FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 56
A152/16

Lord President
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

in the cause

THE ADVOCATE GENERAL

Pursuer and Respondent

against

JOHN GUNN AND SONS LIMITED

Defenders and Reclaimers

Pursuer and Respondent: Maciver; Office of the Advocate General
Defenders and Reclaimers: Simpson QC; Harper Macleod LLP

4 September 2020

Introduction

[1] In this reclaiming motion (appeal), the defenders seek the recall of the Lord Ordinary's interlocutor of 13 April 2018 which granted decree *de plano* for payment by the defenders to the pursuer of £1,064,869 plus interest. The Lord Ordinary held that this was the amount to be recovered in respect of Aggregates Levy which the defenders had not paid

as a result of two statutory exemptions. The European Commission ultimately decided that the exemptions amounted to unlawful state aid and were thus in breach of article 107(1) of the Treaty on the Functioning of the European Union. The Commission ordered the United Kingdom to recover the aid from the "beneficiaries".

[2] What is the consequence of the Commission's decision? The competing contentions can be shortly stated. The pursuer maintains that the defenders must pay the amount of Levy which they would otherwise have paid to HM Revenue and Customs but for the unlawful exemptions. The defenders argue that they only have to pay the amount which represented the actual advantage which the exemption had given to them. This sum would be nil, standing the defenders' averments that they had passed on the benefit of the exemptions to their customers.

[3] There are other questions. First, is the pursuer, by seeking the larger amount, in breach of Article 1 of Protocol 1 of the European Convention (protection of property)? Secondly, is the pursuer acting unlawfully by breaching HMRC's Policy Brief 11 (2015): *Reinstatement of certain Aggregates Levy exemptions*, if it were applied *mutatis mutandis* to the defenders' situation? Thirdly, is the domestic time limit of four years applicable under the EU principle of equivalence?

Background

[4] Aggregates Levy is a tax which applies to the commercial exploitation of rock, sand or gravel. It was imposed by Part II of the Finance Act 2001, partly as an environmental measure to discourage quarrying in favour of using recycled materials. It was charged on the first exploiter, initially at a rate of £1.60, rising to £1.95 and then £2.00 per tonne. Liability arises when the aggregate is, *inter alia*, removed from site, sold and used for

construction purposes (2001 Act, ss 16(2) and (3), 19(1) and (2)). There were exemptions for shale and shale spoil (s 17(3)(f)(i) and (4)(a)). The defenders had been involved in the extraction of such materials (shale and shale spoil), and their commercial exploitation as aggregate, since before the 2001 Act.

[5] In late 2001, the UK notified the European Commission of its intention to introduce the Levy. Objectors to the Levy, including the British Aggregates Association, complained to the Commission that the Levy would be unlawful because, as a result of the exemptions, it amounted to state aid. On 19 April 2002, the High Court of Justice of England & Wales refused the BAA's application for judicial review (*British Aggregates Association* v *HM Treasury* [2002] 2 CMLR 51). The judge at first instance held that the Levy was not the equivalent of a customs duty and thus not in breach of EU law. The exemptions did not amount to state aid. The BAA were given permission to appeal. The appeal was sisted in May 2002 (see *British Aggregates Association* v *HM Treasury* [2013] EWCA Civ 720 at para 6).

[6] Meantime, on 24 April 2002, the Commission decided not to object to the Levy or the exemptions. The BAA challenged that decision before the General (First Instance) Court of the EU. The challenge initially failed (*British Aggregates Association* v *EU Commission* [2007] Env LR 11) but, on 22 December 2008, it was successful on appeal to the Court of Justice of the European Union (*British Aggregates Association* v *EU Commission* [2009] Env LR 24). The CJEU referred the matter back to the General Court for reconsideration.

[7] On 7 March 2012, after almost 10 years, the General Court annulled the Commission's initial decision. That required the Commission to reassess its decision to raise no objection. On 31 July 2013, it decided that the Levy was lawful but commenced an investigation into the lawfulness of the exemptions (see *Cloburn Quarry Co* v *HM Revenue & Customs* 2014 SLT 303). As a result, the United Kingdom suspended the exemptions with

effect from 1 April 2014 (Finance Act 2014, s 94). Meantime, on 10 April 2013, the Court of Appeal in England and Wales recalled the sist in the judicial review appeal proceedings.

