OUTER HOUSE, COURT OF SESSION

[2018] CSOH 39

A152/16

OPINION OF LORD UIST

In the cause

THE ADVOCATE GENERAL FOR SCOTLAND

Pursuer

against

(FIRST) JOHN GUNN AND SONS LIMITED and (SECOND) JOHN GUNN AND SONS HOLDINGS LIMITED

Defenders

Pursuer: Maciver; Office of the Advocate General
Defenders: Lindsay QC; Harper McLeod LLP

13 April 2018

Introduction

[1] In this action the Crown seeks to recover from the defenders the value of unlawful and incompatible State aid granted to the first defender in the form of exemption from payment of Aggregates Levy of the commercial exploitation of shale and shale spoil. The first defender is a limited company which extracts aggregate materials for the purpose of commercial exploitation and is registered as a person liable to pay the levy charged on the extraction of aggregate for commercial use under the Finance Act 2001 as amended. Included in its activities since before 2002 has been the extraction of shale and shale spoil

and its commercial exploitation as aggregate. During the period in which it has quarried aggregate in the United Kingdom the first defender has been included in the register of persons that are subject to the levy. The second defender has owned the first defender since before 2002. The case called before me on the Procedure Roll on the pleas to the relevancy of both the pursuer and the defenders.

State aid

[2] Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) provides:

> "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market."

Article 107(2) outlines the types of aid which shall be considered compatible with the internal market. Article 107(3) outlines the types of aid which shall be considered incompatible with the internal market. Neither provision is relevant in the present case. The granting of unlawful and incompatible aid distorts the internal market as it gives the recipient of the aid an unfair and unjust advantage over its competitors and also, in certain cases, deprives the State of funds which should have been made available to it.

[3] Article 108 TFEU, insofar as relevant to the present proceedings, provides:

> "2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.
>
> If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions

> of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.
>
> …
>
> 3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not consistent with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."
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> Section 2(1) of the European Communities Act 1972 (the 1972 Act) provides:
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> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures provided for by or under the Treaties, as in accordance with the Treaties are to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly …"

Aggregates Levy

[4] On 20 December 2001 the United Kingdom notified the European Commission of its intention to introduce an Aggregates Levy with effect from 1 April 2002. Two companies and an association called the British Aggregates Association (BAA) submitted complaints to the European Commission arguing Aggregates levy to be unlawful because it gave rise to State aid as a result of its reliefs or exemptions.

[5] On 24 April 2002 the European Commission decided to raise no objection to the Aggregates Levy (the initial decision). It determined that the exemptions were justified by the logic of the tax and therefore did not open a formal investigation under Article 108 TFEU, on the ground that the Finance Act 2001 did not give rise to State aid. On 12 July 2002 the BAA initiated proceedings for annulment of the initial decision. On 13 September 2006 the General Court dismissed the proceedings in their entirety. On 27 November 2006 the BAA appealed the judgment of the General Court. On 22 December 2008 the Court of

Justice set aside the appealed judgment and referred the case back to the General Court. On 7 March 2012 the General Court annulled the initial decision on the ground of errors in the Commission's original assessment. The Commission therefore had to reassess its decision to raise no objection to the levy.

[6] By letter dated 31 July 2013 the Commission confirmed that the levy itself was lawful but at the same time informed the United Kingdom that it had decided to initiate the formal investigative procedure in respect of certain exemptions, exclusions and reliefs (including those measures which it subsequently decided to be unlawful exemptions). In its final decision it concluded that:

> "… the exemptions from the AGL granted for (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as a by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate, which have been unlawfully implemented, represent State aid that is incompatible with the internal market."

[7] In light of its conclusion that the exemptions in question gave rise to unlawful and incompatible aid, and in light of its obligations under TFEU and the Procedural Regulation, the Commission determined that the beneficiaries of the exemptions had to repay the aid, plus interest, in order to re-establish the situation in the market that existed prior to their granting. The aid to be repaid was the advantage that those beneficiaries obtained over their competitors as a result of the unlawful exemptions, subject to certain exceptions. The Recovery Order issued by the Commission provides as follows:

> "Article 5
>
> 1. The United Kingdom shall recover the incompatible aid granted under the scheme referred to in Article 1(1) from the beneficiaries.
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> 2. The aid to be recovered shall include interest from the date on which it was put at the disposal of the beneficiaries until their actual recovery.

> 3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004.
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> Article 6
>
> 1. Recovery of the aid granted under the scheme referred to in Article 1(1) shall be immediate and effective.
> 2. The United Kingdom shall ensure that this Decision is implemented within four months following the date of notification of this Decision."

The BAA has launched the following applications: (i) for annulment of the decision to open a formal investigation; and (ii) for annulment of the Final Commission Decision. There are also domestic proceedings which are stayed pending the European proceedings. The existence of these proceedings does not alter the obligation on the United Kingdom to recover the State aid found to be unlawful (Commission notice on the enforcement of State aid law by national courts 2009/C 85/01).

[8] From April 2002 the first defender was engaged in activity benefiting from the unlawful exemptions. It did not pay aggregates levy in respect of that activity. On 23 June 2015 Her Majesty's Revenue and Customs (HMRC) sent a questionnaire to the first defender asking for information which would enable assessment as to whether it would require to pay unlawful aid, and, if so, how much. Based on the information provided, and on returns provided by the first defender, it was calculated by HMRC that the first defender must repay (a) £1,064,869 representing the amount of unpaid levy for which it received the advantage of the unlawful exemptions; and (b) £206,956 in respect of interest, calculated to 30 April 2016 in accordance with Regulation 794/2004/EC and which continues to run.

