Neutral Citation Number: [2002] EWHC 197 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Strand
London
WC2A2LL

4 February 2002

B e f o r e :

MR JUSTICE NEUBERGER

CAPITAL ONE DEVELOPMENTS LIMITED **Claimants**

- v –

COMMISSIONERS FOR CUSTOMS & EXCISE **Defendant**

Tape Transcription by Smith Bernal Ltd
190 Fleet Street, London,
Telephone 020 7404 1400
(Official Shorthand Writers to the Royal Courts of Justice)

MR MICHAEL PATCHETT-JOYCE (instructed by Messrs Penningtons) appeared on behalf of THE CLAIMANTS
MR JONATHAN PEACOCK QC (instructed by the Solicitor for HM Customs & Excise) appeared on behalf of THE DEFENDANT

HTML VERSION OF JUDGMENT (AS APPROVED BY THE COURT)

MR JUSTICE NEUBERGER:

Introduction

1. This is an application by Capital One Developments Limited, ("the claimants)" for an order that the Commissioners for Customs and Excise ("the Commissioners") pay them a sum of nearly £8 million, which is currently the subject of a bona fide disputed claim by the claimant before the VAT and Duties Tribunal ("the Tribunal"). The application raises questions relating to the court's jurisdiction to make an interim order for payment of input VAT which is subject to a disputed claim pending the resolution of the dispute by the Tribunal.

The Facts

2. The claimants together with other companies in the Capital One group ("the group"), entered into a series of transactions designed to optimise the VAT position of the group in relation to the construction of a building at Station Road, Nottingham. As a result of these transactions and the construction of the building, the claimant made a VAT return for the period 4/2000 seeking a payment of about £8 million. The Commissioners rejected this claim on 27 July 2001. The claimants appealed that decision to the Tribunal to whom such appeals are directed by section 83 of the Value Added Tax 1994 ("the 1994 Act"). It appears that this appeal may well be heard in about three months time, with an estimate of ten days.

3. The facts and principles on which the substantive claim to the £8 million is made and resisted are not relevant for the purposes of this application. It is sufficient to say that each party accepts that the other party has a reasonable arguable case and that at least if the facts are determined by the Tribunal favourably to the Commissioners, the issues of law are agreed to justify a reference to the European Court of Justice ("the ECJ").

4. In March 2001, before it issued the appeal to the Tribunal, the claimants sought payment of the £8 million from the Commissioners on the basis that, if the claimants' contention was correct, they were being wrongly deprived of a substantial sum which they could profitably employ, and if the claimants' contention turned out to be wrong the repayment of the £8 million to the Commissioners would be guaranteed by a bank in the Capital One group. This request was rejected by the Commissioners. After further discussions the claimants issued the present application which effectively repeats the proposal of March 2001.

The Prima Facie Position

5. The order sought by the claimants is an interim order in the sense that it would result in something happening, namely money being paid for a potentially temporary period in that the order would effectively be rescinded -- indeed, its effect reversed -- in the event of the decision of the Tribunal being adverse to the claimants.

6. At first sight, therefore, the claimants' case suffers from two defects. First, the court should not grant interim relief where it has no jurisdiction to grant final relief. Secondly, in any event, the court should not order a payment of money where the defendant's liability is disputed, save in accordance with principle applicable to an interim payment, which cannot be invoked by the claimants here.

7. So far as the first point is concerned, it appears to me that, at any rate in general, a court cannot grant an interlocutory injunction where there is no substantive action which it could entertain. That is well illustrated by the fact that if no claim form has been issued when an interim injunction is sought, the court will invariably require, as a condition of granting the interim injunction, an undertaking to issue a claim form. In this connection, it is true that the terms of section 37 of the Supreme Court Act 1981, which empower the court to grant an injunction, are very wide indeed. However, I do not think that they would enable the court normally to make an interlocutory order where there are no facts which would enable it to entertain an action in connection with the issue: see, for instance, Siskina [1979] AC 210, 254E.

8. Section 24(1)(a) of the Civil Jurisdiction and Judgments Act 1982 specifically empowers the court to grant interim relief in a "case where the issue to be tried relates to the jurisdiction of the court to entertain the appeal and that section 25(1) of the same Act gives the court power to grant interim relief, even where there are no proceedings on foot. However, it appears to me that the very existence of these statutory provisions indicates that, in their absence, the court would have no jurisdiction to grant such orders.