[8] On 27 March 2015, the Commission issued its final decision (2016/288 C(2015) 2141). It determined that the exemptions in relation to shale and shale spoil amounted to unlawful state aid because they were not justified in environmental terms (TFEU, Art 107(3)(c); *Community Guidelines on State Aid for Environmental Protection* 2001). Central to its determination was a finding (see recitals 353, 366 and 505) that freshly quarried shale was a material which was subject to the Levy. It was, like other rock, used as aggregate. The exemptions preferred those who extracted shale or shale spoil for use as aggregate over those who extracted other materials for the same use. As such, they provided a "selective" advantage (para 507) over other traders in aggregate, including those involved in cross-border trade between the UK and Ireland (para 509). Contrary to the UK's contention, the exemptions undermined the environmental objective of the Act and encouraged the fresh quarrying of shale (para 582). They distorted competition in the local aggregates markets (592).

[9] The Commission continued:

> "(513) Although the [Levy] was notified by the UK authorities before being put into effect, the UK did not observe the standstill clause of Article 108(3) … before the Commission adopted its decision on 24 April 2002 to not raise objections. The Commission decision was timely challenged and eventually annulled by the General Court on 7 March 2012 … Thus that decision must be considered void with regard to all persons as from the date of its adoption. Since the annulment of the Commission decision put a stop, retroactively, to the presumption of its lawfulness, the implementation of the aid in question since 1 April 2002 must be thus regarded as unlawful… According to the case-law the recipients of the aid cannot entertain legitimate expectations as to the lawfulness of the implementation of the aid, since the Commission decision not to raise objections to the measure was challenged in due time before the General Court ."
>
> The Commission concluded, in relation to recovery, that:

(621) … [T]he exemptions from the [Levy] granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as 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.

(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 [C-70/72 *Commission* v *Germany* [1973] ECR 813, para 13]. 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 [C-278 and 279/92 *Spain* v *Commission* [1994] ECR I-4103, para 75].

(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 payment of the aid is restored [C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paras 64 and 65].

(624) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]'.

(625) Thus, given that the exemptions from the [Levy] … were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order 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 (i.e. the day from which the beneficiary would have been obliged to pay the [Levy] if the unlawful and incompatible exemptions from the [Levy] 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 the aid entails that the beneficiaries of the exemptions should pay the [Levy], for the period of its application, together with interest until effective recovery.

…

(630) In order to define … the respective aid amounts, … The UK authorities should … by means of all available sources of information, including public information and confidential tax records, establish the amounts of shale material specified in recital 621 … commercially exploited by these shale producers. Should it

not be possible to establish these amounts on the basis of the available information, the UK authorities should request the shale producers to demonstrate to what extent the shale material they produce is (and to what extent it is not) the material specified…".

[10] The operative articles of the decision include the following:

"Article 1

1. The aid scheme consisting of the exemptions from the aggregates levy … granted for:

(a) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, … and

(b) aggregates consisting wholly of the spoil from any process by which shale that is deliberately extracted for commercial exploitation as aggregate has been separated from other rock …

put into effect by the United Kingdom in breach of Article 108(3) TFEU are incompatible with the internal market.

…

Article 5

1. The United Kingdom shall recover the incompatible aid granted under the scheme referred to in Article 1(1) from the beneficiaries.

2. The aid to be recovered shall include interest …"

Article 6

1. Recovery of the aid… shall be immediate and effective".

Following the Commission's final decision, the exemptions were repealed (Finance (No. 2) Act 2015, s 48).

The Dispute on Record

[11] The parties agree that recovery of the unlawful state aid is required. The dispute is on quantum. The pursuer avers that Article 5 of the Commission decision orders the UK to

recover unlawful aid granted from 1 April 2002 to 31 March 2014 by requiring the defenders to pay the Levy which ought to have been charged during that period.

[12] The defenders paid the Levy on shale and shale spoil exploitation, which they carried out between 1 April 2002 and about November 2003. In autumn 2003, HMRC confirmed that the defenders' shale and shale spoil exploitation qualified for exemption from 1 April 2002. The defenders then reclaimed the Levy which they had paid. HMRC refunded them £90,598. On 26 July 2016, after the Commission's final decision, the defenders repaid that sum to HMRC. On 5 August 2016 they paid HMRC compound interest of £55,554.21 on that sum. The principal sum of £1,064,869, which is that concluded for, represents the sum which the defenders would have paid as Levy from November 2003 to 31 March 2014, had their exploitation of shale and shale spoil during that period not been exempt.

[13] The pursuer maintains that, if the defenders had wanted to challenge the Commission decision, they should have done so before the CJEU. The defenders admit that the court is bound to implement the Commission decision. They state expressly that they do not challenge the decision. They claim that their only obligation was to repay the £90,598 which they received from HMRC after they had retrospectively qualified for the shale exemptions. This had been the sole advantage which they had obtained. Repayment of that sum restored the market to the situation in which it had been before the unlawful aid was paid. In other words, this was the actual advantage to them of the exemptions. The law ought to reflect the fact that they had passed on the benefit to their customers, without obtaining a competitive advantage. Their local competitors in Caithness and Sutherland had also received the exemptions, but they had operated on a much smaller scale. The state aid, which those local competitors had received, fell below the *de minimis* threshold for recovery.