[9] The defenders moved the court to sustain their plea to the relevancy and dismiss the action. The sole advantage that the first defender obtained from its shale exemption was the refund of £90,598 after it retrospectively qualified for the shale exemption, with compound interest from the date it was received in or about November 2003. The principal sum of

£390,598 was paid on 26 July 2016 and the compound interest of £55,554.21 was paid on 5 August 2016.

Quantum

Submissions for the defenders

[10] There was no lawful basis for HMRC to seek to recover a sum equivalent to the Aggregates Levy "that would have been charged on the tonnage of shale commercially exploited, if shale had been a taxable commodity", which was the basis upon which the sums first and second concluded for had purportedly been qualified. Such a recovery was not mandated or required by the Final Commission Decision. More importantly, such a recovery would run counter to well established EU legal principles governing the recovery of unlawful State aid and would unlawfully interfere with the first defender's property rights protected by the Human Rights Act 1998. It also contradicted the guidance relating to exemptions from the Aggregates Levy given in HMRC's Brief 11/15 "Reinstatement of certain Aggregates Levy exemption".

[11] It was well established that the recovery of State aid must be limited to the financial advantage actually arising from the placing of the aid at the disposal of the beneficiary, and be proportionate to them: *Salzgitter* v *Commission* T-308/00 RENV, ECR, EU:T2013:30 at paragraph 138, where it is stated:

> "That recovery must, nevertheless, be limited to the financial advantages actually arising from the placing of the aid at the disposal of the beneficiary, and be proportionate to them (see, by analogy Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 99)."

[12] That meant that it was necessary to assess, as accurately as the circumstances of the case would allow, the actual value of the financial advantage received from the aid by the beneficiary: *Scott* v *Commission* T-366/00, ECR, EU:T:2007-99 at paragraph 95:

> "However, if the Commission, pursuant to its obligation to conduct a diligent and impartial examination of the case under Article 88 EC … does decide to order the recovery of a specific amount it must assess, as accurately as the circumstances of the case will allow, the actual value of the benefit received from aid by the beneficiary. In restoring the situation existing prior to payment of the aid the Commission is, on the one hand, obliged to ensure that the real advantage resulting from the aid is eliminated and it must thus order recovery of the aid in full. The Commission may not, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received by the latter. On the other hand, the Commission is not entitled to mark its disapproval of the serious character of the illegality by ordering recovery of an amount in excess of the value of the benefit received by the recipient of the aid."

[13] The most recent consideration by the European court of Justice of the quantification of unlawful State aid was in *European Commission* v *Aer Lingus Ltd & Ryanair* C-164/15P & C-165/15. At paragraph 89 the Court explained that the recovery of unlawful State aid was intended to restore the situation as it was before the aid was granted:

> "that said, as regards the analysis of the substance of the Commission's single ground of appeal, it should be noted, first, that the obligation on the Member State concerned to abolish, through recovery, aid considered by the Commission to be incompatible with the single market has, as its purpose, according to the court's established case law, to restore the situation as it was before the aid was granted (see, to that effect, judgment of 4 April 1995, *Commission v Italy* C 350/93, EU:C:1995:96, paragraph 21 and the case law cited)."

[14] The significance of the restitution of the advantage procured by the aid was explained by the Court at paragraph 92 as follows:

> "It follows, as the Advocate General observed, in essence, in point 62 of his Opinion, that recovery of such aid entails the restitution of the advantage procured by the aid for the recipient, not the restitution of any economic benefit the recipient may have enjoyed as a result of exploiting the advantage. That benefit may not be the same as the advantage constituting the aid, and there may be no such benefit, but that cannot justify any failure to recover that aid or the recovery of a different sum from that constituting the advantage procured by the unlawful aid in question."

[15] The importance of restoring the market in question to the situation as it was before aid was granted was stressed by the Court at paragraph 105:

> "The considerations set out above are not called into question by Ryanair's argument based on Article 13 of Directive 2014/104. As is apparent from the Court's case law … the recovery of unlawful aid had a different purpose from that of Directive 2014/104. In particular, that Directive, as is made clear in recitals 3 and 4 thereof, seeks to ensure that any person who considers that he has been adversely affected by an infringement of the competition rules laid down in Articles 101 and 102 TFEU may effectively exercise his right to claim compensation for the harm which he believes he has suffered. On the other hand, the purpose of aid recovery is not to seek compensation for individual harm of any kind, but to re-establish, on the market in question, the situation as it was before the aid was granted."

[16] The above legal principles required to be applied when considering the relevancy of the pursuer's averments relating to the quantification of the sums sued for. The pursuer's averments relating to quantum were wholly irrelevant because they did not comply with the applicable principles of EU State aid law. In particular, the pursuer had failed to assess the value of the actual advantage received by the first defender as a consequence of the unlawful State aid. In addition, the pursuer's proposed quantification of this advantage would not re-establish the market in question to the situation as it was before the unlawful State aid was granted. Rather, the pursuer's proposed quantification would further distort competition in the market in question.

[17] The pursuer had failed relevantly to aver that the value of the advantage actually received by the first defender as a consequence of the exemption had been assessed. The pursuer had not relevantly averred that the first defender had retained the advantage for itself and did not pass the advantage on to its customers. The pursuer did not aver that the first defender had increased its prices to take account of the Aggregates Levy and thereafter did not reduce them when it was granted an exemption.

