APPLICATION - to strike out or dismiss one issue in an appeal - application dismissed - VATTR 1986 Rules 18(1) and 19(3)
APPLICATION - to hear one issue as a preliminary issue of law - application dismissed - VATTR 1986 Rule 19(3)

LONDON TRIBUNAL CENTRE

(1) GIL INSURANCE LIMITED (2) UK CONSUMER ELECTRONICS LIMITED (3) CONSUMER ELECTRONICS INSURANCE COMPANY LIMITED (4)DIRECT VISION RENTALS LIMITED (5) HOMECARE INSURANCE LIMITED (6) PINNACLE INSURANCE PLC	Appellants
- and -	
THE COMMISSIONERS OF CUSTOMS AND EXCISE	Respondents

Tribunal: DR A N BRICE (Chairman)

Sitting in private in London on 13 October 1999

Mr David Vaughan QC and Mr Conrad McDonnell of counsel instructed by Messrs Rowe & Maw Solicitors for the Appellants
Mr Paul Lasok QC and Mr A Robinson of counsel instructed by the Solicitor for the Customs and Excise for the Respondents

REASONS FOR DIRECTION

The applications

1. On 13 August 1999 Customs and Excise applied for a direction that one issue in these appeals (the state aid issue) be struck out or dismissed. In the alternative, Customs and Excise applied for a direction that the state aid issue be heard as a preliminary issue of law. Both applications were opposed by the Appellants.

The Rules

2. The procedure before the tribunal is governed by the Value Added Tax Tribunals Rules 1986 SI 1986 No. 590 as amended (the Rules). The relevant parts of Rule 18 provide:

"18(1) A tribunal shall-

(a) strike out an appeal where no appeal against the disputed decision lies to a tribunal; and

(b) dismiss an appeal where the appeal cannot be entertained by the tribunal. ...

(3) ... no appeal shall be struck out or dismissed under this rule without a hearing."

3. The relevant parts of Rule 19 provide:

"19(3) Without prejudice to the preceding provisions of this rule a tribunal may of its own motion or on the application of a party to an appeal or application ... give or make any direction as to the conduct of or as to any matter or thing in connection with the appeal or application which it may think necessary or expedient to ensure the speedy and just determination of the appeal ...".

The documents

4. At the hearing of the application an agreed bundle of documents was produced. A supplemental bundle of documents was produced by the Appellants. Outline submissions were produced in advance of the hearing by Customs and Excise and by the Appellants. A further "Note on behalf of the Appellants" was produced at the hearing together with a "Note on preparation to date". Two bundles of authorities were produced at the hearing.

The facts relevant to the application

5. Each Appellant provides insurance for domestic appliances and each Appellant is registered for insurance premium tax. Between April 1997 and June 1998 the Appellants submitted returns, and paid insurance premium tax at the higher rate, to Customs and Excise. The amounts of tax paid were:

GIL Insurance Limited £17,228,047.00

UK Consumer Electronics Limited £ 37,366.00

Consumer Electronics Insurance

Company Limited £20,758,275.31

Direct Vision Rentals Limited £ 10,318.00

Homecare Insurance Limited £ 244,604.93

Pinnacle Insurance PLC £ 954,584.24

6. In September 1998 each Appellant made a claim for the repayment, with interest, of the amounts paid by it by way of higher rate insurance premium tax. On 21 September 1998 Customs and Excise rejected the Appellants' claims. On 28 September 1998 the Appellants required Customs and Excise to review their decisions. On 13 November 1998 Customs and Excise confirmed that the Appellants' claims were rejected. On 20 November 1998 the Appellants appealed against the decisions on review. On 11 May 1999 the Appellants supplied further and better particulars of their grounds of appeal.

7. On 24 June 1999 Customs and Excise applied for six identified issues to be heard as preliminary issues. The application was heard on 25 June 1999 when the tribunal made a number of directions. These included directions that Customs and Excise should serve their Statements of Case, after which either party had liberty to apply for one or more issues to be heard as separate issues. Directions were

also made as to the production of documents and witness statements. Customs and Excise served their Statements of Case on 27 July 1999 and these were amended on 5 October 1999. The production of documents and of witness statements has proceeded. It is expected that there will be a pre-trial review on 6 December 1999.