[14] The defenders' pleadings include something of an essay on the purpose of determining state aid to be unlawful; that being to restore the *status quo ante*. That was achieved by the person, who had enjoyed the benefit of the aid, repaying it and, in so doing, forfeiting the advantage which he had enjoyed in the market. It was a form of restitution. The recovery sought here was excessive and disproportionate. It would itself constitute unlawful aid in favour of quarriers from whom recovery was not required. The defenders had not increased their prices by the amount of the Levy. Their prices had been unaffected by the Levy. Article 1 of Protocol 1 of the European Convention would be breached. The legitimate public interest in recovering unlawful state aid was limited to the value of any advantage received.

[15] At the stage of the reclaiming motion, the defenders introduced a new defence based upon the EU law principle of equivalence. Recovery of state aid ought to be effected in accordance with national procedural rules, which must not be less favourable than those governing similar domestic actions. The relevant similar domestic action was an assessment to recover the Levy. In the absence of negligence or deliberate conduct, UK law imposed a time limit of four years for the making of such an assessment (Finance Act 2001, sch 5, para 4 (Aggregates Levy: Recovery and Interest)). Accordingly, only the Levy that ought to have been paid in accounting periods ending no more than four years before the HMRC's demand letter ought to be recoverable.

Lord Ordinary's reasoning

[16] The Lord Ordinary found in favour of the pursuer. The amount to be recovered was the amount that would have been paid as Aggregates Levy had there been no shale and shale spoil exemptions. The calculation of any other amount would be "wholly unrealistic".

There was no merit in the defenders' argument that all aggregate quarriers within the relevant local market benefited from the exemptions and there was therefore no distortion of competition. The Commission did not think in terms of small local markets, but in terms of the European single market. What a recipient of state aid did or did not do with the financial benefit, which he had gained from the application of an unlawful exemption, was immaterial.

[17] The Lord Ordinary's finding on the main issue dealt with Article 1, Protocol 1. In any event, section 6(1) of the Human Rights Act 1998 was not engaged as a result of subsection (2)(a). The UK had no alternative, in terms of section 2(1) of the European Communities Act 1972, but to seek recovery of the sums sought.

[18] The Lord Ordinary considered that the Policy Brief was necessary to ensure that, in the converse situation, a party who had been required, unlawfully, to pay a Levy, obtained compensation. Here, the amount due was that which should have been paid over the relevant period. Therefore, there was no requirement for a corresponding policy brief.

Submissions

Defenders

[19] The defenders advanced five grounds of appeal. First, the Lord Ordinary's decision did not comply with the principles of EU law. The correct sum had to correspond to the actual advantage to the defenders and be proportionate to it (T-308/00 *Salzgitter* v *Commission* EU:T:2013:30, para 138; T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, at para 99; T-366/00 *Scott* v *Commission* [2007] ECR II-797, at para 95). Repayment of the sum could not return the market to the pre-aid situation (C-164 and 165/15 P *Commission* v *Aer Lingus and Ryanair* [2017] 2 CMLR 23, at paras 89, 92 and 105). The defenders had passed the

financial advantage of the exemptions to customers, which was consistent with the nature of the Levy as an indirect tax. The true beneficiaries were the customers, from whom the pursuer should recover the Levy. The defenders had gained no competitive advantage. There was no distortion of competition.

[20] The defenders did not challenge the Commission decision because they could only have done so if they had been directly affected by it (C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2001] 1 CMLR 10, at paras 32-34). Although it was not founded upon in the pleadings, and was produced only at the stage of the reclaiming motion, the defenders referred to a letter to them from HMRC dated 4 August 2003. This referred to a professional analysis of the aggregate which had been removed from two of their quarries. The level of the shale content was between 78% and 90%. On this basis, HMRC told the defenders that the aggregate from their quarries would be exempt. The defenders had not advanced a plea based on legitimate expectation as it could only arise from something which the Commission had said or done.

[21] Secondly, the Commission decision and the Recovery Order did not require the pursuer to recover the sums sued for. The direction required the UK to examine the defenders' individual circumstances in order to identify the actual financial advantage. The Commission's statement of reasons (paras 622, 623, 625 and 626) supported this approach and had to be taken into account when interpreting the operative part of the decision (C-271/13 P *Rousse Industry* v *Commission* EU:C:2014:175, at para 69; C-415/03 *Commission* v *Greece (Re aid to Olympic Airways)* [2005] 3 CMLR 10, at para 41).

