Trinity Term
[2011] UKSC 25
On appeal from: [2010] EWCA Civ 263

JUDGMENT

Bloomsbury International Limited and others (Respondents) *v* Sea Fish Industry Authority and Department for Environment, Food and Rural Affairs (Appellant)

before

Lord Phillips, President
Lord Walker
Lady Hale
Lord Mance
Lord Collins

JUDGMENT GIVEN ON

15 June 2011

Heard on 23 and 24 March 2011

Appellant

Hugh Mercer QC
Tim Eicke QC
Iain Quirk
(Instructed by DEFRA Law & Corporate Services)

Respondents (for the 1st, 7th and 8th)
Fergus Randolph QC
Margaret Gray
Karwan Eskerie
(Instructed by The Wilkes Partnership)

Intervener (Sea Fish Industry Authority)
Mark Hoskins QC
Robert Weekes
(Instructed by Treasury Solicitor)

LORD MANCE (with whom Lord Walker, Lady Hale and Lord Collins agree)

Introduction

1. The Sea Fish Industry Authority ("the Authority") is established under the Fisheries Act 1981 with powers granted "for the purpose of promoting the efficiency of the sea fish industry and so as to serve the interests of that industry as a whole" (section 2(1)). For the purpose of financing its activities, the Authority may, by regulations confirmed by ministerial order, "impose a levy on persons engaged in the sea fish industry" (section 4(1) and (2)).

2. The issues on this appeal are, firstly, whether this power extends to imposing a levy in respect of sea fish or parts of sea fish first brought to land (by the catching or another vessel) outside the United Kingdom and only later imported into the United Kingdom (in the same form or in the form of some other fish product); and, secondly, if it does, whether the imposition of any such levy was and is a charge equivalent to a customs duty, contrary to articles 28 and 30 of the Treaty on the Functioning of the European Union ("TFEU"), in so far as it applies to imports from other EU member states.

3. The respondents are importers who have brought these proceedings to challenge the validity of levies made on them in respect of imports. The appellants are the Department for Environment, Food and Rural Affairs, and the Authority, having been a defendant in the proceedings, now appears as intervener. The respondents' challenge failed before Hamblen J [2009] EWHC 1721 (QB), but succeeded in the Court of Appeal [2010] EWCA Civ 263, [2010] 1 WLR 2117. Before the Supreme Court, they suggest that the second issue should also cover imports from non-EU states and that consideration be given to a further issue under article 110, if articles 28 and 30 do not apply. I will return to these suggestions later in this judgment.

4. Section 14(2) defines the sea fish industry and persons engaged in it:

> "… 'the sea fish industry' means the sea fish industry in the United Kingdom and a person shall be regarded as engaged in the sea fish industry if –

(a) he carries on the business of operating vessels for catching or processing sea fish or for transporting sea fish or sea fish products, being vessels registered in the United Kingdom; or

(b) he carries on in the United Kingdom the business of breeding, rearing or cultivating sea fish for human consumption, of selling sea fish or sea fish products by wholesale or retail, of buying sea fish or sea fish products by wholesale, of importing sea fish or sea fish products or of processing sea fish (including the business of a fish fryer)."

5. Section 4(3) to (5) state the bases upon which a levy may be imposed:

"(3) Regulations under this section may impose a levy either -

(a) in respect of the weight of sea fish or sea fish products landed in the United Kingdom or trans-shipped within British fishery limits at a prescribed rate which, in the case of sea fish, shall not exceed 2p per kilogram; or

(b) in respect of the value, ascertained in the prescribed manner, of sea fish or sea fish products landed or trans-shipped as aforesaid at a prescribed rate not exceeding 1 per cent of that value.

(4) If regulations under this section impose a levy as provided in subsection (3)(a) above the prescribed rate in relation to any sea fish product shall be such that its yield will not in the opinion of the Authority exceed the yield from a levy at the rate of 2p per kilogram on the sea fish required on average (whether alone or together with any other substance or article) to produce a kilogram of that product.

(5) Different rates may be prescribed for sea fish or sea fish products of different descriptions; ....

…..