[18] The pursuer's averments failed to engage with the first defender's circumstances and made no effort, diligent or otherwise, to quantify the real financial advantage enjoyed by the first defender as a consequence of its exemptions. The first defender passed on the whole financial advantage of the exemption to its customers. The first defender did not increase its price by the amount of the Aggregates Levy or by any lesser sum. The price charged by the first defender in respect of the shale aggregate was completely uninfluenced by the imposition of the Aggregates Levy and the subsequent exemption. In such circumstances, other than the refund, the first defender enjoyed no financial advantage as a consequence of its exemption, and the pursuer had failed relevantly to aver any such real financial advantage on the part of the first defender.

[19] During the period for which the pursuer was seeking to recover State aid the first defender supplied shale and other aggregates only to customers in Caithness, and, to a lesser extent, Sutherland. The first defender competed with four other quarries in Caithness for this business. All of these competitor quarries also had shale exemptions from the Aggregates Levy. Accordingly, the first defender enjoyed no competitive advantage as a consequence of its shale exemption. As all of the quarries benefited from the same shale exemption there was no distortion of competition. The pursuer did not aver that any of the first defender's competitors did not have an identical exemption. In order relevantly to assess the real financial advantage enjoyed by the first defender as a consequence of its exemption it would be necessary for the pursuer to make averments relating to the position of the first defender's competitors.

[20] It would only have been if the first defender had increased its prices by the amount of the Aggregates levy and had retained this increase without passing any of it on to its customers and/or the other quarries with which it competed had not had the same shale

exemption that the pursuer's approach to quantifying the real financial advantage received by the first defender would be correct. The pursuer had made no averments to that effect. As the whole financial advantage of the exemption was passed on to the first defender's customers the averments of the pursuer did not accurately or relevantly quantify the amount of aid repayable by the first defender.

[21] The recovery of aid had to be limited to financial advantages actually arising from the aid. Recovering more than the actual financial advantage would also distort the market and be contrary to the applicable EU legal principles. The financial advantage enjoyed by the first defender was the refund of £90,598 that it received from HMRC after its application for a shale exemption was granted with retrospective effect. The first defender had paid this sum with compound interest in full and final settlement of all claims for repayment of unlawful State aid arising out of its exemption from the Aggregates Levy.

[22] Accordingly, it was not necessary for the pursuer to recover an amount equivalent to the amount of the levy that would have been charged on the tonnage of shale commercially exploited in order to re-establish the *status quo ante*. This was because this was not the real financial advantage enjoyed by the first defender as a consequence of its exemption. Receiving such a grossly excessive and disproportionate amount would create additional distortions of competition as it would lead to the recovery of more from the first defender than the advantage it actually enjoyed.

[23] Indeed, the sums demanded by the pursuer had the potential to render insolvent many of the quarries which had been in receipt of the exemption. At the very least, the excessive and disproportionate recoveries sought by the pursuer would greatly diminish the abilities of these quarries to invest and to compete for business. Such insolvencies and lack of investment would significantly distort competition. The pursuer's approach of seeking to

recover more than the advantage actually enjoyed by the first defender would, in itself, constitute State aid to the quarries that did not benefit from a shale exemption.

[24] In conclusion, if the pursuer's averments were taken *pro veritate* the proposed quantification of the financial advantage would not re-establish the market in question to the situation as it was before the unlawful State aid was granted. Rather, it would further distort competition in the market in question. For the foregoing reasons the pursuer's averments relating to quantum were wholly irrelevant and the defenders' first plea-in-law should be sustained and the action dismissed. HMRC's proposed recovery of "the amount of levy that would have been charged on the tonnage of shale commercially exploited, if shale had been a taxable commodity" was unlawful because it contravened the well-established European legal principles relating to the recovery of unlawful State aid.

Submissions for the pursuer

[25] The submission for the pursuer was that the sum of which recovery was to be ordered was the amount equal to the amount of the Aggregates Levy not paid by the first defender as a result of the shale and shale spoil exemption enjoyed by it between 2002 and 2014. The Commission Decision was definitive on the point, particularly at recitals 625 and 626 of the decision:

> "(625) … given that the exemptions from the AGL granted for the material specified in recital 620 of this decision were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered inorder to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the aid was put at the disposal of the beneficiary (ie the day from which the beneficiary would have been obliged to pay the AGL if the unlawful and incompatible exemptions from the AGL had not existed) until the day when the advantage of the beneficiary ceased to exist. The sums to be recovered should bear interest until effective recovery.

> (626) as the exemptions constitute forgone revenues by the UK authorities , the recovery of aid entails that the beneficiaries of the exemptions should pay the AGL, for the period of its application, together with interest until effective recovery."

In light of the terms of the Commission Decision the defenders' position that the only advantage received (and received by the first defender alone) was untenable.

[26] The point that the first defender passed on some or all of the benefit to its customers and consequently did not benefit itself to the full amount was without merit. In the *Aer Lingus and Ryanair* cases it was confirmed at paragraphs 89 to 96 that the amount to be repaid by a recipient of unlawful and incompatible aid was the advantage gained by the recipient of that unlawful and incompatible aid, which, in the case of a recipient gaining advantage by means of the payment of a lower rate of tax, was the payment by that recipient of the tax which it would have paid had the unlawful and incompatible aid not been granted. The transactions actually carried out by the recipient of the aid were irrelevant. In any event the terms of the Commission decision were clear: the United Kingdom had to recover from the defenders the sums not paid as a result of the exemptions, together with interest. It was not open to the defenders to argue in the Court of Session that their liability to pay was other than that contained in the Final Commission Decision.