8. The Appellants' Notices of Appeal, and the Statements of Case served by Customs and Excise, identify the following issues for determination in the appeal:

(1) whether the imposition of the higher rate of insurance premium tax infringes the Appellants' directly enforceable Community law rights under Articles 11, 13, and/or 33 of the Sixth Council Directive on the harmonisation of the laws of Member States relating to turnover taxes (77/388/EEC); these are referred to as the Sixth Directive issues;

(2) whether the imposition of the higher rate of insurance premium tax infringes the Appellants' directly enforceable Community law rights under Articles 52 and/or 53 of the EC Treaty; this is referred to as the right of establishment issue;

(3) whether the imposition of the higher rate of insurance premium tax infringes the Appellants' directly enforceable rights under Articles 59 and 62 of the EC Treaty; this is referred to as the freedom to provide services issue;

(4) whether the unequal tax treatment resulting from the higher rate of insurance premium tax infringes the Appellants' directly enforceable Community law rights under Articles 92 and 93 of the EC Treaty; this is referred to as the state aid issue; and

(5) whether the Appellants passed on the burden of the higher rate of tax to their customers so that repayment of the tax would unjustly enrich the Appellants; this is called the unjust enrichment issue.

9. This application concerns only the state aid issue.

10. The Appellants have also commenced proceedings in the High Court seeking damages for loss arising out of the introduction of the higher rate of insurance premium tax.

The legislation relating to insurance premium tax

11. Insurance premium tax was introduced by Part III of the Finance Act 1994 (the 1994 Act). Section 51 provided that tax should be charged at the rate of 2.5%. A new section 51 was introduced by section 21(1) of the Finance Act 1997 (the 1997 Act) which provided:

"Rate of tax

51 (1) Tax shall be charged-

(a) at the higher rate, in the case of a premium which is liable to tax at that rate; and

(b) at the standard rate, in any other case.

(2) For the purposes of this Part-

(a) the higher rate is 17.5 per cent; and

(b) the standard rate is 4 per cent."

12. Section 22 of the 1997 Act introduced a new section 51A to the 1994 Act which provided that premiums were liable to tax at the higher rate if they fell within one or more of the paragraphs of Part II of Schedule 6A of the 1994 Act. Schedule 4 of the 1997 Act introduced the new Schedule 6A of the 1994 Act, Part II of which described the premiums liable to tax at the higher rate; these included some, but not all, premiums for insurance relating to motor cars, domestic appliances and travel.

13. Paragraph 8 of Schedule 7 of the 1994 Act contains provisions for the repayment of overpaid tax and the relevant parts provide:

"8(1) Where a person has paid an amount to the Commissioners by way of tax which was not tax due to them, they shall be liable to repay the amount to him. ...

(7) Except as provided by this paragraph, the Commissioners shall not be liable to repay an amount paid to them by way of tax by virtue of the fact that it was not tax due to them."

14. Section 59 of the 1994 Act contains provisions about reviews and appeals. Section 59(2) provides that any person affected by a decision to which the section applies may require Customs and Excise to review their decision. The decisions to which the section applies are listed in section 59(1) and subsection (1)(l) refers to a decision with respect to a claim for repayment under paragraph 8 of Schedule 7. Section 60 contains provisions about appeals and section 60(1)(a) provides that an appeal shall lie to a tribunal with respect to any decision by Customs and Excise on a review under section 59.

The legislation relating to state aid

15. At the relevant time Chapter 1 (Articles 85 to 93) of Title V of the EC Treaty contained rules on competition. Section 3 of Chapter 1 (Articles 92 and 93) contained provisions relating to aid granted by states. The relevant part of Article 92 provided:

"92.1 Save as otherwise provided in this Treaty, 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, in so far as it affects trade between Member States, be incompatible with the common market. ... "

16. The relevant part of Article 93 provided:

"93.3 The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. ... The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

17. The Commission were not informed of the plans to impose a differential rate of insurance premium tax before it was introduced in 1997.

The Lunn Poly decisions

18. Lunn Poly Ltd and Bishopsgate provided travel insurance and, after the introduction of the higher rate of insurance premium tax, they sought a declaration that the statutory provisions giving effect to the differential rates were incompatible with Community law. Before the Divisional Court (R v Customs and Excise Commissioners, ex parte Lunn Poly and another [1998] STC 649) a number of issues were raised, including the Sixth Directive issues, the right of establishment issue, the freedom to provide services issue and the state aid issue. As far as the state aid issue was concerned, the Divisional Court held that the differential rates constituted a state aid within the meaning of Article 92 and, since the Commission had not been notified and had not given its approval as required by Article 93.3, the differential rates were illegal. The wording of the amended Order of the Divisional Court of 2 April 1998 declared that the differential rates of tax were an unlawful state aid contrary to Article 92 of the EC Treaty. The Court of Appeal (R v Customs and Excise Commissioners, ex parte Lunn Poly Ltd and another [1999] STC 350) considered only the state aid issue and upheld the decision of the Divisional Court.