[22] Thirdly, the Lord Ordinary erred in rejecting the defenders' submissions on Article 1 of Protocol 1. The pursuer's approach to quantum constituted an unlawful interference with the defenders' possessions. Recovery of state aid must not be incompatible with

fundamental rights (Council Regulation (EU) 2015/1589, art 16; TFEU art 6.3). If there was a conflict, the defenders' Article 1 Protocol 1 rights prevailed (*Bosphorus Airlines* v *Ireland* (2006) 42 EHRR 1; *Avotiņš* v *Latvia* (2017) 64 EHRR 2).

[23] Fourthly, the court had to consider if "equivalent protection" existed in EU law. Only if it did, would there be a presumption that the state's action was compatible with the Convention. If not, the court had to scrutinise the measure for compatibility (*Matthews* v *United Kingdom* (1999) 28 EHRR 361). If the pursuer's interpretation were correct, there would be no equivalent protection provided by EU state aid law because recovery would not be limited to the advantage gained. It was for this court to scrutinise whether ordering recovery would be disproportionate. It was beyond the margin of discretion to interfere with property to an extent significantly beyond what would be proportionate (*National & Provincial Building Society* v *United Kingdom* [1997] STC 1466).

[24] Fifthly, the pursuer's approach to quantum contradicted the guidance contained in HMRC's Policy Brief 11/15. If refunds were applied *mutatis mutandis* to the recovery of state aid, it would require a consideration of whether or not any advantage had been retained by the business or passed on to the customer. The same general principles should apply in determining who had ultimately benefited. The guidance in part 5 of the Brief accorded with EU law by recognising the need to consider individual circumstances. The pursuer failed to recognise that whether or not a business passed on the cost of the Levy to customers was of critical importance when recovering state aid, as it was when determining what refunds were payable.

[25] Recovery of aid had to comply with general principles of EU law, one of which was the principle of equivalence (Council Regulation (EU) 2015/1589, art 16(3); C-205 to 215/82 *Deutsche Milchkontor* v *Germany* [1984] 3 CMLR 586, para 19). Equivalence required that

national procedural rules relating to the enforcement of EU law rights did not discriminate against the enforcement of EU law rights by comparison with the national procedural rules applicable to analogous domestic law rights. Where a taxpayer had incorrectly claimed an exemption, and underpaid tax, HMRC had to make an assessment within four years. The equivalent here is the notification to the defenders of the amount of the Levy to be recovered. The time limit of four years should apply. C-349/17 *Eesti Pagar* v *Ettevõtluse Arendamise Sihtasutus* ECLI:EU:C:2019:172 and C-627/18 *Nelson Antunes da Cunha* v *Instituto de Financiamento da Agricultura e Pescas* ECLI:EU:C:2020:321[1] were not relevant. They concerned the separate EU law principle of effectiveness. At worst, there could be said to be a tension between the two principles, in which event it could be that a reference to the CJEU would be required.

Pursuer

[26] The pursuer submitted that seven principles were determinative of the case. First, the identification and amount of the state aid was set out unambiguously in the Commission decision. The exemptions had been found to constitute unlawful state aid. The Commission had ordered the UK to effect recovery. This was done across the UK. The defenders were the only entity not to have repaid the aid. Secondly, the UK was obliged to implement the Commission decision. Article 5 directed it to recover the aid from the beneficiaries. The obligation was given effect by section 2(1) of the 1972 Act.

[27] Thirdly, the court's duty was to enforce the decision by ordering recovery from the recipients. It was not disputed that the court should order recovery (C-39/94 *Syndicat Francais de l'Express International* v *La Poste* [1996] 3 CMLR 369). The *Commission notice on the*

[1] This case is not available in an official English translation.

enforcement of State aid law by national courts (2009/C 85/01) identified (para 30) the duty of national courts to order full recovery. The national courts could not (para 66) be used to challenge the underlying validity of the Commission decision. Fourthly, a Commission decision could only be challenged by an application to the Court of Justice of the European Union. An individual could do so within two months and ten days (Article 263 TFEU; C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* (*supra*), at paras 34 to 37; Article 51 of the Rules of Procedure of the CJEU). The defenders had been directly concerned but they did not raise a challenge.

[28] Fifthly, the amount to be recovered was the amount of aid received (T-366/00 *Scott* v *Commission* (*supra*), at para 95). That was the amount of the Levy which was not paid. This conformed to the terms of the decision itself and the principle set out in C-164 and 165/15 P *Commission* v *Aer Lingus and Ryanair* (*supra*, at paras 89 to 102). Sixthly, whether the advantage obtained through non-payment was passed on to customers was irrelevant. *Aer Lingus* was determinative of the outcome. Seventhly, no national procedural law could stand in the way of an effective recovery. That meant that any limitation period under national law did not apply (C-24/95 *Land Rheinland-Pfalz* v *Alcan Deutschland* [1997] 2 CMLR 1034 at para 37; C-94/87 *Commission* v *Germany (re Alcan Aluminiumhütte*) [1989] 2 CMLR 425, at para 12, citing *Deutsche Milchkontor* v *Germany* (*supra*)).

