Case No: C1/2002/0940(B)

**Neutral Citation Number: [2013] EWCA Civ 720**

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**QUEEN’S BENCH DIVISION**

**ADMINISTRATIVE COURT**

**(MR JUSTICE MOSES)**

Royal Courts of Justice

Strand

London WC2A 2LL

Wednesday, 10 April 2013

**Before:**

**LORD JUSTICE LONGMORE**

and

**LORD JUSTICE BEATSON**

**Between:**

**BRITISH AGGREGATES ASSOCIATION AND OTHERS**

**Applicants**

**--and--**

**HER MAJESTY'S TREASURY**

**Respondent**

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

**Mr David Anderson QC** and **Miss Kelyn Bacon** (instructed by Herbert Smith Freehills LLP) appeared on behalf of the **Applicants**

**Miss Melanie Hall QC** and **Mr Gerry Facenna** (instructed by HMRC Solicitors) appeared on behalf of the **Respondent**

**JUDGMENT**

**(Approved)**

**Crown copyright**©

**Lord Justice Longmore**:

1. This is an application by the appellants that a stay imposed on the appeal for which they were given permission by Moses J when he gave judgment in April 2002 should now be lifted so that the appeal may proceed. The application is resisted by the Treasury, who say that the stay should continue, although it has been in existence now for approximately ten years.
2. I need not give too much of the background to this case. It concerns an aggregates levy introduced by the Finance Act 2001 and effective in April 2002, the aim of which was to incorporate the environmental costs of quarrying aggregate within its market price and to promote the use of recycled aggregates and/or certain waste products as an alternative. The rate of the levy is presently £2 a tonne.
3. The appellants are an association representing independent quarrying companies, and there are also two quarry operators who are subject to the levy.
4. Shortly before the levy was introduced, the appellants brought a judicial review claim challenging the levy under EU law, as well as on other human rights and public law grounds, and interim relief was applied for. It seemed a good idea to Moses J that, instead of getting involved with questions of interim relief, there should be a speedy hearing of the judicial review. He heard the judicial review over three days in March 2002 and gave judgment on 19 April 2002. He held that, in broad terms, on the question of state aid, which is now the only question that divides the parties, the levy did not amount to state aid because it derived from the basic principles which underlay the scheme.
5. The European Commission had also been invited to consider the question, and on 24 April 2002, only nine days after a complaint had been submitted to them, the Commission adopted a decision not to raise any objections to the levy. Like Moses J, they decided that the levy did not comprise any elements of state aid since its scope was justified by the logic and nature of the tax system.
6. The appellants lodged a notice of appeal, Moses J having granted permission to appeal. They also decided to challenge the Commission's decision in the European Court of First Instance (“CFI”), now the General Court, and they then proposed that the proceedings should be stayed pending resolutions of the issues at the EU level and a stay was imposed on the appeal. Herbert Smith for the appellants wrote to the court on 16 May 2002 saying this:

"There is a very considerable overlap between the issues which our client intends to raise and the issues which 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 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."

They added that, if the CFI agreed to expedite the matter, judgment could be obtained in about ten months. In those circumstances, the Revenue and Customs agreed that the sensible course then was the appeal should be stayed, and Master Venne, because it was so long ago when he was the Registrar of Civil Appeals, stood the appeal out at that stage for ten months. That standing out of the appeal has continued to this date.

1. The CFI then took cognisance of the matter. They agreed with the Commission and the appellants then took the matter to the European Court of Justice, which set aside the decision of the General Court in 2008 and remitted the case to the General Court for further decisions to be made, and in March 2012 the General Court annulled the original Commission decision and remitted the matter to the Commission to make another decision.
2. It has been explained to us what the various options are open to the Commission, but the Commission has so far not made any decision as to what to do. It is thought that it is likely that they will decide to open a formal investigation. But the question arises what should now happen to the appeal, which is so far stayed. There was an application that the stay be lifted, which came before Stanley Burnton LJ in July of last year, and it was then anticipated that the position of the Commission would be known in the spring of this year, and he ordered that a directions hearing should be held in order to determine how the matter should proceed in the light of what the Commission had then decided. As it is, the Commission has not decided anything. As I say, the anticipation is that it will decide to hold a formal preliminary investigation, the results of which of course it is impossible to predict at the moment.
3. The appellants say the time has now come when the stay should be lifted. They have permission to appeal, and the appeal should proceed. The Treasury say that the stay should not be lifted, but accept that it is a matter for the discretion of this court.
4. Miss Melanie Hall for the Treasury has emphasised the matters which should govern our discretion in this matter: firstly, that if the appeal goes ahead there will be a risk of inconsistent decisions; secondly, that there are aspects of the case, particularly in relation to compatibility with the EU Treaty, which are within the sole and exclusive jurisdiction of the Commission, so if the appeal goes ahead not everything will be decided on the appeal. She has also pointed out the requirements for mutual co‑operation which are necessary between this court and the EU institutions and she submits that, as a matter of that mutual co‑operation, an appeal should only proceed if there is scarcely any risk of inconsistent decisions being arrived at. Of course, if this court feels that it cannot reach a decision without the assistance of the European Court, any question which needs resolution can be referred to the European Court. She points out also that the appellants have a perfectly good voice if the Commission does open a formal investigation procedure, and if necessary they can also apply for interim relief, which was unnecessary in the light of the way matters originally proceeded before Moses J.
5. Miss Hall also emphasises the fact that, where there are concurrent jurisdictions, it is usually cheaper and thus more consistent with the Overriding Objective if the institution with the most ample jurisdiction makes the relevant decisions. There is obviously force in everything she says.
6. Mr Anderson for the appellants submits that the time that has passed is so long that yet further delay means that effectively these appellants will be denied any prospect of relief of any kind.
7. The matter is complicated by the fact that, as a result of the passage of the ten years, new European law apparently gives the appellants an opportunity to argue not merely that the exemptions which have been granted in respect of the levy amount to impermissible state aid, which if true might, I suppose, mean that the monetary equivalent of that state aid could be recovered from the beneficiaries, but also in some circumstances the entire levy can be said to be unlawful and therefore that any money paid pursuant to the levy can be recovered. That was a point not argued in front of Moses J, but Stanley Burnton LJ has given permission for that point to be argued as a new point solely of law, which has arisen solely due to the passage of time.
8. This is a matter for the court's discretion. It does seem to me that at some stage the appeal for which Moses J has given permission has to be decided, and the question is whether it should be decided now or whether it is to be decided at some time in the indefinite future which is impossible to predict. On balance, despite the arguments of Miss Hall, which as I say have a considerable amount of force, nevertheless it seems to me that, despite the existence of risks of the possibility of inconsistent decisions and the fact that any decision of this court may not be the end of the matter, because one still has to consider the question of compatibility as well as selectivity, nevertheless this appeal should now be heard and the time has come when the court should do its best to grapple with the issues to which it gives rise. If my Lord agrees, we will then go on to consider the appropriate directions in relation to a decision made in 2002 where the issue will be whether that decision was correct when it was made.

**Lord Justice Beatson**:

1. I agree. Miss Hall's submission that one should concentrate on the time that had lapsed since the most recent decision of the General Court was a strong one, but she accepted that one should not set aside the background of delay which preceded that. Through the fault of nobody before this court, there is absolutely no certainty as to when the European process will conclude. Both parties will have the opportunity of legal challenges. If the timetable of the past is replicated these could take a further decade. In these circumstances, I consider that it would be wrong to let the risk of incompatible judgments and decisions control the outcome. The position would have been different had there been a clear timetable and some knowledge of when the European system would do its stuff.

**Order:** Application granted (for further directions hearing)