Reasons for Direction

19. The arguments of the parties on the applications raised four interdependent questions which it is convenient to consider in the following order: (1) does the tribunal have jurisdiction to hear the state aid issue? (2) does Rule 18 or Rule 19 give the tribunal power to strike out one issue in an appeal? (3) should the tribunal strike out or dismiss the state aid issue? and (4) should the tribunal direct that the state aid issue be heard as a preliminary issue of law?

(1) - Does the tribunal have jurisdiction to hear the state aid issue?

20. The first question is whether the tribunal has jurisdiction to hear the state aid issue.

21. For Customs and Excise Mr Lasok argued that the jurisdiction of the tribunal was statutory and the tribunal did not have a general equitable jurisdiction; he cited Customs and Excise Commissioners v Arnold [1996] STC 1271. Whatever the decision on the state aid issue, the review decision of Customs and Excise in these appeals would still be correct because the higher rate tax paid by the Appellants was not illegal state aid; it was, therefore, tax due to Customs and Excise; and so repayment was not due to the Appellants. The only possible remedies available to the Appellants were the obligation on Customs and Excise to collect tax at the higher rate from those competitors of the Appellants who had paid tax at the lower rate (subject to any defences that those competitors might have) and the right of the Appellants to take proceedings for compensation for any loss that they might have suffered arising from the introduction of the higher rate of tax. Neither of those remedies was within the jurisdiction of the tribunal.

22. For the Appellants Mr Vaughan said that he did not understand the argument of Customs and Excise on the question of jurisdiction. If the Appellants were successful in their arguments that the higher rate, or the differential rates, of tax were illegal, and if the higher rate was disapplied as from 1997, then the tax paid by the Appellants was not tax due to Customs and Excise. In such a case Customs and Excise were liable to repay it to the Appellants and a refusal to repay gave rise to a right of appeal to the tribunal.

23. Arnold confirmed that the jurisdiction of the tribunal is statutory. The tribunal only has jurisdiction to hear appeals if it is given that jurisdiction specifically by statute. In the context of insurance premium tax the list of appealable matters appears in section 60 of the 1994 Act. Section 60(1)(a) gives the right of appeal to the tribunal from any decision of Customs and Excise on a review under section 59. Section 59(1)(l) refers to a decision with respect to a claim for repayment under paragraph 8 of Schedule 7. The Appellants made a claim for repayment under paragraph 8 of Schedule 7 and Customs and Excise gave a decision on review which the Appellants dispute. The legislation gives the tribunal jurisdiction to hear an appeal against that disputed decision. The Appellants are asking the tribunal to decide that the higher rate, or the differential rates, of tax are illegal so that the tax they have paid is not tax due to Customs and Excise with the result that they are entitled to be repaid within the meaning of paragraph 8(1) of Schedule 7 of the 1994 Act. That is a matter within the jurisdiction of the tribunal. The Appellants are not asking the tribunal to make an order for damages for loss nor are they asking the tribunal to order Customs and Excise to recover tax at the higher rate from the competitors of the Appellants who paid at the standard rate. Such remedies would be outside the jurisdiction of the tribunal. The other matters mentioned by Mr Lasok are for decision in the appeal. If Mr Lasok's arguments are accepted then the higher rate of tax will not be illegal; the tax paid by the Appellants will be tax due to Customs and Excise; no repayment will be due and the appeal will be dismissed. However, if the Appellants' arguments are accepted then the higher rate of tax will be illegal; it will not have been tax due to Customs and Excise; it should be repaid to the Appellants; and their appeal will be allowed. All these matters are in dispute and are matters for argument in the appeal. They are not matters which affect the jurisdiction of the tribunal.

24. The conclusion on the first question is that the tribunal does have jurisdiction to hear the state aid issue.

(2) - Does the tribunal have power to strike out or dismiss one issue in an appeal?