9. Section 25(1) of the 1982 Act has no application here. It is concerned with cases falling within the Brussels or Lugano Conventions. Section 24(1)(a) has no application because the court would have no jurisdiction to determine the issue as to the liability of the Commissioners for payment of the £8 million. That is because that is the very issue which the 1994 Act has directed be determined by the Tribunal: see the discussion in Glaxo Group Plc v Inland Revenue Commissioners [1995] STC 1075, 1080H-1084C per Robert Walker J.

10. As to the second point, while it may be wrong to suggest that it is an absolute principle, it seems to me that it

would require very special facts before a court would be prepared to use its powers to grant an interim injunction to order that a payment of a disputed sum from a defendant to the claimant on the basis that it will be repaid if the claimant lost.

11. Payment into court to protect a fund or to protect a claimant, or a freezing order to protect the claimant is one thing. Payment of a deposited sum to the claimant before judgment, which the claimant may have to pay back if it fails, is quite another. As Mr Jonathan Peacock QC, who appears for the Commissioners, says, the CPR specifically deals with interim payment orders: see rule 25.7. Before any such interim payment order can be made, the court must be satisfied that the claimant will recover judgment for the sum which is to be paid over to it: see CPR rule 25.7(1)(c) and Schott Kem Ltd v Bentley [1991] 1 QB 61,71E-F, per Neill LJ.

12. It is not suggested on behalf of the claimants that this is such a case. Given those restrictions in respect of interim payment, while I do not say that the court could never use its wide interlocutory jurisdiction to order an interim payment on a returnable basis, I think it would require a very exceptional case before that would be done.

The Issues

13. Mr Michael Patchett-Joyce, who appears on behalf of the claimants, contends, however, that the present application is justified because of the court's duty to ensure that the VAT regime is managed and run in conformity with the Sixth Directive (Council Directive 77/388 OJL145 of 13 June 1977), as interpreted by the ECJ. In particular he says, where the court would otherwise have no jurisdiction to make an order, the Sixth Directive by its terms, and as interpreted by the ECJ, may effectively accord to the court such a power, with the result that the court will have jurisdiction. In other words, if an aspect of the Sixth Directive has direct effect, then this court must give effect to it.

14. I accept that proposition as a matter of principle, which is helpfully summarised in paragraphs 2 and 3 of Halsbury's Laws (4th ed, reissue) Vol 49-1, and I do not understand Mr Peacock to challenge it.

15. Mr Patchett-Joyce's case primarily relies on Articles 17 and 18 of the Sixth Directive, and in particular Articles 17(1) and 18(4). Article 17 is headed "Origin and Scope of the right to deduct", and Article 17(1) is in these terms:

> "The right to deduct shall arise at the time when the deductible tax becomes chargeable."

16. Article 18 is headed "Rules governing the exercise of the right to deduct. Article 18(4) provides as follows:

> "Where for a given tax period the amount of authorised deductions exceeds the amount of tax due, the member states may either make a refund or carry the excess forward to the following period according to the conditions they shall determine. However, member states may refuse to refund or carry forward if the amount of the excess is insignificant."

17. These provisions have substantially been brought into domestic law through the medium of sections 25 and 26 of the 1994 Act. In this connection I should refer in particular to sections 25(1)-(3) inclusive, which provide as follows:

(1) A taxable person shall -

> (a) in respect of supplies made by him; and
>
> ….

account for and pay VAT by reference to such periods at such time and in such manner as may be determined by or under regulations and regulations may make different provisions for different circumstances.

(2) Subject to the provisions of this section he is entitled at the end of each prescribed period to a credit for so much of his input tax as is allowable under section 26 and then to deduct that amount from any output tax that is due to him.

(3) If either no output tax is due at the end of the period or the amount of credit exceeds that of the output tax then subject to subsections (4) and (5) below the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners. An amount which if due under this subsection is referred to in this Act as a VAT credit."

18. Without going into the details of this case, the claimants' contention is that the £8 million became due more than a year ago, pursuant to these provisions.

19. Mr Patchett-Joyce argues that in light of the reasoning and decision of the ECJ Garage Molenheide BVBA v Belgium [1998] All ER EC 61 ("Molenheide"), this court not only has jurisdiction to grant the claimants' current application, but that the court ought to grant the claimants' application.