[27] The defenders' second point, that, in the market in which it competed, all exploiters of aggregate benefited from the exemptions and there was thereby no distortion of competition, was without merit for the same reasons. In addition, the defenders gave no specification as to the structure of or participants in their local market, and for that reason their averments relating to it were irrelevant. In any event the defenders' economic activity was not restricted to operations within their local area, but included, for example, the purchase of plant and equipment from other parts of the EU, thereby producing effects capable of distorting trade in those markets.

Discussion

[28] In my opinion the points made by the defenders about quantum are both ingenious and unsound. It is perfectly plain that the amount to be recovered is what would have been paid as Aggregates Levy by the first defenders had the exemption not existed. In other words, it is the amount of underpaid tax due now that the exemption has been found to be unlawful. Any other view is, in my opinion, wholly unrealistic. In addition, I consider the point about the local market made by the defenders to be both without merit and irrelevant for the reasons given above by the pursuer. The European Commission does not think in terms of small local markets: it thinks in European terms of the entire single market. I conclude that the defenders' challenge on quantum fails. I consider separately the question of the status of the Final Commission Decision below.

Final Commission Decision

Submissions for the defenders

[29] The decision of the United Kingdom to recover the "incompatible aid" required to be interpreted in accordance with the binding legal principles set out by the European Court of Justice in the authorities referred to above. Accordingly, when giving effect to the Commission's decision to recover the "incompatible aid" it was necessary for HMRC to examine the individual circumstances of the first defender in order to identify the actual financial advantage received by it. It was impermissible and contrary to these well-established legal principles for HMRC to fail to have regard to the first defender's particular circumstances and to seek to recover a grossly excessive and disproportionate amount which far exceeded the actual advantage received by the first defender, based upon a mistaken assumption that all quarries would have retained the advantage of the exemption and would not have passed the

advantage on to their customers. The only lawful interpretation of the operative part of the Commission's decision was that the actual financial advantage received by the first defender, namely, the retrospective refund of £90,598, required to be recovered with compound interest.

[30] According to settled case law, the statement of reasons for a decision on state aid must be taken into account when interpreting the operative part of that decision: *Rousse Industry* v *Commission* C-271/13 P, EU:C:2014:175, paragraph 69 and the case law cited; and *Greece* v *Commission* C-415/03 at paragraph 41 as follows:

> "It must be added that , according to the settled case law of the Court, whereby the operative part of a decision on State aid is indissociably linked to the statement of reasons for it, so that, when it is interpreted, account must be taken of the reasons which led to its adoption (see, in particular, Case 355/95 P *TWD v Commission* [1997] ECR i-2459, paragraph 21) the amounts to be repaid pursuant to Decision 2003/372 can be established by reading Article 2 in conjunction with points 206 to 208 of the grounds thereof."

There was nothing in Commission's statement of reasons in this instance which cast doubt on the correctness of the above interpretation of the operative part of the Commission's decision. This could be demonstrated by considering the relevant parts of the Commission's statement of reasons.

[31] For present purposes, the starting point for an analysis of the statement of reasons was paragraphs 622 and 623, in which the Commission reminded itself that in unlawful State aid cases the beneficiaries require to repay the actual aid that they have received in order to establish the *status quo ante*:

> "[622] According to the Treaty and established case law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation.
>
> [623] In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the

> advantage which it had enjoyed over its competitors on the market, and the situation prior to the repayment of the aid is restored."

The Commission dealt with recovery of the advantage at paragraphs 625 and 626 (quoted above).

[32] It was readily apparent from the terms of these paragraphs that the factual situation which the Commission had in mind was the case where a quarry retained the advantage of the exemption for itself and did not pass the advantage onto its customers. This would occur when a quarry increased its price by the amount of the Aggregates Levy and then failed to reduce its price after receiving an exemption. The reference to "forgone revenues" in paragraph 626 made clear that what the Commission had in mind was a quarry continuing to charge the Aggregates Levy on its shale and retaining this "revenue" for itself rather than passing it on to HMRC because it had an exemption; hence the reference to the revenue being "forgone". On the other hand there would be no revenue, forgone or otherwise, if exempt quarries passed on the entire advantage of the exemption to their customers because there would be no part of the price which corresponded to the levy.

[33] Accordingly, paragraphs 625 and 626 dealt only with one particular set of circumstances. The statement that recipients should pay "the AGL for the period of its application" applied only to these particular circumstances, that is, when the quarry had retained the advantage of the exemption and not passed it on to customers. It was not a general statement of universal application. The Commission were not stating that all beneficiaries were having to repay the AGL for the period of its application regardless of the particular circumstances of the beneficiary and the actual advantage received by them.

[34] The Commission's narration of the applicable legal principles in paragraphs 622 and 623 of its statement of reasons made clear that it was aware of the need to examine the

individual circumstances of the recipient and that recovery required to be limited to the actual advantage received. That was all consistent with the above interpretation of the operative part of the Commission's decision. The Commission's statement of reasons therefore supported, and did not contradict, the interpretation of the operative part of the decision requiring the individual circumstances of the recipient to be considered and recovery to be limited to the value of the actual advantage received by them as a consequence of the exemption.