(8) For the purposes of this section -

(a) parts of a sea fish shall be treated as sea fish products and not as sea fish;

(b) references to the landing of fish include references to the collection for consumption of sea fish which have been bred, reared or cultivated in the course of fish farming whether in the sea or otherwise and references to the landing of fish or fish products include references to bringing them through the tunnel system as defined in the Channel Tunnel Act 1987."

The second part of section 4(8), referring to the landing of fish or fish products through the Channel Tunnel, was inserted by the Channel Tunnel (Amendment of the Fisheries Act 1981) Order 1994 (SI 1994/1390).

6. Section 2(2A) was inserted by the Fisheries Act 1981 (Amendment) Regulations 1989 (SI 1989/1190) to cater for a concern raised by the European Commission that the effect of the levy might be unduly to burden the sea fish industries of other EU states to the benefit of the United Kingdom's sea fish industry:

"(2A) If any levy imposed under section 4 below has effect in relation to sea fish or sea fish products from the sea fish industries of member States other than the United Kingdom, the Authority shall so exercise its powers under this Part of this Act as to secure that benefits are conferred on those industries commensurate with any burden directly or indirectly borne by them in consequence of the levy."

7. The regulations made by the Authority are currently the Sea Fish Industry Authority (Levy) Regulations 1995 ("the 1995 Regulations"), as contained in the Schedule to the Sea Fish Industry Authority (Levy) Regulations 1995 Confirmatory Order 1996 (SI 1996/160). They cover imports expressly:

"*2. Interpretation*

In these Regulations, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them –

….

‘firsthand sale’ means -

(a) in relation to any sea fish or sea fish product which has been first landed in the United Kingdom the first sale thereof (other than a sale by retail) whether prior to or after landing in the United Kingdom;

(b) in relation to any sea fish or sea fish product which has been first landed outside the United Kingdom and any sea fish product manufactured outside the United Kingdom from such sea fish or sea fish product which in either case is purchased by a person carrying on business in the sea fish industry and is imported or brought into the United Kingdom for the purposes of any such business, the first sale thereof (whether in the United Kingdom or elsewhere) to such a person as aforesaid;

(c) in relation to any sea fish or sea fish product which is trans-shipped within British fishery limits, the first sale thereof;...

‘sale by retail’ means a sale to a person buying otherwise than for the purpose of resale or processing or use as bait, and includes a sale to a person for the purposes of a catering business (other than a fish frying business); and ‘sell by retail’ has a corresponding meaning; …

4. Imposition of levy

(1) There shall be paid to the Authority subject to and in accordance with the provisions of these Regulations by every person engaged in the sea fish industry who -

(a) purchases any sea fish or any sea fish product on a firsthand sale; or

(b) trans-ships within British fishery limits any sea fish or any sea fish product by way of firsthand sale; or

(c) lands any sea fish or sea fish product in the United Kingdom for subsequent sale other than in the United Kingdom;

a levy (hereinafter referred to as 'the levy') at the rate per kilogram set out in the second column of the Schedule hereto in respect of any sea fish or sea fish product specified opposite thereto in the first column of the said Schedule so purchased or trans-shipped or landed by him.

…..

(6) Where the levy becomes payable in respect of any sea fish it shall not be payable in respect of the products of such sea fish.

5. Time Limits for Payment

(1) Levy payable by a person who purchases any sea fish or sea fish product on a firsthand sale shall be paid to the Authority within seven days after the end of -

(a) the week during which there took place the firsthand sale of the fish or fish product in respect of which the levy is payable; or

(b) the week during which such fish or fish product was imported or brought into the country;

whichever is the later."

8. The Schedule to the Regulations contains rates of levy for sea fish and sea fish products. There are ten different categories of sea fish products, starting with "fresh, frozen or chilled sea fish", under which different rates are set out for "gutted", "headless and gutted", "fillets, skin on" and "fillets, skinless". Consistently with section 4(8) of the Act, parts of a sea fish are treated as sea fish products. Other categories include "smoked sea fish", again with different rates for "headless and gutted", "fillets, skin on" and "fillets, skinless", "salted and cured sea fish", with different rates for wet and dried, "sea fish products sold for fishmeal", "sea fishmeal", "any sea fish product not referred to above" and "any pelagic fish product not referred to above", each with a different rate. The different rates reflect the usable fish content in the various sub-categories.