20. The argument on behalf of the Commissioners to the contrary is as follows:

(a) Molenheide does not apply to the present application;

(b) Whether or not that is right, the procedure adopted by the claimants is wrong; they should have applied for judicial review, and therefore this court should not grant the relief sought;

(c) Even if the court does have power to grant the application, it should not do so.

I shall consider those three questions in turn.

Does Molenheide apply?

21. I n Molenheide the ECJ had to consider four cases where a taxpayer had claimed a payment under the equivalent of Article 18(4) and the Belgian domestic legislative equivalent of section 25(3) of the 1994 Act. The Belgian authorities refused to make the payment, relying on another provision of the Belgian legislation, because they suspected that, in each case, the taxpayer owed them a VAT debt which did not appear from his return or previous returns. The taxpayer contended that the Belgian legislation which permitted the authorities to take that attitude was incompatible with the Sixth Directive. In their judgment the ECJ concluded, at paragraph 44 [1998] All ER EC 93D-E, that Articles 17 and 18 do "not in principle preclude measures of the kind in issue in the main proceedings". Then at paragraphs 45-48, [1998] All ER EC 93E-J, the ECJ said this:

> "45. As regards next the effects which the principle of proportionality may have in this context, it must be emphasised that whilst member states may in principle adopt such measures, it is nonetheless the case that those measures are liable to have an impact on the national authority's obligation to make an immediate refund under Article 18(4) of the Sixth Directive.
>
> 46. Thus in accordance with the principle of proportionality the member states must employ a means which, whilst enabling them effectively to attain the objective pursued by their domestic laws are the least detrimental the objectives and the principles laid down by the community legislation.
>
> 47. Accordingly, while it is legitimate for the measures adopted by the member states to seek to preserve the rights of the Treasury as effectively as possible, they must not go further than is necessary for that purpose. They may not, therefore, be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant community legislation.
>
> 48. The answer to be given in that regard must therefore be that the principle of proportionality is

applicable to the national measures which like those at issue in the main proceedings are adopted by a member state in the exercise of its powers relating to VAT since if those measures go further than necessary in order to attain their objective they would undermine the principles of the common system of VAT and in particular the rules governing deductions which constitute an essential component of that system."

22. At paragraphs 56-61 [1998] All ER EC 94J-95F the ECJ went on to say:

> "56. Consequently, provisions of laws or regulations should prevent the judge hearing attachment proceedings from lifting in whole or in part the retention of the refundable VAT balance, even though there is evidence before him which would prima facie justify the conclusion that the findings of the official reports drawn up by the administrative authority were incorrect, should be regarded as going further than is necessary in order to ensure effective recovery and would adversely affect to a disproportionate extent the right of deduction.
>
> 57. Similarly, provisions of laws or regulations which would make it impossible for the court adjudicating on the substance of the case to lift in whole or in part the retention of the refundable VAT payments before the decision on the substance of the case become definitive would be disproportionate.
>
> 58. Third, the plaintiffs observe that it is impossible for a taxable person to request a court to adopt in place of the retention a different protective measure which is sufficient to protect the interests of the Treasury and it is less onerous for the taxable person, such as, for example, the provision of a bond or bank guarantee. Such a possibility is open only to the tax authority and is entirely a matter of its discretion.
>
> ….
>
> 61 it must be observed that the exercise of effective judicial review of the kind described above, in
>
> particular if both the court adjudicating on the substance of the case and the judge hearing attachment proceedings were able to grant the taxable person at his request and at any stage of the procedure a total or partial lifting of the retention would suffice to eliminate any lack of proportionality in the calculation of the amounts retained, in particular as far as penalties are concerned."

23. Mr Patchett-Joyce contends that these observations of the ECJ are directly applicable to this case. In that case, as in this case, the domestic VAT authorities were seeking to withhold payment to a taxpayer of a sum which was claimed by the taxpayer effectively pursuant to Article 18(4) of the Sixth Directive and its domestic equivalent. On the other hand, Mr Peacock argues that Molenheide is of no little assistance in the present case. He says that in Molenheide the authorities had admitted the taxpayer's prima facie right to a payment under Article 18(4), but had raised on a potential claim that they had against the taxpayer, effectively as a cross-claim to justify non-payment of that claim. On the other hand, he points out that in this case the Commissioners are raising a bona fide reasonable contention that the claimants have no right to a payment under Article 18(4) at all.