25. The second question is whether the tribunal has power to strike out or dismiss one issue in an appeal.

26. For Customs and Excise Mr Lasok argued that, although Rule 18 referred to striking out or dismissing "an appeal", it would be wholly unreasonable to confine it to the whole of an appeal and not to individual issues in an appeal. For example, if an Appellant appealed on a number of grounds, one of which was the reliance upon an extra-statutory concession as in Arnold, it should be open to the tribunal to strike out or dismiss the issues in respect of which it had no jurisdiction. However, even if Rule 18 did not give the tribunal power to strike out or dismiss one issue in an appeal, then Mr Lasok relied upon Rule 19(3) as giving the tribunal the power to make the necessary direction.

27. For the Appellants Mr Vaughan argued that Rule 18 did not give the tribunal power to strike out or dismiss part of an appeal.

28. Rule 18(1)(a) gives the tribunal power to strike out an appeal where no appeal against a disputed decision lies to a tribunal. The tribunal only has jurisdiction to hear appeals if it is given that jurisdiction specifically by statute. In the context of insurance premium tax the list of appealable matters appears in section 60 of the 1994 Act. In the context of value added tax the list of appealable matters appears in section 83 of the Value Added Tax Act 1994. If a

decision does not appear in the statutory list of appealable matters then it is a decision where no appeal lies to a tribunal. In such a case rule 18(1)(a) applies and the appeal must be struck out.

29. The present appeal is against a review decision of Customs and Excise rejecting a claim for repayment under paragraph 8 of Schedule 7 of the 1994 Act. By virtue of section 60(1)(a) of the 1994 Act that is a decision against which the Appellants may appeal to the tribunal. The decision is, therefore, a disputed decision against which an appeal does lie to the tribunal It does not, therefore, come within rule 18(1)(a). Accordingly, it would not be appropriate to strike out this appeal under rule 18(1)(a).

30. Rule 18(1)(b) gives the tribunal power to dismiss an appeal where the appeal cannot be entertained by a tribunal. The legislation which gives the tribunal jurisdiction to hear appeals also contains specific provisions about appeals which cannot be entertained by the tribunal. For example, section 84(2) of the Value Added Tax Act 1994 provides that an appeal under that Act shall not be entertained unless the appellant has made all his value added tax returns and paid the amount of tax shown as due in those returns. A somewhat similar provision appears in section 60(4) of the 1994 Act relating to insurance premium tax. In these cases there may be a disputed decision against which an appeal does lie to the tribunal (so that the appeal is not to be struck out under Rule 18(1)(a)) but where the legislation imposes conditions which must be complied with before the appeal can be entertained. If the statutory conditions are not complied with, then the appeal cannot be entertained and so it is dismissed under Rule 18(1)(b).

31. In the present appeal it was not suggested that the Appellants had not fulfilled the conditions mentioned in section 60(4) of the 1994 Act. Thus there is no reason why the appeal should not be entertained by the tribunal. Accordingly, it would not be appropriate to dismiss this appeal under Rule 18(1)(b).

32. Bearing in mind the statutory background and purpose of rule 18(1) it would be inappropriate to use that rule to strike out or dismiss one issue in an appeal in a case where the legislation provides that an appeal against a disputed decision lies to the tribunal and where an appeal can be entertained by the tribunal. It is relevant that the words of the rule are directed to "an appeal" and not to part of an appeal. Thus the words of the rule support the conclusion that part of an appeal should not be struck out or dismissed under Rule 18.

33. The ambit of Rule 19 is very much wider than that of rule 18. However, Rule 18 specifically provides that a direction under the rule cannot be made without a hearing whereas Rule 19(3) provides that a direction under that rule could be made of the tribunal's own motion. Thus Rule 19(3) cannot be treated as a wider version of Rule 18. The matters mentioned in Rule 18 must follow the procedure set out in that Rule. However, Rule 19 could be relevant in situations not covered by Rule 18. For example, Rule 19 is wide enough to give the tribunal power to direct that an issue be heard as a preliminary issue, or to direct that separate issues be heard separately. It may also be wide enough to give the tribunal power to direct that a ground of appeal which discloses no reasonable ground for bringing the appeal should be struck out.

34 Thus the answer to the second question is that Rule 18 does not give the tribunal power to strike out or dismiss one issue in an appeal but that Rule 19 is most probably wide enough to give the tribunal power to direct that a ground of

appeal which discloses no reasonable grounds for bringing the appeal should be struck out.

(3) Should the tribunal direct that the state aid issue be struck out?