The meaning of "landed"

9. The first issue is whether the statutory power enables a levy in respect of sea fish or parts of sea fish first brought to land (by the catching or another vessel) outside the United Kingdom and only later imported into the United Kingdom (in the same form or in the form of some other fish product). The issue has, strictly, to be formulated in these terms, because fish first landed in the United Kingdom from a vessel not registered in the United Kingdom are under European Union law to be regarded as imported. There is a choice between a wider and a narrower sense of the word "landed" in section 4(3). The former would cover any form of bringing into the United Kingdom, commonly by sea or air, wherever the sea fish or fish product may have been first landed after catch. The latter would cover only their first landing after catch. Hamblen J acknowledged that the narrower meaning was, in many contexts, likely to have been intended, but considered that, in the specific context of the 1981 Act, the wider meaning applied. Richards LJ, giving the only full judgment in the Court of Appeal started with the provisional view that the "normal" meaning did not cover the arrival of fish or fish product on a ferry or aircraft from another country, and that it would be "highly artificial" to extend it to their importation by road or rail as might occur between Eire and Northern Ireland. He looked at the factors on which the judge had relied, and found none of them sufficient to displace that view.

10. In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area as in the area of contractual construction, "the notion of words having a natural meaning" is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme. In the case of a statute which has, like the 1981 Act, been the subject of amendment it is not lightly to be concluded that Parliament, when making the amendment, misunderstood the general scheme of the original legislation, with the effect of creating a palpable anomaly (see eg the principle that provisions in a later Act in pari materia with an earlier may be used to aid the construction of the former, discussed in *Bennion on Statutory Interpretation*, 5th ed (2008), section 234).

11. The purpose and scheme of the 1981 Act are identified in sections 2(1) and 14(2). The Authority is set up and given powers to promote the efficiency of the sea fish industry, and this is defined specifically to include importers of sea fish or sea fish products. The purpose and scheme are expressed in terms extending to importers generally. Yet the narrower sense of the word "landed" would mean that very few of such importers actually contributed to the levy. Some of such importers would be the operators of foreign fishing vessels who first landed their fish in the United Kingdom, but the specific reference to importers in section 14(2)

would be unnecessary to catch their fish, since (accepting that they would not themselves be likely to be carrying on business in the United Kingdom) those who purchased their fish would be covered by the reference in section 14(2) to buying by wholesale or selling by retail.

12. Section 2(2A) is clearly intended to address a concern that the burden of the levy would fall on those engaged in the sea fish industries of other EU member states, while the benefits would accrue disproportionately to those engaged in the United Kingdom's sea fish industry. Such a situation would have involved an obvious risk of infringement of European Union law, in the form currently of TFEU article 110, considered below (see Case 73/79, *Commission v Italy* [1980] ECR 1533) – that is the point that the European Commission had been making to the United Kingdom government (para 6 above). Section 2(2A) is in terms which suggest a general concern, whereas the narrower sense would eliminate any impact on the sea fish industries of other member states, with the exception of the catching sector.

13. The predecessor schemes to that introduced by the 1981 Act had all involved levies imposed on imports. In particular, under the Sea Fish Industry Act 1970, the White Fish Authority was given power to impose a general levy on persons engaged in the white fish industry in respect of white fish and white fish products landed in the United Kingdom (section 17(1)(a)) and references to persons so engaged were to "be construed as including references to persons carrying on in Great Britain the business of buying the products of white fish by wholesale or of importing white fish or their products" (section 17(8)). The Authority had the general function of reorganising, developing and regulating the white fish industry in Great Britain, having "regard to the interest of consumers in a plentiful supply of white fish at reasonable prices, as well as to the interests of the different sections of the white fish industry" (section 1(1), 4(1) and 27(1)), and persons engaged and vessels used in the industry were required to be registered (sections 8 and 9). For these purposes, a person was "without prejudice to section 17(8) ….. deemed to engage in the white fish industry if he carries on the business of operating vessels to which this Part of the Act applies for catching or processing white fish or for transporting white fish or the products of white fish, or if he carries on in Great Britain the business of selling white fish by wholesale or by retail or of processing white fish (including the business of a fish fryer)" (section 27(1)). The conjunction of section 17(1)(a) and section 17(8), which Richards LJ did not mention, makes it impossible to suggest that the 1970 Act did not authorise levies on imports. While the present Authority has no regulatory function, no reason has been suggested for any change of policy under the 1981 Act as regards the ambit of its promotional role or the source of its funding, so as largely to exclude fish importations and importers.