24. I n my judgment, Mr Peacock is right in his submission that Molenheide is distinguishable on the specific ground he raises, so that the reasoning of the ECJ in that case does not apply here, at least without severe modification. In Molenheide the taxpayer's right to claim a payment under Article 18(4) or its domestic equivalent was admitted by the Belgian authorities. Accordingly the Sixth Directive gave a right to the taxpayer to payment which (to quote the ECJ) was "a fundamental principle of the common system of VAT", and any measure which impinged that right would risk "undermining the common principle of VAT". Accordingly the measures relied on by the Belgian authorities were considered critically by the ECJ and were held to be open to being disapplied or modified by the national courts.

25. In this case, the fundamental dispute between the Commissioners and the claimants is not whether the claimants

should be paid a sum which they are admittedly entitled to claim: it is whether the claimants are entitled to maintain their claim at all. Indeed, if the Tribunal were to decide the substantive issue in favour of the claimants, there would be no dispute: subject to being repaid if the Commissions successfully appeal, the £8 million would be paid to the claimants pursuant to section 84(8) of the 1984 Act, together with such interest and at such rate as the Tribunal may determine. Accordingly, given that the Commissioners have a bona fide arguable case that the claimants have no claim, it cannot be said that their conduct encroaches on the principles of the common system of VAT in the same way as the Belgian measures under consideration in Molenheide.

26. The conclusion can be supported by the following point. If the Commissioners were to make the payment sought by the claimants and the claimants ultimately fail, it could be said that (albeit for a limited time) the payment of £8 million to the claimants, which on this hypothesis should not have been made, would "undermine the common principle of VAT". In other words, until the determination of the Tribunal is known (subject to any appeal) it is a matter of speculation whether failure to make an interim payment or the making of an interim payment would arguably contravene the fundamental principle. That is not a point which could have been made in Molenheide for the reasons I have explained.

27. On the other hand, I incline to the view that the question of proportionality identified in paragraphs 46 and 48, and referred to in paragraph 61, of the judgment of the ECJ, has some part to play in a case such as this, so that the courts can -- indeed in an appropriate case should -- be prepared to intervene, but not nearly as readily as in a case such as Molenheide. In this connection Mr Peacock contends that the wide powers of management given to the Commissioners by paragraph 1 of Schedule 11 to the 1994 Act, which states that VAT shall be under the care and management of the Commissioners, gives them a discretion to make an interim payment to a taxpayer, who has raised a bona fide disputed claim, on the basis that it will be repaid to the Commissioners if the taxpayer fails. This is not challenged by Mr Patchett-Joyce.

28. In my view, the doctrine of proportionality discussed in Molenheide would apply to the exercise of this discretion. First, it does not seem to me that there is any good reason why the principle of proportionality identified and discussed in Molenheide by the ECJ should not apply to such a case. Secondly, it appears to me that the reasoning of the Advocate General in Molenheide, who reached the same conclusion as the ECJ, at least in places to suggest that the application of the doctrine of proportionality, does not merely embrace cases such as in Molenheide where the VAT authorities accepted that the claim was justified. In this connection, some of the observations of the Advocate General, if taken out of context, might appear to support Mr Patchett-Joyce's contention that the conclusion in Molenheide should apply in a case such as this. But, in my judgment, a fair reading of the Advocate General's reasoning in its context demonstrates that his view was substantially the same as that of the ECJ. Nonetheless, to my mind, his observations do suggest that proportionality has a part to play when the Commissioners come to exercise their collection or payment powers in relation to VAT.

29. Thirdly, this view seems consistent with the obiter observations of the Court of Appeal in Han v Customs and Excise Commissioners [2001] 1 WLR 2253, per Potter LJ, with whom Mance LJ agreed, at paragraphs 28-31 at page 2261C- G, where Molenheide was cited.

30. Before turning to the other two main issues I should deal with two further points. First, Mr Patchett-Joyce also relied on Article 1 of the First Protocol to the European Convention on Human Rights which he contends can be invoked by the claimants here. In my judgment, that takes matters no further. I am prepared to assume in the claimants' favour that the disputed claim for payment is a "possession" within Article 1 of the Protocol, which is an open question in light of Marks & Spencer Plc v Customs and Excise Commissioners [1999] STC 205, 234E per Moses J, and [2000] STC 16, 38G-39C per the Court of Appeal, and now discussed in the same case by the Advocate General in his opinion of 24 January 2000 at paragraphs 75-77.