35. The third question is whether the tribunal should direct that the state aid issue be struck out.

36. The arguments of Customs and Excise on this question were the same as those raised on the question of jurisdiction, namely that, whatever the decision on the state aid issue, the review decision of Customs and Excise in these appeals would still be correct because the higher rate tax paid by the Appellants was not illegal state aid; it was, therefore, tax due to Customs and Excise; and so repayment was not due to the Appellants.

37. For the Appellants Mr Vaughan cited Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd [1986] AC 368 as authority for the view that an appeal should not be struck out if there were any doubts about the pleadings and then only if striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for the trial. There would be no reduction of the burden in this case. He also cited Barret (A.P.) v London Borough of Enfield HL (Unreported) Transcript of 17 June 1999 as authority for the view that an appeal should only be struck out if it were possible to give a certain answer to the question whether the claim would succeed and that striking out was not appropriate in uncertain and developing areas of law where judgement should be given on the actual facts as found. Rule 19(3) was designed to ensure the speedy and just determination of an appeal. If successful, the application of Customs and Excise would lead to further delay as the state aid issue was only one of a number of issues in the appeal and preparation for the hearing of all issues was proceeding; this appeared from the Appellants' "Note on preparation to date". The hearing of all the issues by the Divisional Court in Lunn Poly had only occupied four days. This was a lead case and there were others following. The Notices of Appeal had been lodged on 20 November 1998 and the appeal had already proceeded for almost a year.

38. In order to identify the principles to be applied in deciding whether to direct that the state aid issue be struck out reference is made to the authorities cited by the parties. Although they concern the Rules of the Supreme Court and not the Rules of the tribunal, and although they pre-date the introduction of the Civil Procedure Rules 1998, they do give helpful guidance as to the principles to be followed.

39. Williams & Humbert (1986) concerned the construction of RSC Ord 18 r 19 which provided that the court could order to be struck out or amended any pleading on the ground that it disclosed no reasonable cause of action. At page 441 Lord Mackay of Clashfern said:

"If on an application to strike out it appears that a prolonged and serious argument will be necessary there must, at the least, be a serious risk that the court time, effort and expense devoted to it will be lost since the pleading in question may not be struck out and the whole matter will require to be considered anew at the trial. This consideration, as well as the context in which Ord. 18 r. 19 occurs, and the authorities upon it, justifies a general rule that the judge should decline to proceed with the argument unless he not only considers it likely that he may reach the conclusion that the pleading should be struck out, but also is satisfied that striking out will obviate the necessity for a trial or will so

substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worthwhile."

40. In Barret (1999) Lord Browne-Wilkinson said that, unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. Further, in an area of law which was uncertain and developing it was not normally appropriate to strike out. It was of great importance that such development should be on the basis of actual facts found at the trial and not on hypothetical facts assumed to be true for the purpose of the strike out.

41. Practice Direction 3.4 of the Civil Procedure Rules 1998 provides that a court may strike out part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending the claim.

42. Applying those principles to the facts of the present application I conclude that the tribunal should only direct that the state aid issue be struck out if it is satisfied that there are no reasonable grounds for the Appellants raising that issue. Relevant factors are the chances of the Appellants succeeding on the issue and whether such a direction would obviate the necessity for a hearing or would substantially cut down or simplify the hearing of the appeal.

43. In order to decide whether the Appellants had reasonable grounds for raising the state aid issue it is necessary to give some consideration to the substantive arguments of the parties. I must, however, make it clear that I have reached no view on the merits of these arguments.

44. For Customs and Excise Mr Lasok argued that, to succeed on the state aid issue, the Appellants had to establish that the differential rate of insurance premium tax was a state aid and that would depend on the facts. However, even if it were established that there had been state aid, and that the differential rates were illegal, that did not mean that the higher rate of tax was illegal and he argued that it was the lower rate of 4% which was illegal. Article 92 of the EC Treaty referred to state aid as "favouring certain undertakings" and Epifanio Viscido and Others v Ente Poste Italiane Cases C-52 to C-54/97 [1988] ECR I-2629 established that it was only advantages granted through state resources which could be considered as aid within the meaning of Article 92(1). This had been confirmed by the Master of the Rolls in the Court of Appeal's decision in Lunn Poly at 362h and by Clarke LJ at 365d. As state aid was the receiving of a benefit it followed that it was only the measures conveying the benefit which were illegal. The measure giving effect to the state aid was the introduction of the 4% rate of tax; if that was illegal then the result would be that all premiums were liable to tax at 17.5%.