[29] On the first and second grounds of appeal, the pursuer's averments relating to quantum were irrelevant. The pursuer was bound by the terms of the Commission decision. The defenders' averments on quantum and market effect were without merit. Those averments amounted to an attempt to challenge the terms of the final decision. *Commission* v *Aer Lingus* (*supra*) confirmed that the amount to be recovered was the advantage gained;

being the amount that the recipient of the aid would have paid had the unlawful aid not been granted. The Commission decision left no scope for a different amount to be sought on the basis of the particular circumstances of the defenders. *Aer Lingus* confirmed that, where unlawful aid was granted by means of the payment of a lower rate of tax, the advantage was the amount of tax which the recipient of that aid would have paid had it not been granted. The transactions actually carried out by the recipient of the aid were irrelevant as was the notion of passing on the benefit. The defenders' argument, that the Commission decision was to be read otherwise, was, as the Lord Ordinary described it, "tortuous and untenable". The Lord Ordinary correctly rejected the argument that enforcement required the court to undertake a detailed investigation into what a beneficiary had done with the aid.

[30] On the third and fourth grounds, there was no unlawful interference with the defenders' A1P1 rights. It was in the public interest to enforce the law on state aid. The quantification was in conformity with EU law as expressed in the Commission decision and the CJEU case law. It was accordingly subject to conditions provided for by law. The specific unlawfulness averred was that recovery of the entire unlawful aid would fall outwith the margin of appreciation afforded to states in the implementation of A1P1. The test of "devoid of reasonable foundation" could not be met in light of the express terms of the Commission decision, the general principles in *Commission* v *Aer Lingus and Ryanair* (*supra*), and the defenders' failure to challenge the Commission decision in the correct forum. Even if the defenders were correct in their criticism regarding the compatibility of the state aid regime with the Convention, recovery would not be unlawful under the Human Rights Act 1998. The UK was obliged by the 1972 Act to effect recovery. Section 6(1) of the 1998 Act did not apply to the bringing of the action or the grant of recovery.

[31] On the fifth ground, the Policy Brief 11/15 had no application. The Brief related to

other exemptions, which were suspended on 1 April 2014 pending the Commission's investigation but which the Commission ultimately found to be lawful. In those cases, taxpayers could reclaim the Levy which they had paid between 1 April 2014 and 31 March 2015; provided that they had not passed on the cost of the Levy to their customer (or, if they had, provided that they would reimburse those customers with the Levy charged). There was no equivalence between a claim by a taxpayer for such a repayment and the pursuer's claim against the defenders. Repayment of tax may be refused to entities which had not passed on that cost and would be unjustly enriched by a repayment (C-76/17 *Petrotel-lukoil* v *Ministerul Economiei* EU:C:2018:139, at paras 32 to 34). In contrast, *Commission* v *Aer Lingus and Ryanair* (*supra*) was definitive. Recovery was to be effected regardless of whether the benefits had been passed on.

[32] On limitation, the defenders' argument was without merit for two reasons. First, by invoking a domestic law limitation period in order to seek to modify the recovery obligation, the argument became that the obligation on the UK was unlawful under EU law. By operation of a principle of EU law, the Commission decision exceeded the scope of what the Commission could order. The obligation was defined in scope by the dates specified in the recovery order. This new point sought to restrict those dates as being contrary to EU law. As such, the true challenge is to the *vires* of the Commission decision. This ought to have been raised before the CJEU. Secondly, a decision of an EU institution is binding upon those to whom it is addressed (TFEU, Art 288). The defenders sought to have the EU obligation of the UK defeated by limitation provisions under UK law. The legal hierarchy operates in the other direction (1972 Act s 2(1); C-106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] 3 CMLR 263 at para 17). A limitation period could not be invoked as a means of frustrating the recovery of unlawful aid (C-24/95 *Land Rheinland-Pfalz* v *Alcan*

Deutschland (*supra*), at para 34). This has been described as the principle of effectiveness. It is not open to the court to apply a limitation provision in order to deprive the Commission decision of its effectiveness.