Submissions for the pursuer

[35] The terms of the Final Commission Decision were clear: the United Kingdom had to recover the sums not paid as a result of the exemptions, together with interest. It was not open to the defenders to argue in the Court of Session that their liability to repay was other than that provided for in the Final Commission decision. The Commission being the body charged with enforcing EU law on State aid, it was not open to the defenders to challenge its decision in the Court of Session as being itself unlawful under State aid law: see Commission notice on the enforcement of State aid law by national courts *2009/C 85/01 09.04.2009* at paragraph 66 and paragraph 30, which provides as follows:

> "Where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law. The national court must therefore in principle order the full recovery of unlawful State aid from the beneficiary."

Discussion

[36] In my opinion the interpretation of the Final Commission Decision put forward on behalf of the defenders is tortuous and untenable. What a recipient of State aid did or did not do with the financial benefit gained from the application of an unlawful exemption is

immaterial as far as the Commission is concerned. If the defenders were correct in their proffered interpretation it would mean that in every case the Commission or the national court giving effect to the Commission's decision would have to undertake a detailed investigation into what the beneficiary of the unlawful exemption did with the benefit gained by him. That cannot be right. In each case the advantage received is the same: it is the amount of the Aggregates levy which was not paid as a result of the unlawful exemption. In my judgement the submission for the pursuer on this point is correct and must be upheld.

Human Rights Act 1998

Submissions for the defenders

[37] HMRC is a public authority and therefore bound by the provisions of the Human Rights Act 1998. Section 6(1) of that Act makes it unlawful for any public authority "to act in a way which is incompatible with a Convention right". HMRC's proposals were unlawful because they were incompatible with the first defender's Convention rights under Article 1 of Protocol 1 (A1P1) to the convention, which is in the following terms:

> "Protection of property
>
> Article 1
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preciding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in the public interest or to secure the payment of taxes or other contributions or penalties."

The decision of the First Division in *Pairc Crofters Ltd* v *The Scottish Ministers* 2013 SLT 308 made clear the importance which the courts attached to protecting property rights falling within the scope of A1P1.

[38] In the present case the approach contended for by HMRC would be an unlawful interference with the first defender's possessions, being the difference between the advantage actually received by the first defender and the much larger sum that HMRC were seeking to recover. There was no legal authority for HMRC to seek to recover more than the actual advantage received by the first defender as a consequence of its shale exemption. In addition, there was no public interest in doing so. In such circumstances the approach adopted by HMRC was unlawful as it breached their duty not "to act in a way which is incompatible with a Convention right", namely, the first defender's Convention property rights which were protected by A1P1.

[39] The only way that HMRC could act in a manner compatible with the first defender's A1P1 rights was to recover no more than the value of the actual advantage received by the first defender as a consequence of having an exemption from the Aggregates Levy. That was all that HMRC had lawful authority to recover. Recovering anything more than the actual advantage received by the first defender would constitute an unlawful misappropriation of its property not justified by the public interest. As well as being compatible with the first defender's property rights this approach was also what was required by the well-established European legal principles relating to the recovery of unlawful State aid and by the terms of the Final Commission Decision. Accordingly, HMRC's obligations under the Human Rights Act 1998 and under EU law were consistent and complementary. There was no conflict between them.

[40] The EU law origins of the present dispute did not relieve the pursuer of the requirement to act in accordance with the obligations imposed upon it by the Human Rights Act 1998 and the ECHR. If there were any conflict between HMRC's obligations under the ECHR and under EU law it required to follow the guidance provided by the ECJ in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi* v *Ireland* (2006) 42 EHRR 1 and *Antonins* v *Latvia* (2017) 64 EHRR 2. Where the Member State had no discretion and was simply fulfilling its obligations under EU law, such as in the present case, the national court required to consider if "equivalent protection" existed under EU law. If there was such "equivalent protection" there would be a presumption that Member State action was compatible with its ECHR obligations. Where "equivalent protection" did not exist the national court required to scrutinise the measure for its compatibility with the ECHR, if necessary finding a breach to avoid any gap in protection: see, for example, App no 24833/94, *Matthews* v *United Kingdom* ECHR 1999-1.

[41] In the present case, if the pursuer's interpretation of what was required by the Final Commission Decision were correct, there was no equivalent protection provided by EU State aid rules because recovery would not be limited to the actual advantage received by the first defender. It was therefore necessary for the court to scrutinise the actings of the pursuer in order to determine whether or not ordering payment of the sums first and second concluded for would be a disproportionate interference with the first defender's A1P1 rights.

[42] Taking the pursuer's averments *pro veritate* it was clear that granting decree as first and second concluded for would be a disproportionate interference with the first and second defenders' A1P1 rights. The method of quantification adopted by the pursuer was an unlawful interference with their possessions, being the difference between the advantage

actually received by the first defender (£90,598) and the much larger sums that the pursuer was seeking to recover (£1,064,869 and £206,956). There was no public interest in doing so.

[43] The legitimate public interest in recovering unlawful State aid was limited to recovering the actual advantage received by the first defender as a consequence of its shale exemption, being the refund of £90,598. Recovering the sums sued for would distort the operation of the market as it would confer an advantage upon those quarries that did not have a shale exemption and would thereby be contrary to the public interest as well as constituting unlawful State aid. The pursuer's method of quantifying State aid was therefore unlawful as it breached the duty not "to act in a way which is incompatible with a Convention right", the rights in question being the first and second defenders' Convention property rights protected by A1P1.