45. Mr Lasok went on to argue that, where illegal state aid had been granted, the remedy for the illegality was that the recipient had to repay it to the state. In Federation Nationale du Commerce Exterieur des Produits Alimentaires and Syndicat National des Negociants et Transformateurs de Saumon v French State (FNCE) Case C-354/90 and Syndicat Francais de L'Express International (SFEI) and Others v La Poste and Others Case C-39/84 [1996] ECR-I 3547 at paragraph 58 the Court of Justice had held that the state had to recover any financial support granted in disregard of the provisions of the Treaty; the Court of Justice had not held that those paying the full price were entitled to a refund; that would extend the scope of state aid, increase its effect, and extend the illegality. Ministero delle Finanze v IN.CO.GE.'90 Srl Cases C-10/97 to C-22 /97 [1998] ECR-I 6307 was authority for the view that a rule of national law which was

incompatible with an existing Community law was not non-existent; however, a national court was obliged to disapply the incompatible rule and to apply, from the various procedures available under national law, those which were appropriate for protecting the individual rights given by Community law. Further, Council Regulation (EC) No. 659/1999 of 22 March 1999 laid down detailed rules for the application of Article 93 of the EC Treaty. Recital 2 stated that the regulation was intended to codify the case law of the Court of Justice and Article 14 provided for the recovery of unlawful aid from recipients; there was no power to extend the scope of aid to others. It followed that, in the present appeal, Customs and Excise were under an obligation to recover the difference between tax at 4% and tax at 17.5% from those who had paid the 4%, subject to any defences they might have. An alternative remedy was for those who had been disadvantaged by the illegal state aid to seek compensation from the state. The purpose of Article 92 was to prevent the competitive position of individuals from being adversely affected.

46. For the Appellants Mr Vaughan argued that it was the higher rate of tax which was illegal. If there were only one rate of tax of 4% then there would be no state aid and no illegality. It was the differential between the 4% and the 17.5% which established the state aid and so it was the introduction of the higher rate of tax which caused the state aid. Thus it was the higher rate of tax which should be disapplied. He distinguished the decision in Viscido which, he argued, dealt with an entirely different situation, as had been noted by the Court of Appeal in Lunn Poly at 370f. He relied upon the decision of the Court of Appeal in Lunn Poly as authority for the view that it was the differential taxation which was unlawful and he contended that so long as there were a difference in rates then the whole system of differential taxation was unlawful. The amended Order of the Divisional Court declared that the differential rates constituted an unlawful state aid contrary to Article 92 of the EC Treaty and that Order had been upheld by the Court of Appeal; Clarke LJ at page 365d had said that it was the differential which created the state aid.

47. Turning to the remedies for the illegality, Mr Vaughan cited Regina v The Attorney General, ex parte Imperial Chemical Industries Plc [1987] 1 CMLR as authority for the view that, where there was a directly effective provision of the EC Treaty, enforcement was for the national court who had to make available the same remedies as were available for an equivalent right in domestic law. He cited the Opinion of the Advocate General in SFEI at paragraphs 22 and 23, and also paragraph 12 of the judgement of the Court of Justice in FNCE, as authority for the view that national courts had to have regard to the validity of the measures giving effect to the aid. He contended that the measures which gave effect to the aid in this appeal were the amendments to the 1994 Act which were introduced by the 1997 Act and which created the differential between the two rates. He cited a number of decisions of the Court of Justice, including BP Supergas v Greece Case C-62/93 [1995] ECR-I-1883 and Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR I-3595, to support his argument that, if an amount of tax were charged by a Member State in breach of the rules of Community law, there was a right to obtain a refund of the amount charged.

48. Having heard the arguments of the parties it seems to me that it is at least arguable that it is the higher rate, or the differential, which is illegal rather than the lower rate. In Lunn Poly the Court of Appeal, having found that it was the differential rate of tax which was illegal, did not go on to identify the specific measures which had to be disapplied. If one accepts, for the purposes of argument, that illegal state aid is the giving of advantages, that does not provide an answer to the question as to what are the consequences of the finding of

illegality and exactly what measures have to be disapplied. FNCE and SFEI both indicate that regard must be had to the validity of the measures giving effect to the aid. In this case the measures giving effect to the aid were the amendments to the 1994 Act which were introduced in the Finance Act 1997. Those measures introduced a "standard" rate which applied generally (unless the higher rate applied) and also the "higher" rate which applied only to some premiums for three types of insurance. Although one possible answer is that it is the lower rate which is illegal and that all taxpayers should pay at the higher rate, (or at least all taxpayers in competition with the Appellants), another possible answer is that it is the higher rate which is illegal and the "standard" rate should apply to all taxpayers, and yet another possible answer is that it was all the amendments introduced in 1997 which were illegal.