[33] The principle of "equivalence" provided that it was for the domestic legal systems to lay down the procedural rules governing actions for safeguarding rights which individuals derive from Community law; provided that such rules were not less favourable than those governing similar domestic actions (C-231/96 *Edilizia Industriale Siderurgica (EDIS)* v *Ministero delle Finanze* [1999] 2 CMLR 995 at para 34). It was bound up with the protection of EU rights. This case was not about safeguarding an EU right conferred upon the defenders. There was no EU right involved. Rather there was an obligation imposed upon the UK to recover the aid. There was no procedure under domestic UK law for the recovery of unlawful aid; hence the present action which sought a remedy *sui generis*. It was not equivalent to an assessment to tax, which in ordinary (but not all) cases, would be subject to a four year time limit. The action did not seek the payment of tax, but the recovery of unlawful and incompatible aid. There was no basis for reading any time limit from taxation legislation across to procedure for the recovery of unlawful aid. Even if there were, it would immediately be disapplied by EU law (C-94/87 *Commission* v *Germany* (*supra*), at para 12) because national procedures must not render the recovery of unlawful aid practically impossible (C-627/18 *Nelson Antunes da Cunha* (*supra*), at paras 52 and 56-57). There was no scope for the principle of equivalence. No reference to the CJEU was required. What was required by way of recovery of unlawful aid, in accordance with the Commission decision, was *acte clair*.

Decision

[34] C-164 and C-165/15 P *Commission* v *Aer Lingus and Ryanair* [2017] 2 CMLR 23 sets out the principles to be applied in relation to the recovery of unlawful state aid in clear terms. First, the purpose of the obligation on the state to recover such aid is "to restore the situation as it was before the aid was granted" (para 89). The obligation is fulfilled when the aid, and interest, is "repaid by the recipient, or, in other words, by the undertakings which actually enjoyed the benefit of it" (para 90). Repayment forfeited the advantage gained over competitors (*ibid*). Secondly, recovery does "not imply reconstructing past events differently on the basis of hypothetical elements such as the choices… which could have been made… since the choices actually made with the aid might prove to be irreversible" (para 91). Recovery involves "restitution of the advantage … not the restitution of any economic benefit" (para 92). There may be no benefit but that did not justify any failure to recover the aid "or the recovery of a different sum from that constituting the advantage procured by the unlawful aid" (*ibid*). Where the aid was in the form of a tax advantage, recovery meant that the "transactions actually carried out by the recipients of the aid… must be subject to the tax treatment which the recipients would have received in the absence of the unlawful aid" (para 93).

[35] Just as Aer Lingus and Ryanair had to pay the difference between the unlawful lower air travel tax and the higher figure in respect of each transaction (ie €10 - €2 = €8), irrespective of what actual advantage was gained by the airlines, so, as the Commission determined, the defenders have to pay a sum equivalent to the amount of the Aggregates Levy which they would have had to pay, but for the exemptions.

[36] T-308/00 *Salzgitter* v *Commission* EU:T:2013:30 concerned a number of issues surrounding special depreciation allowances which had been afforded to certain steel

manufacturers on the Germany border with what was then Czechoslovakia. It does not contain any *dicta* which differ from C-164 and C-165/15 P *Commission* v *Aer Lingus and Ryanair* (*supra*). Under reference to T-459/93 *Siemens* v *Commission* [1995] ECR II-1675 (at para 99) the court in *Salzgitter* stated (at para 138) that the recovery must "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". There is nothing controversial about that. In the defenders' case, the advantage arising is quantified by determining the amount of the Levy which was not paid by them. No more intricate a calculation is necessary. Similar considerations apply to T-366/00 *Scott* v *Commission* [2007] ECR II-797. *Scott* concerned the correct valuation of heritable property which had been transferred to a manufacturer by a local authority at a price which the Commission maintained was preferential. The Court of First Instance emphasised (at para 95) the need for an accurate valuation of the benefit received. In restoring the situation to the *status quo ante*, the real advantage; that being the "value of the aid" received, had to be ascertained and recovered in full. That is entirely consistent with the approach in *Aer Lingus*.

[37] It follows that the challenge to the pursuer's assessment of *quantum* must fail and with it the first and second grounds of appeal. In any event, any such challenge would have had to have been made to the Court of Justice of the European Union (C-39/94 *Syndicat Francais de l'Express International* v *La Poste* [1996] 3 CMLR 369 at paras 70-71 adopting the Advocate General's opinion, at para 70 *et seq*). The national courts are required to implement the Commission's decision (*Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the [TFEU],* Art 16.3).

[38] The order of the Commission is unambiguous. Articles 1, 2 and 5 state that the UK "shall recover the incompatible aid", including interest, "from the beneficiaries" and that the

recovery is to be "immediate and effective". For the reasons already explored in relation to C-164 and 165/15 P *Commission* v *Aer Lingus and Ryanair* (*supra*), "beneficiaries" refers to the persons who did not pay the Levy because of the unlawful exemption. These are the defenders and not their customers. The tax is levied on the first exploiter of the aggregate, not on the eventual users of the material.