[44] The only way in which the pursuer could act in a manner compatible with the defenders' A1P1 rights was to recover no more than the value of the actual advantage received by the first defender as a consequence of having an exemption from the Aggregates Levy. That was all that the pursuer had lawful authority to recover. Recovering anything more than the actual advantage received by the first defender would constitute an unlawful misappropriation of its property which is not justified by the public interest. The only proportionate interference with such rights would be to recover the actual advantage received by the first defender as a consequence of its shale exemption, being the refund of £90,598.

Submissions for the pursuer

[45] No violation of A1P1 arose. It was in the public interest to enforce the law on State aid as contained in the TFEU and in the legal instruments made thereunder, including in

particular the Final Commission Decision. It was in the public interest that the United Kingdom should comply with its legal obligation to do so, as provided in the 1972 Act. Recovery of the unlawful and incompatible aid from the defenders was by virtue of the same instruments subject to the conditions as provided for by law. That remains and would remain the case unless and until the Final Commission Decision was suspended or reduced, something which can be done only by the ECJ. The defenders argued that the amount to be recovered by them was restricted to the refund obtained by them in 2003, and that the seeking of recovery beyond that sum was not compliant with A1P1. As the former argument was not tenable in face of the express terms of the Final Commission Decision the latter argument could not arise.

[46] Finally, even if the defenders were correct in their criticism of the compatibility of the State aid regime with A1P1, recovery would be unlawful under section 6(2)(a) of the 1998 Act, which provides:

> "(2) Subsection (1) does not apply to an act if –
> (a) As the result of one or more provisions of primary legislation the authority could not have acted differently …"

The United Kingdom, including both the Crown and the courts, was obliged by *inter alia* the operation of the 1972 Act to effect recovery of the sums detailed in the Final Commission Decision, that is, repayment in full of the sum not paid by the first defender as a result of the shale and shale spoil exemptions from the Aggregates Levy. Accordingly, section 6(1) did not apply to the bringing of the present action by the Crown, or to the court in granting the remedy sought by the Crown.

Discussion

[47] I have already held above that the substratum of the defenders' human rights point, concerning the amount recoverable, is without merit. It follows that the human rights point itself is without merit. Moreover, in my opinion section 6(1) of the 1998 Act is not engaged in this case by virtue of section 6(2)(a). The United Kingdom has no alternative, under section 2(1) of the 1972 Act, but to seek the sums sought. I therefore reject the defenders' human rights point.

HMRC Brief 11/15

Submissions for the defenders

[48] On 23 July 2015 HMRC published its brief 11/15 entitled "Reinstatement of certain Aggregate Levy exemptions". Part 5 of the Brief deals with reclaiming tax paid on exemptions found to be lawful and provides the following advice, where relevant:

> "5. Reclaiming tax paid on exemptions found to be lawful
>
> Making the reinstatement of lawful exemptions retrospective to the date the exemptions were suspended will enable businesses that have paid the levy on these materials to reclaim that levy. This includes shale but only insofar as the exemption has been found to be lawful. Interest will be paid on claims …
>
> Businesses should not adjust their aggregates levy returns to reflect the sum due to them. They must send the following evidence to show that aggregates levy was paid at the full rate on the aggregate that has been found to be lawful …
>
> When the exemptions were suspended, businesses were advised by HM Revenue and Customs (HMRC) to keep records to demonstrate that they would not gain financially from any repayment. Businesses will need to confirm when submitting their claims that they did not pass on the cost of the tax to their customers, retaining the records they kept as evidence. Where a business has passed on a cost to a customer they should not now seek to reclaim the tax.
>
> HMRC may check records, if necessary, to ensure that any business which passed on the cost of the levy to its customers will not be unjustly enriched by any repayment.

> HMRC may also check the customer's records to ensure that the relevant amounts have been credited to them …"

That guidance was correct and in accordance with the legal principles identified in the European authorities. It recognised the need to consider the individual circumstances of each quarry when assessing whether or not a refund of Aggregates Levy was payable. It made no assumption that all quarries would not have passed on the cost of the levy to their customers and correctly stated that "where a business has passed on the cost to a customer, they should not seek to reclaim the tax". That was because a refund in such circumstances would result in the business being "unjustly enriched by any repayment". Such guidance was self-evidently correct and complied with the well-established European legal principles already referred to.

[49] The approach adopted by HMRC to recover the unlawful State aid from the first defender contradicted the guidance contained in Brief 11/15. Whether or not a business passed on the cost of the levy to its customers was of critical importance in deciding what refunds were repayable. So too, in the context of recovering State aid, was the issue of whether the businesses retained the advantage of the exemption or passed it on to their customers. If the guidance on refunds contained in Brief 11/15 were applied *mutatis mutandis* to the recovery of State aid it would require a consideration of whether or not the advantage of the exemption had been retained by the business or passed on to the customer. In other words, the issues of whether the business or customer obtained the advantage of the exemption and whether the cost of the levy was borne by the business or the customer were different sides of the same State aid coin. The same general principle of seeking to determine who ultimately benefitted and who ultimately bore the cost applied.

[50] It was for these reasons that the guidance contained in Brief 11/15 was inconsistent with the approach being adopted by HMRC in its dealing with the first defender relating to the recovery of unlawful State aid. HMRC should have applied the general principles contained in Brief 11/15 to the present case by considering whether or not the first defender had passed on the advantage of the exemption to its customers or retained the advantage for itself. It was necessary to do so in order to identify the actual advantage received by the first defender as a result of its exemption, in the context of the first defender's particular market and competitive restraints. The actual advantage received by the first defender was all that could lawfully be recovered by HMRC.