49. At the hearing of the application there was reasonably prolonged and very serious argument on the question of the nature of the illegality and on the consequences of it. Having heard those arguments I am unable to reach the conclusion that the Appellants had no reasonable grounds for raising the state aid issue. There is at least a possibility that they will succeed. Further, this is an area of law which is uncertain and developing. I also bear in mind that this is a lead case and that substantial amounts of tax are at stake. In my view the Appellants should have the opportunity of presenting their arguments fully in the substantive appeal rather than having them dealt with summarily on an application to strike out. For those reasons alone I would not direct that the state aid issue be struck out. In addition, however, such a direction would not obviate the need for the hearing of an appeal, as there are other issues to be determined.

50. The answer to the third question is that the tribunal should not direct that the state aid issue be struck out.

(4) - Should the state aid issue be heard as a preliminary issue of law?

51. The fourth question is whether the state aid issue should be heard as a preliminary issue of law.

52. For Customs and Excise Mr Lasok argued that the state aid issue was a discrete legal issue and would determine the state aid aspect of the appeals. The investigation of the facts as to whether or not there had been unlawful state aid would be expensive and time-consuming and, even if the Appellants succeeded, they would not win their appeal on that issue. It was not the best use of the tribunal's resources to find the facts until after the legal issue had been decided. He cited Ashmore v Corporation of Lloyd's [1992] 1 WLR 446 at 448g as authority for the view that it was the duty of the court to identify the crucial issues and to see that they were tried as expeditiously and inexpensively as possible. He also cited Carl Zeiss Stiftung v Herbert Smith & Co and Others [1969] 1 Ch 93 as authority for the view that an issue should be tried as a preliminary issue if it would dispose of that issue.

53. For the Appellants Mr Vaughan argued that the tribunal had rejected an application for the hearing of preliminary issues at the hearing on 25 June 1999. He cited The Commissioners of Customs and Excise v The Zoological Society of London (Unreported) Transcript of 13 July 1999 as authority for the view that great care was called for before directing the hearing of preliminary issues and that such direction should only be given if the relevant facts were agreed or determined. It was unlikely that the facts relating to the state aid issue could be agreed. Further the factual matrices of all the issues were strongly interlinked so

that the evidence about economic loss which was relevant to the state aid issue was also relevant to the unjust enrichment issue.

54. In considering the arguments of the parties reference is first made to the authorities cited. Reference is also made to Tilling v Whiteman [1980] AC 1 which was referred to by the trial judge in Ashmore. Although, these authorities were not decided on the Rules of the tribunal and although they pre-date the Civil Procedure Rules 1998, they do provide helpful guidance as to the principles to be applied in reaching a decision.

55. In Carl Zeiss (1969) an East German company claimed that all the assets of a West German company with the same name were the property of the East German company. The East German company brought an action against a firm of solicitors who were acting for the West German company claiming payment of all moneys they had received as fees, costs or disbursements in connection with the claim. Under RSC O 33 R. 4(2) the firm of solicitors moved for an order for the trial as a preliminary issue of a question of law as to whether they would be accountable for their fees, costs and disbursements if the plaintiffs established the facts which were in issue in the proceedings. In directing the trial of a preliminary issue the Court of Appeal bore in mind that the main claim was "an action on a colossal scale" which would not come on for trial for some time. The solicitors were continuing with the litigation and had received large sums for costs and were incurring large sums in carrying on the action; they were at risk from the claim made against them. They had to know their position as a matter of urgency before further costs were incurred. Lord Denning MR adopted the principle stated by Romer J in Everett v Ribbands [1952] 1 KB 112 as:

"Where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings."

56. Lord Denning went on to say that in many cases the facts and the law were so mixed up that it was very undesirable to have a preliminary issue. He always liked to know the facts before deciding the law but the case before him was an exceptional case. If the issue of law was decided in favour of the solicitors it would dispose of the claim against them, irrespective of the main action.

57. In Tilling v Whiteman (1980) Lord Wilberforce said at page 17G:

"I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated, and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional."