[39] If this court held that the defenders were not required to repay state aid equivalent to the total Levy, which they did not pay because of the unlawful exemptions, that would amount to a determination that the Commission's decision was itself unlawful. This court has no power to make such a declaration; the Commission being subject to the jurisdiction of the CJEU in terms of Article 263 of the Treaty on the Functioning of the European Union. That article permits any legal person to challenge an act of the Commission if it is "of direct and individual concern" to that person. It is, of course, for the CJEU to interpret that Article, but this court has no reason to consider that the CJEU would not have entertained a timeous challenge by the defenders to a determination that resulted in them having to pay a sum in excess of a million pounds. As stated in C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2001] 1 CMLR 10, although an undertaking cannot challenge a decision purely on the basis that it may potentially be a beneficiary of a scheme (para 33), it is different when it is an actual beneficiary of aid (para 34). In that situation it is "individually concerned" (para 35) with the decision of the Commission to require recovery of that aid.

[40] As a general principle, if recovery of unlawful state aid would be contrary to the European Convention on Human Rights, it ought not to be ordered. Even when applying EU law, which is binding upon them, states remain bound by the Convention (*Avotiņš* v *Latvia* (2017) 64 EHRR 2, at para 101, quoting from *Michaud* v *France* (2014) 59 EHRR 9, at para 102, in turn citing *Bosphorus Airways* v *Ireland* (2006) 42 EHRR 1, at paras 152 *et seq*). EU

law already encompasses the rights under the Convention, thus providing an equivalent level of protection to that available using the Convention mechanisms (*ibid* para 102). On that basis, where a state is acting in accordance with the terms of EU law, and there is no discretionary element involved, there is a presumption that it is behaving in a Convention compliant manner unless the protection afforded to Convention rights is "manifestly deficient" (*ibid*, para 101 citing *Michaud* at para 103).

[41] In seeking recovery of the sums ordered by the Commission, the pursuer is complying with a requirement made by an EU institution. The pursuer has no option to do otherwise. The United Kingdom is simply abiding by the terms of section 2(1) of the European Communities Act 1972. It is not acting unlawfully (of the Human Rights Act 1998, s 6(2)(a)). The requirement to ensure recovery involves the implementation of EU law in relation to unlawful state aid. Recovery affects the defenders' possessions. It engages Article 1 of Protocol 1. However, there is no breach of that Article.

[42] Article 1 of Protocol 1 provides that no-one is to be deprived of his possessions except in the public interest and subject to conditions provided for by law. The deprivation, which the defenders will suffer, is justified in the public interest. It is subject to conditions provided for by law. It redresses unlawful state aid. A measure must strike a fair balance between the general interests of the community and the individual's fundamental rights (*National & Provincial Building Society* v *United Kingdom* [1997] STC 1466, at para 80). There is no basis for concluding that the law relating to state aid, which is what is being enforced against the defenders, does not strike that balance. There is no manifest deficiency in the protection of the defenders' fundamental rights in the enforcement of the law relating to state aid. As already noted, the remedy available to the defenders was to challenge the

Commission decision, including on human rights' grounds, in the CJEU. They did not do so. The third and fourth grounds of appeal fall to be rejected.

[43] The HM Revenue and Customs' Policy Brief 11/15 applied to persons who had paid the Levy, following the suspension of the exemptions. It concerned different exemptions which the Commission subsequently found to be lawful. Such persons could reclaim the amount of Levy paid, provided that they could demonstrate that they had paid it. If they had passed on the cost to their customers, they could not claim a repayment for themselves. The Brief has no relevance to the defenders' situation. The defenders have been found liable to return the state aid, which they received by way of a favourable tax treatment. There is no relevant basis for maintaining that, if the defenders can demonstrate that they did not pass on the Levy to their customers, they should not be liable to repay that state aid. There is no merit in this fifth ground of appeal.

[44] The new ground of appeal is based on a contention that the order for recovery is the equivalent of an assessment for Aggregates Levy and that since there is a four year limitation period for making such an assessment, the same limitation period should be applied to the recovery of unlawful state aid. The court does not agree.

[45] First, the order is for recovery of unlawful state aid. It has a different purpose from an assessment to pay Aggregates Levy. The measure of the unlawful aid is the Levy which would have been paid but for the unlawful exemptions. It is state aid law (not tax law) which is the source of the authority to recover it and of the obligation to pay it. The object of recovery is to correct the distortion of the market, which the unlawful aid caused. The making of an assessment to the Levy is not analogous to the recovery of unlawful aid.

[46] Secondly, even if it were analogous, the principle of equivalence cannot be prayed in aid in order to defeat the recovery of unlawful state aid. The object of the principle of

equivalence is to ensure that national procedural rules which apply when an individual seeks to enforce a right derived from EU law are not less favourable to enforcement of the right than the national procedural rules which apply to the enforcement of an analogous right derived from domestic law (C-234/17 *XC, YB, ZA* ECLI:EU:C:2018:853, at paras 22 and 25; *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2012] 2 AC 337, Lord Sumption at para 146).