Submissions for the pursuer

[51] Brief 11/15 related to re-instatement of exemptions after their suspension. There was no valid comparison with the circumstances of the present action, which involved recovering unlawful aid. The *Aer Lingus* case made clear that passing on the advantage was irrelevant in the context of recovering unlawful State aid. The brief in question emerged after the decision in the *Aer Lingus* case.

Discussion

[52] Policy Brief 11/15 was necessary to ensure that, in the converse situation from that in the present case, a party who had paid a levy unlawfully exacted obtained in compensation only the amount of his loss, if any. If the cost of the levy had been passed on to the customer then he had no loss. In the present case the amount due to HMRC is the amount which should have been paid in Aggregates Levy over the relevant period. There is therefore no

requirement for a corresponding Policy Brief to deal with the present situation. In my opinion the submissions for the defenders on this point are therefore unsound.

Unjust enrichment

Submissions for the defenders

[53] The averments of the pursuer in article 11 that both defenders had been unjustifiably enriched were wholly irrelevant and should not be remitted to probation. These averments are as follows:

> "*Separatim* the defenders have been unjustifiably enriched by the receipt of the unlawful aid. The first defender has benefitted from its receipt of the unlawful aid by obtaining an unfair advantage over its competitors, distorting competition in the market. The benefit and advantage thereby obtained were unjust because they resulted from unlawful and incompatible State aid. The second defender, by virtue of its ownership of the first defender, has benefited to the same extent as has the first defender. It is equitable that the unlawful aid should be recovered. The defenders' averments in answer are denied. Explained and averred that the first defender having been the recipient of unlawful and in compatible aid, it follows that that receipt was unjustifiable. Whether or not it passed on the benefits thereof to its customers is irrelevant (Cases C-164/15P and 165/15 P, *Commission v Aer Lingus and Ryanair* at paragraph 102)."

[54] A person may be said to be unjustifiably enriched at another's expense when he has become owner of the other's money or property or has used that property or otherwise benefited from his actings or expenditure in circumstances which the law regards as actionably unjust, so as to require the enrichment to be reversed. The requirements for a claim of unjust enrichment were set out by Lord Hope of Craighead in the House of Lords in *Dollar Land Cumbernauld Ltd* v *CIN Properties Ltd* 90 at p99 as follows:

> "In *Varney (Scotland) Ltd v Burgh of Lanark* at p51 Lord Fraser said that nothing had happened since 1909, when, in *Edinburgh and District Tramways Co Ltd v Courtenay*, at p105 Lord president Dunedin said that he did not think that it was possible to frame a definition of recompense which would by itself at once include all classes of cases which fall within the doctrine and at the same time successfully exclude those which do not, to make the framing of such a definition any easier. The approach which he

> adopted was to identify the factors which are essential to the success of a case based on recompense and to see whether they were present in that case. Now that unjustified enrichment is more clearly seen as the event which justifies the granting of the remedy, the more obvious it becomes that Lord Fraser's approach was the correct way in which to subject the facts to analysis. I think that lord Rodger stated the matter correctly in the present case … when he said that the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment."

The pursuer in this case had failed relevantly to aver any of the four essential requirements of a claim for unjustified enrichment.

[55] First, the pursuer had failed relevantly to aver that the first defender had been enriched. It was not averred that the defenders had retained the advantage of the exemption for themselves. The pursuer does not aver that such advantage was not passed on to the first defender's customers. The pursuer did not relevantly aver how the first defender obtained an unfair advantage over its competitors. It was not averred that the first defender's competitors did not have similar exemptions. There were no averments quantifying the alleged enrichment following from the alleged distortion of the market. The first defender had not been enriched by its exemption from the Aggregates Levy. It had passed on the whole advantage of the exemption to its customers and enjoyed no competitive advantage as a consequence of its shale exemption.

[56] Secondly, the pursuer had not averred that the first defender's alleged enrichment was at the pursuer's expense.

[57] Thirdly, the pursuer had not relevantly averred that there was no legal justification for the alleged enrichment. The pursuer averred that the first defender had an exemption from the Aggregates Levy throughout the relevant period. It was not averred that, in accordance with the law which was in force at the time, the exemption was not properly granted nor that the exemption remained valid throughout the relevant period until the

Final Commission Decision. The retroactive classification of the shale exemption from the Aggregates Levy as unlawful did not render any benefits which had been received during the period it was lawful unjustifiable at common law.

[58] Fourthly, taking the pursuer's averments *pro veritate* it was not equitable to ordain the first defender to make payment of the sums first and second concluded for. The first defender had no responsibility for the retrospective classification of the shale exemption from the Aggregates Levy as unlawful and applied for and received its exemption in accordance with the law that was in force at that time. The pursuer did not aver otherwise. As the first defender had not been unjustifiably enriched by its exemption the second defender had not been indirectly or directly enriched as a consequence of being the sole shareholder of the first defender.

Submissions for the pursuer

[59] The defenders had been enriched through the non-payment by the first defender of Aggregates Levy as a result of the exemptions for shale and shale spoil, which payments would otherwise have been collected by the Crown. The Final Commission decision made plain that those exemptions were legally unjustified from their inception. The United Kingdom (including its courts) was under an obligation to recover the unlawful and incompatible State aid thereby granted, from which it followed that it was equitable to do so. While the pursuer's case primarily depended upon the court's obligation to enforce the Final Commission Decision addressed to the United Kingdom to recover the unlawful and incompatible aid, the court could also order recovery on the basis of the common law concept of unjustified enrichment.