31. The current attitude of the Commissioners and the procedure for appealing laid down in section 83 of the 1994 Act cannot to my mind sensibly be said to deprive the claimants of that claim. They are free to pursue the appeal to the Tribunal and, if successful, that appeal will result in their claim being upheld, an order for the payment of money, and the likelihood for an order for payment of interest. It is not suggested that the delay in the appeal procedure is excessive or that there is any unfairness in the procedure itself.

32. The second further point is Mr Peacock's contention that the court has no jurisdiction to entertain the present application in light of the exclusive jurisdiction principle discussed in Glaxo [1995] STC 1075 in the passage to which I have referred. It is true that the Tribunal has jurisdiction to order payment of the £8 million if in due course it allows the claimants' appeal: see section 84(8) of the 1994 Act. I would accept therefore that the exclusive jurisdiction principle means that the court would never, or at least only in the most exceptional circumstances, consider making such an order which would involve usurping the Tribunal's function of making the initial determination of the substantive dispute between the taxpayers and the Commissioners.

33. However, in the instant case what is being sought by the claimants is an interim payment of the amount they claim with an obligation to repay if the Tribunal decides in favour of the Commissioners. Such relief is not within the jurisdiction of the Tribunal. Accordingly, the exclusive jurisdiction principle has, in my view, no part to play.

Procedure: Judicial Review

34. In my judgment, in the absence of any European law dimension, it would be virtually self-evident that the primary decision maker on the question of whether or not to make an interim payment as sought by the claimants would be that of the Commissioners. Indeed, that is inherent in the fact that paragraph 1 of Schedule 11 to the 1994 Act applies. The court would be entitled to examine that conclusion, but would do so through the means of judicial review. I do not see why the incidence of European law and proportionality should make any difference. Indeed, it would lead to greater delays, expense and inconvenience to the Commissioners and to taxpayers, and indeed to other litigants, if any application for an interim payment had to be made to the court rather than the Commissioners. There could be a myriad of applications if the court was the primary decision maker, or, indeed, even if the appellate function of the court was exercised on the basis of a re-hearing rather than a judicial review.

35. If the court's power is, as I think, limited by the fact that it can only reverse the Commissioners' refusal to make an interim payment on what I might call judicial review grounds, it does not mean that when considering the Commissioners' decision the court cannot take into account the principles of proportionality. On the contrary, it seems to me clear that if I am right in my view as to the effect of the reasoning in Molenheide, the court would have to take into account proportionality when reviewing the refusal of the Commissioners to make an interim payment.

36. From this it must I think follow that the claimants' application should not have been, as it is, by way of a private law application for an interim payment, in the Chancery Division, but for a judicial review of the Commissioners' refusal to make an interim payment, in the Administrative Court. However, that does not of itself preclude me from dealing with the application.

37. The correct approach to a private law application by an applicant who should have proceeded by way of judicial review was considered by the Court of Appeal in Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988. In that case the Court of Appeal permitted a private law claim to proceed, even though the claim should have been by way of judicial review and even though the claim, which was brought within the limitation period for a private law claim, was well out of time under the time limits laid down for judicial review (then in RSC Order 53, Rule 4(1), now CPR Rule 54.5). At paragraph 17, [2000] 1 WLR 1993H-1994A, Sedley LJ said that in his view:

> "The single most important difference between judicial review and civil suit [is] the differing time limits."

38. Lord Woolf MR also emphasised the importance of this distinction at paragraph 35 at [2000] 1 WLR 1997C-G. At [2000] 1 WLR 36-38 1997G-1998B he said:

> "36. When considering whether proceedings can continue, the nature of the claim can be relevant. If the court is required to perform a reviewing role on what is being claimed as a discretionary remedy,

whether it be a prerogative remedy or an injunction or declaration, the position is different from when the claim is for damages or a sum of money for breach of contract or a tort, irrespective of the procedure adopted. Delay in bringing the proceedings for a discretionary remedy has always been a factor which the court could take into account in deciding whether it should grant that remedy. Delay can now be taken into account on an application for summary judgment under CPR Part 24 if its effect means that the claim has no real prospect of success.

