court's discretion:

- 1.3.1 There is a risk of inconsistent decisions between this court and the Commission.
- 1.3.2 Aspects of the case, especially of compatibility, are within the sole and exclusive jurisdiction of the Commission and therefore the appeal cannot decide the entire case at hand.
- 1.3.3 The duty of mutual cooperation between national courts and European institutions means that, in Ms Hall's submission, the appeal should only proceed if there is scarcely any risk of an inconsistent decision. If the court feels that it cannot decide without the assistance of the EU institutions, any issue can be referred to the European Court.
- 1.3.4 The appellants will have a voice if the Commission opens a formal investigation as well as the possibility of interim relief.
- 1.3.5 With concurrent jurisdiction, it is usually cheaper and more consistent with the overriding objective if the court with the most ample jurisdiction makes the decision.

Mr Anderson submits that time has passed and that it has been so long that any further delay would deny the appellants any prospect of relief of any kind.

### 1.4 **Decision**

This matter is complicated by the fact that, due to the passage of 10 years, new European law allows the appellants to argue that not just the exemptions granted are an impermissible state aid and that there should be recovery from the beneficiaries but the entire levy itself may constitute unlawful state aid, meaning that any money paid pursuant to the levy could be recoverable. This point was not argued before Moses J but permission was given by Stanley Burnton LJ.

This is a matter for the court's discretion. It seems to me that at some stage the appeal has to be decided, whether now or at a time in the indefinite future.



On balance, despite Ms Hall's arguments which have weight, the risk of inconsistent decisions and the fact that any decision may not be the end of the matter because of the issue of compatibility, the time has come where this appeal should now be heard and the court should do its best to grapple with the issues.

If Beatson LJ agrees, we will consider appropriate directions.

2. **BEATSON LJ**

I agree.

Ms Hall's submission that we should concentrate on the time since the most recent judgment is a strong one. She accepted, however, that the background of delay which preceded that should not be set aside.

We have no knowledge of when the European process will complete and, with the possibility of legal challenges, if the past timetable is anything to consider it could be a further decade and it would be wrong to let the risk of inconsistency control the outcome.

This would possibly be different if Europe had issued a clear timetable.

3. **SUMMARY OF ORDER**

IT IS ORDERED THAT:

- 3.1.1 the Appellants file a skeleton argument by 21 May 2013;
- 3.1.2 the Respondent file a skeleton argument by 19 June 2013;
- 3.1.3 a further directions hearing be listed for the first available date after 19 June 2013, for the purpose of setting out all further necessary directions for the hearing of the present appeal. The parties shall seek to agree an agenda for that directions hearing 7 days in advance and shall file and exchange written submissions at least 3 working days before the hearing;
- 3.1.4 a hearing be listed for 3 days thereafter, for the hearing of the present appeal;  
and
- 3.1.5 the Respondent pay the Appellants' costs of this application.

Time summary

Start time – 10:37

Adjourned – 13:05

Start time – 14:22

Judges retire – 15:05

Judgment given – 15:10

End time – 15:53