58. And at page 25C Lord Salmon said:

"Preliminary points of law are too often treacherous shortcuts. Their price can be ... delay, anxiety and expense."

59. In Ashmore (1992) the judge ordered the trial of three preliminary points of law and the defendants appealed against his order. In refusing to interfere with the decision of the judge the House of Lords held that it was part of the duty of the trial judge to identify the crucial issues and to see they were tried as

expeditiously and as inexpensively as possible. Litigants were not entitled to the uncontrolled use of the judge's time.

60. In The Zoological Society (1999) a tribunal, at the request of the parties, determined a preliminary question of law on the basis of limited documentation. On appeal to the High Court Lightman J said:

"It is a pre-condition for the adoption of this procedure [i.e. the determination of a preliminary issue of law] by any court or tribunal that (a) the relevant issue is clearly defined and (b) the relevant facts are either agreed (whether for the purpose of the preliminary issue alone or generally) or to be determined as part of the preliminary issue. ... The failure to take the necessary preliminary steps leaves the Decision in the air devoid of meaning and effect and (unless remedial action can now be taken) precludes the matter being taken further on appeal. ... this unhappy episode is a clear warning that great care is called for before seeking or directing the hearing of preliminary issues. Such hearings often appear superficially attractive shortcuts: too often they prove nothing of the sort."

61. From those authorities I derive the principles that the hearing of a preliminary issue of law should only be directed in an exceptional case. Cases where it might be directed include cases where, if the preliminary issue of law is decided in one way, it is decisive of the litigation; or in cases where the legal issue is short and easily decided and the facts are complicated; or in cases where the facts are agreed or are determined as part of the preliminary issue. However, a preliminary issue of law should not be directed where the facts and the law are mixed up. The principle in Barret is also relevant, namely that in uncertain and developing areas of law judgement should be given on the actual facts as found.

62. Applying those principles to the facts of the present application this is not a case where any decision on the law relating to the state aid issue will be decisive of the litigation. If Customs and Excise succeed on the preliminary issue of law then the Appellants still have further issues to argue and if the Appellants succeed on the preliminary issue of law Customs and Excise have not agreed the facts. Neither is this a case where the legal issue is short and easily decided, as appears from the arguments of the parties summarised earlier. Again, the facts relating to the state aid issue have not been agreed and Mr Lasok does not propose that they be determined as part of the preliminary issue of law. Further, this is a case where the facts and the law are mixed and also where the facts relating to the state aid issue may be relevant to other issues in the appeal. Finally, this is an uncertain and developing area of the law and so it is desirable for future developments to be made on the basis of actual facts found at the hearing of the appeal.

63. The answer to the fourth question is that the state aid issue should not be heard as a preliminary issue of law.

Costs

64. On behalf of the Appellants Mr Vaughan applied for costs of the application on the indemnity basis. The application to strike out or dismiss the state aid issue did not have any legal basis and the application to hear the state aid issue as a preliminary issue was a waste of time and costs and an abuse of the process because the tribunal had rejected an application in June 1999 for the hearing of preliminary issues.

65. For Customs and Excise Mr Lasok accepted that if Customs and Excise were unsuccessful in their applications then the Appellants should be paid their costs but he resisted the suggestion that these should be on the indemnity basis.

66. Rule 29(1)(a) of the Rules provides that a tribunal may direct that an applicant shall pay to the other party to the application within such period as the tribunal may specify such sum as the tribunal may determine on account of the costs of such other party of and incidental to and consequent upon the application.

67. As Customs and Excise have been unsuccessful in these applications I direct that they should pay the Appellants' costs. However, such payment should be on the standard basis and not on the indemnity basis. The directions issued by the tribunal on 25 June 1999 included a direction that either party had liberty to apply that one or more issues be heard as separate issues.

DIRECTION

68. For the reasons given THIS TRIBUNAL DIRECTS :

(1) that the application of Customs and Excise dated 13 August 1999 (for a direction that the state aid issue be struck out or dismissed) be dismissed;

(2) that the alternative application of Customs and Excise dated 13 August 1999 (for a direction that the state aid issue be heard as a preliminary issue of law) be also dismissed; and

(3) that Customs and Excise should pay the costs of the Appellants of and incidental to and consequent upon this application on the standard basis the amount of such costs to be agreed between the parties but failing agreement to be determined by a tribunal.

DR A N BRICE
CHAIRMAN
Date of Release: 26th October 1999

LON/98/9005-10