37. Similarly, if what is being claimed could affect the public generally, the approach of the court would be stricter and the proceedings only affect the immediate parties. It must not be forgotten the court can extend time to bring proceedings under RSC Order 53. The intention of the CPR is to harmonise procedures so far as possible and to avoid barren procedural disputes which generate satellite litigation."

39. With that guidance in mind, I should ask myself whether it is right to entertain this application, even though it should not have been brought by way of civil suit, but by judicial review. In my judgment the relevant facts are these:

(1) Although this is an application for payment of money, it is, in my view, a claim for a "discretionary prerogative remedy" not for "breach of contract or a tort". It is therefore more clearly inappropriate for a civil suit, and more clearly appropriate for judicial review, than the claim in Clark [2000] 1 WLR 1988.

(2) The claim was brought within the time limit specified in CPR Rule 54.5. Unlike in Clark, therefore, no question of abuse of process could be raised against the claimants in that connection.

(3) The claim is before a Judge who does not sit in the Administrative Court and has only incidental experience of administrative law cases.

(4) While all the evidence which the claimants would wish to adduce on a judicial review application is, I understand, before the court, Mr Peacock tells me that it is likely that, if the claimants had proceeded by way of judicial review the Commissioners would have put in further evidence. Given that, in a judicial review, the reasoning behind the Commissioners' decision would have been under scrutiny, that point seems to me to have some force.

(5) There is a danger that if I dismiss the application on the ground that it is brought in the wrong forum it will now be too late for the claimants to seek judicial review as they will be out of time for doing so.

40. Bearing in mind justice generally, the thrust of the reasoning of the ECJ in Molenheide, the observations of the Court of Appeal in Clark [2000] 1 WLR 1988, and the thrust of the CPR, it seems to me that I should determine this application if I can do so fairly. However, it appears to me that it would be wrong to determine this case against the Commissioners in light of point (4). Further, I should not determine the case against the claimants unless I am confident in my conclusion, bearing in mind both that judicial review might have produced evidence from the Commissioners helpful to the claimants, and because of point (3). However, if I do not determine this case, I should seek to protect the claimants in light of point (5) if it is possible to do so, given that they applied promptly for relief. Their failure to invoke the proper procedure is scarcely culpable. Indeed to a significant extent this case is in new and unchartered waters with changing topography and even changing oceanography techniques, well illustrated by the reasoning both in Clark [2000] 1 WLR 1988 and Han [2001] 1 WLR 2253.

41. So far as the final point is concerned, Mr Peacock has largely put my concerns to rest by saying on behalf of the Commissioners that the claimant may make a further application for payment of the £8 million, which I presume that the Commissioners would deal with very quickly, whereupon an application for judicial review could be issued.

Conclusions

42. I turn to consider the conclusion I should reach in this case in light of the foregoing points. The factors

favouring the claimants' case are as follows:

(1) The claimants have a real prospect of success in their appeal on the substantive issue, as is conceded by the Commissioners.

(2) The claimants will, on the face of it, be able to make good use of the £8 million as part of the working capital of the Capital One group.

(3) A substantial sum of money is involved and if the claimants are entitled to it, it can be said to be particularly harsh to deprive them of it.

(4) The claimants suggest that they can earn around 16% per annum on their working capital which, says Mr Patchett-Joyce, is substantially more than they are likely to be paid by way of interest by the Tribunal under section 84(8) of the 1994 Act.

(5) The claimants and the group are plainly good for the return of the £8 million to the Commissioners if they lose the appeal, and they have made it clear that they will pay interest on the money while they have it, if they have to return it.

43. These arguments have obvious force. However, I am of the view that the decision of the Commissioners to refuse an interim payment of the disputed £8 million, even with the guarantee offered on behalf of the claimants cannot be faulted. In reaching this conclusion I bear in mind the following factors:

(1) The Commissioners have a real prospect of successfully resisting the claimants' claim before the Tribunal, as the claimants accept.

(2) The decision, whether or not to pay the £8 million on an interim basis to the claimants, is one primarily for the Commissioners. This court should not interfere with that decision unless it can be shown to have been based on irrelevant material, or that the Commissioners have ignored relevant material or have reached a conclusion that they could not reasonably have reached (always taking into account proportionality).