Discussion

[60] I do not know why the pursuer thought it either necessary or appropriate to include an alternative claim for unjust enrichment at common law this action. This action is about the application of EU law to the Aggregates Levy and I see no good reason for the inclusion of a case based on unjust enrichment, which raises considerations of equity which do not arise in the claim based on EU law.

[61] In my opinion it is not correct to say, as the defenders submit, that the first defender had not been enriched at the expense of the pursuer. The first defender was clearly enriched to the amount of the Aggregates Levy which it should have paid but did not pay and this was at the expense of the Crown which did not receive payment of the levy. It is true that the exemption from the levy was thought to be lawful at the time, but in retrospect it has been found to be unlawful. That makes it unlawful from the beginning. I do not accept the submission for the defenders that the retrospection classification of the exemption from the levy as unlawful did not render any benefits rendered under it at the time it was lawful unjustifiable at common law. The position seems to me to be equivalent of that where a lower court holds something to have been lawful and its decision is thereafter reversed on appeal.

[62] On the other hand, I think that there is some merit in the defenders' submission based on equity. The first defender did nothing that was considered to be wrong at the time the exemption was applied. It acted in accordance with the clear provisions of domestic law. It is correct to say that it had no responsibility for the retrospective classification of the shale exemption as unlawful. If the reasonable person were to consider the circumstances of the present case and ask who should in fairness bear the loss I think that the response given by him or her would be the taxing authority responsible for what had happened. On one view

of the matter this is a case of unjustified impoverishment of the first defender now rather than unjustified enrichment of it at the time the exemption was applied. When considerations of equity fall to be applied I am of the view that they are plainly in favour of the first defender and I hold that it would not be equitable to order that the first defender make payment of the sums sought.

Joint and several liability

Submissions for the defenders

[63] The pursuer's averments relating to the alleged joint and several liability of the defenders were irrelevant. The pursuer had failed to aver any relevant basis for the imposition of joint and several liability. In particular, there had been a failure to aver any relevant basis for the second defender being jointly and severally liable for any unlawful State aid received by the first defender.

[64] The pursuer did not aver that any State aid, unlawful or otherwise, had been paid direct to the second defender. The pursuer did not aver that the second defender had any exemptions in its name from the Aggregates Levy. The pursuer accepted that the exemption was in the name of the first defender and that all State aid was paid to the first defender in the first instance.

[65] The sole basis for the purported imposition of joint and several liability was to be found in the following averments in article 3 of condescendence, where the pursuer averred:

> "The second defender wholly owns the first defender. It has done so since before 2002. The second defender has thereby benefitted and continues to benefit from the activities of the first defender in the course of its business."

[66] While it was correct that the first defender was a wholly owned subsidiary of the second defender, parent companies were not jointly and severally liable for the debts of their

subsidiaries. In law a parent company and its subsidiaries remained separate corporate entities with distinct legal personalities. The second defender had no contractual liability to indemnify or guarantee any debts owed by the first defender to HMRC. Equally, there were no statutory provisions which imposed any joint and several liability on the second defender for any debts that the first defender may owe to HMRC in respect of alleged unlawful State aid. Accordingly, the pursuer had failed relevantly to aver any basis for imposing joint and several liability upon the second defender in respect of the sums allegedly due by the first defender to HMRC.

Submissions for the pursuer

[67] The first defender was an entity engaged in the quarrying of aggregate and would have been liable to pay Aggregates Levy on the exploitation of shale and shale spoil, but for the exemptions. The second defender was not so engaged. It wholly owned the first defender. They formed a single economic unit. Between 2002 and 2014 the second defender derived benefit from the first defender's enjoyment of the exemptions as recipient of the profits made by the first defender and/or the enhanced value of the first defender. These profits or that value were greater than they would otherwise have been as a result of the first defender's enjoyment of the exemptions from Aggregates Levy subsequently found to be unlawful and incompatible aid, and were greater precisely to the extent which the first defender did not pay Aggregates Levy as a result of the exemptions. To that extent, the second defender is also to be regarded as a recipient of the unlawful and incompatible aid, notwithstanding that it did not itself benefit in the most direct way by being itself exempted from paying the Aggregates Levy. It had benefited through forming part of the single economic unit and through its receipt of enhanced economic value.

[68] The purpose of repayment of aid being the restoration of the *status quo ante*, if the unlawful and incompatible aid were recovered by means of payment from the first defender to the pursuer, the resulting decrease in value of the first defender would serve to extinguish any benefit received by the second defender. Repayment by the second defender would thus become unnecessary. For that reason the appropriate form of liability was joint and several liability between the first and second defenders.

Discussion

[69] Joint and several liability is a form of liability which arises between co-obligants. The first and second defenders were not co-obligants to the pursuer. The only party liable to pay Aggregates Levy was the first defender: the second defender was never at any time so liable. This action is an action to enforce payment of the Aggregates Levy which should have been, but was not, paid by the first defender. The second defender was never under any liability to the pursuer for Aggregates Levy at the material time, and cannot be made so liable now. The submissions for the defenders are in my opinion correct and must be sustained. The submissions for the pursuer proceed upon a fundamental misconception about the nature of joint and several liability and must be rejected.

Decision

[70] I shall grant decree against the first defender for payment to the pursuer of the sums first, second and third concluded for and assoilzie the second defender from the conclusions of the summons.