[47] There are four reasons why the principle of equivalence does not assist the defenders. First, this is not an instance of an individual seeking to enforce a right conferred upon him by EU law. The defenders are not such a person. Neither is the pursuer. Rather, the pursuer has been ordered by the Commission to recover unlawful state aid.

[48] Secondly, there are no national procedural rules which have been applied specifically to the recovery of unlawful state aid. The court is not faced with a situation in which there are such rules and where those rules are less favourable to the enforcement of the recovery of state aid than national rules applicable to enforcement of an analogous domestic right.

[49] Thirdly, even if a right conferred by EU law was being enforced, and there were national procedural rules which had been applied to that enforcement, the principle of equivalence would not prevent the EU right being treated more favourably by national procedural rules than an analogous domestic right. The object of the principle is to prevent national procedural rules singling out the enforcement of rights derived from EU law for discriminatory (ie unfavourable) treatment in comparison with the treatment of the enforcement of analogous domestic law rights.

[50] The fourth reason is that the principle of effectiveness provides that EU law rights and obligations must not be rendered ineffective by the application of national law, including limitation. This was made clear in C-24/95 *Land Rheinland-Pfalz* v *Alcan*

Deutschland [1997] 2 CMLR 1034. There, the recipient of unlawful state aid had successfully resisted recovery in the German administrative courts on the basis of a number of aspects of national law, including: (i) a prohibition on recovery when the beneficiary had relied upon the lawfulness of the relevant measure and his expectation required protection because he could not reverse the benefit gained without incurring unreasonable disadvantages; and (ii) a time bar of one year from the date upon which the recovering authority became aware of the unlawfulness of the act. The CJEU in C-24/95 *Land Rheinland-Pfalz* v *Alcan Deutschland* reiterated (*supra*, at para 24) the general principle that recovery required to be in accordance with the:

> "procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by [EU] law is not rendered practically impossible [(C-142/87 *Belgium* v *Commission* [1990] ECR I-959, para 61; C-5/89 *Commission v Germany* [1990] ECR I-3437, para 12; the same applies as regards recovery of [EU] aid, see *Deutsche Milchkontor* [v *Germany* [1984] 3 CMLR 586 at para 19]...".

The court repeated the limitations on legitimate expectation and what might be expected of the "diligent businessman" and continued:

> "34 … where State aid is found to be incompatible with the Common Market, the role of the national authorities is… merely to give effect to the Commission's decision. The authorities do not, therefore, have any discretion as regards revocation of a decision granting aid. Thus, where the Commission, in a decision which has not been the subject of legal proceedings, orders the recovery of unduly paid sums, the national authorities are not entitled to reach any other finding…
>
> …
>
> 37 The principle of legal certainty cannot… preclude repayment of the aid on the ground that the national authorities were late in complying with the decision requiring… repayment. If it could, recovery of unduly paid sums would be rendered practically impossible and the [EU] provisions concerning State aid deprived of effectiveness".

C-298/00 *Italy v Commission* [2004] ECR I-4087, at paras 82-91, C-349/17 *Eesti Pagar* v *Ettevõtluse Arendamise Sihtasutus* ECLI:EU:C:2019:172 and C-627/18 *Nelson Antunes da Cunha*

v *Instituto de Financiamento da Agricultura e Pescas*[2] ECLI:EU:C:2020:321 are to similar effect (see also *FMX Food Merchants Import Export Co v Revenue and Customs Comrs* [2020] 1 WLR 757, Lady Arden at para 61. Even if the statutory provision which authorises the making of assessments to Aggregates Levy is analogous to the recovery of state aid, the time limits in that provision would not limit the recovery ordered by the Commission, which is subject to its own limitation period (Council Regulation (EU) 2015/1589 (*supra*) Art 17.1). National procedures must not render the recovery of unlawful state aid practically impossible. These propositions are *acte clair.* Even if the making of an assessment to the Levy was an analogous procedure to the recovery of state aid, and the principle of equivalence could be used to restrict, rather than safeguard, the enforcement of a right conferred by EU law no reference to the CJEU would have been required. This additional ground also fails.

[51] The recovery sought by the pursuer is what EU law requires and the pursuer has no option but to comply with it. The reclaiming motion must accordingly be refused. From the defenders' perspective, this may seem hard. After all, the unlawful exemptions were the prevailing law at the material times. Nevertheless, the fact that they were unlawful state aid created distortion of the market. The consequences of that distortion require to be redressed.

[2] This case is not available in an official English translation.