(3) There is no presumption that an interim payment should be made. Mojenheide does not apply in that connection. As mentioned, that is well illustrated by the point, that, if the Commissioners succeed before the Tribunal on the substantive issue, then it could be said to be positively inimical to the principle of neutrality and the principles of VAT, invoked by the ECJ that the claimants should have the £8 million, even for a time, if it turns out that the provisions of the Sixth Directive mean that they should not have had the money.

(4) There is no evidence of particular need, let alone urgency, on the part of the claimants for the £8 million. Not surprisingly, they would prefer to have the money rather than not have it, but no specific special facts are relied on beyond those to which I have referred.

(5) The claimants have a right to seek interest from the Tribunal, and no doubt the Tribunal can and, if it thinks right to do so, will take into account the arguments on which the claimants rely for the payment now of the £8 million, and in particular their contention that they could earn 16% per annum on it. Whether the Tribunal should take that into account and, if so, the way in which they take it into account would obviously be a matter for them. But I do not see as a matter of principle why it is not something which the taxpayer can rely on, particularly once the Commissioners have been made aware of it.

(6) This is not a case where the Commissioners have been said to have been guilty of, or even to have contributed to, any delay so far as the appeal procedure is concerned.

(7) Although the claimant group represents a very good covenant, the claimants can be even more sure that the £8 million will be paid to them if the Commissioners lose before the Tribunal, than the Commissioners can be sure of repayment of £8 million if the claimants lose.

(8) The claim for payment has been outstanding for significantly more than a year and the Tribunal's decision is likely to be forthcoming in less than nine months.

(9) Although by no means conclusively governing this application, it is not irrelevant to bear in mind that the normal approach adopted by the court on interlocutory applications would lead to this application being dismissed -

(a) as an interim payment application it cannot succeed: see CPR 25.7(1)(c) as discussed above;

(b) as an application for an interlocutory injunction, the claim could only succeed if it was justified on grounds of "urgency" or "the interests of justice": see CPR 25.2(2)(b) relating to interlocutory injunctions. No question of urgency arises, and it seems to me difficult to say, in light of the factors I have mentioned, that the interests of justice would justify an order for payment;

(c) the court is significantly less ready to grant an interim mandatory injunction (which is what this would be) than an interim prohibitory injunction;

(d) in cases where the balance of justice or balance of convenience is pretty finely balanced, the court will normally retain the status quo, and in this case the status quo is the money not being paid.

44. I n all these circumstances I have reached the conclusion, with gratitude to counsel for the arguments that have been advanced, that I should dismiss this application.

45. **MR PEACOCK**: My Lord, I think that leaves costs.

46. **MR JUSTICE NEUBERGER**: I think it does.

47. **MR PEACOCK**: I am not sure whether your Lordship has seen the statement of summary costs of the Commissioners?

48. **MR JUSTICE NEUBERGER**: I have not, no. I should say at once that it may well be my fault that I have not.

49. **MR PEACOCK**: I suspect it is ours, my Lord, because there was a certain degree of confusion as to who had which copies. My learned friend has seen this. I would ask for a summary assessment in that figure.

50. **MR JUSTICE NEUBERGER**: What do you say about that, Mr Patchett-Joyce?

51. **MR PATCHETT-JOYCE**: My Lord, I say what I usually say on these occasions and that is to go through this line by line is an invidious exercise which I would rather not embark on, and I think that the court might well not wish to embark upon either.

52. **MR JUSTICE NEUBERGER**: It is a horrible exercise. I must say, speaking selfishly, I wish this had never been introduced. But, nonetheless, we have to do it. Sometimes it helps to go through.

53. **MR PATCHETT-JOYCE**: Yes.

54. **MR JUSTICE NEUBERGER**: It is very tedious, but sometimes it is unhelpful. Sometimes one looks at the bottom line and forms a view.

55. **MR PATCHETT-JOYCE**: Yes, my Lord. The real problem is in relation to the work done on documents by the solicitors. 25 hours does seem to be a very considerable amount of time and seems to be excessive. My Lord, obviously it has been a difficult matter.

56. **MR JUSTICE NEUBERGER**: You think that is over the top?

57. **MR PATCHETT-JOYCE**: I think that 25 hours is substantially over the top, if I can use that expression, and I

am in your Lordship's hands as to counsel's fees.

58. **MR JUSTICE NEUBERGER**: That is always peculiarly difficult for counsel, I know.

59. **MR PATCHETT-JOYCE**: It is.

60. **MR JUSTICE NEUBERGER**: Can I be brutal and ask whether you have prepared a statement of costs?

61. **MR PATCHETT-JOYCE**: Yes, my Lord. Can I hand it in.

62. **MR JUSTICE NEUBERGER**: My own view is that the other side's statement of costs is sometimes helpful, but it should never be treated by the judge as conclusive, but it does give one something as a sphere. Market forces are not irrelevant.

63. **MR PATCHETT-JOYCE**: My Lord, it is on the basis of the claimants' statement of costs that I say the 25 hours is excessive. My Lord, the difference is that there has been -- certainly it establishes the 25 hours as being, in my submission, an excessive amount. As for the difference between counsel's brief fees, I am not too sure whether we are comparing like for like. My Lord, you will see that my figure is higher, but the brief fee is similar and the immediate preparation is a little bit less. I do not know whether my learned friend's preparation goes back as far as November last year. My Lord, I doubt we are comparing like with like in that regard, but the 25 hours does appear to me to be excessive on the basis of the time difference.

64. **MR JUSTICE NEUBERGER**: I appreciate the difficulty. These things are very difficult, not least because there is no guidance. Different judges approach these matters on an entirely different basis at the moment. I think that the law is in a mess. Some judges say, "I know what this is worth. That is it". Other judges look at the two sides and say, "Well, in this case yours is much more than his, so you should get the lot". Other judges go through it docking things off. It is a very unsatisfactory state of affairs. I think you have made the points entirely fairly. Thank you very much. Is there anything you want to say, Mr Peacock?

65. **MR PEACOCK**: My Lord, I say nothing more about counsel's fees. That is a difficult exercise. In terms of documents, I cannot tell your Lordship what specific time was spent. I do know that this matter has received some fairly careful attention given the nature of the application and the potential consequences to the Commissioners. It is a higher number of hours than my learned friend's clients have spent, but a lower hourly rate. The two figures are not that disproportionate.

66. **MR JUSTICE NEUBERGER**: On the question of costs I feel that one is in an area of difficulty. As Mr Patchett-Joyce says, correctly, one looks at the bottom line; one looks at the individual items and sometimes one gets a bit of help from looking at the paying party's schedule. On a summary assessment none of these factors is decisive. It is the nature of the summary assessment that it is an element of rough justice. In my judgment Mr Patchett-Joyce's points do justify a deduction but bearing in mind (a) that the overall figure looks not unreasonable, (b) the figure that would

    have been claimed by the claimants, and (c) that in general the breakdown looks reasonable, I think making a large deduction would be unfair on the Commissioners. It is rough justice, as I say, but I think the correct figure to award is £17,000. That is the figure I award by way of costs.

67. **MR PATCHETT-JOYCE**: My Lord, I have an application --

68. **MR JUSTICE NEUBERGER**: Which I am inclined, subject to Mr Peacock, to grant.

69. **MR PATCHETT-JOYCE**: I am obliged.

70. **MR JUSTICE NEUBERGER**: Mr Peacock, do you want to say anything?

71. **MR PEACOCK**: My Lord, all I would say is that the Crown is broadly neutral, and just to remind your

Lordship that it is a matter of discretion.

72. **MR JUSTICE NEUBERGER**: It is a matter of discretion, but if what was at stake was my discretion then I would refuse permission. But it seems to me that while I have formed a fairly clear view on Molenheide, it would be silly and arrogant to say that the contrary view was not arguable. Also the Court of Appeal may be persuaded -- it may be a slightly difficult road to hold, but Mr Patchett-Joyce may well be able to persuade them that if I was right on judicial review then the correct course would have been not to decide the application on its merits. I think those two points are well arguable or at least justify going to the Court of Appeal. In this sort of case I think it is wrong to give permission on specific points and not on others. If it is there, the Court of Appeal think I have gone so wrong on discretion that they should interfere, then Mr Patchett-Joyce should have the opportunity to persuade them of that. So I will give permission to appeal in this case.

73. **MR PATCHETT-JOYCE**: I am very much obliged, my Lord.

74. **MR JUSTICE NEUBERGER**: Thank you both very much indeed.