14. It is true that, in the 1981 Act, the reference to persons carrying on in the United Kingdom the business of importing sea fish or sea fish products appears in the interpretation section 14(2) at the end of Part I, rather than in section 2(1) identifying the Authority's duties or section 4 providing for levies. But that drafting change is of no significance. The interpretation section defines the meanings of the "sea fish industry" to which the duties imposed by section 2(1) refer and of "persons engaged in the sea fish industry" on whom levies may be imposed under section 4(1) and (2). It would be particularly surprising therefore if the word "landed", introduced in section 4(3) as the basis on which levies may be imposed, had the effect that they could not be imposed at all on a large number of imports.

15. Taking "landed" in its narrower sense, the reference to "sea fish products landed in the United Kingdom" in section 4(3)(a) could in fact only apply to the sea fish parts which result from the de-heading, gutting and filleting which occurs on board catching or mother vessels and which are by section 4(8) to be treated as sea fish products, rather than as sea fish. Yet section 4(8) is not framed as an exclusive definition, and section 4(4) confirms that the concept of sea fish products is intended to operate more widely. It refers expressly to sea fish products resulting from the addition of other substances or articles to, or their admixture with, fish parts.

16. Section 4(8), providing that landing includes bringing through the Channel Tunnel, is also significant. Richards LJ accepted that, if the narrower sense of "landed" otherwise applied, the specific provision relating to the Channel Tunnel was a "striking anomaly". However, he thought it no more than that, saying that it could not have been intended to have any wider effect on the pre-existing statutory language, that, if the wider meaning otherwise applied, then it was not necessary at all and that, if the wider meaning had been otherwise intended, the natural place to make this clear was section 4(8). To my mind these are unconvincing responses to the discriminatory and on its face irrational distinction, between cross-Channel imports by ferry or air and by the Tunnel, that results from the narrower sense of the word "landed".

17. First, it is clear that section 4(8) in its original form was introduced with a clarificatory intent, to put beyond doubt, rather than because it was actually necessary. The collection and bringing to shore of fish from a fish farm is an activity which one would have thought was anyway embraced within the narrow sense of the word "landed". But I can understand the draftsman making this clear, while at the same time assuming that there was no doubt about importations by cross-Channel ferry or aircraft constituting "landing" in the United Kingdom.

18. Secondly, the Channel Tunnel was in 1994 the first "land" link to the rest of the Continent. One can understand that those responsible for introducing legislation necessary to cater for this new phenomenon might wonder whether goods that remained on (or under) land throughout a Channel crossing could be regarded as "landed", and might decide to put that beyond doubt. It is inconceivable that they intended or thought to introduce a striking anomaly or to ensure anything other than a coherent scheme. It is not surprising that they did not cater expressly for cross-Channel importations by ferry or air: their remit was no doubt to cater for the Channel Tunnel and their starting point must have been that such importations were already embraced by the word "landed". As to the possibility of land importations of fish or fish products across the border from Eire to Northern Ireland, if the original draftsman of the 1981 Act intended the wider sense of "landed" and directed his or her mind to that possibility at all, he or she must have assumed that the wider meaning of "landed" would cover it. It is again understandable if those concerned with ensuring that the Channel Tunnel was covered by appropriate legislation did not direct their minds to that specific border.

19. Most of these points were covered in the judge's very clear judgment. The Court of Appeal's approach does not in my view give due weight to the legislative purpose and scheme as a whole, having particular regard to the definition of "persons engaged in the sea fish industry" which relates to the Authority's duties and powers, including its power to levy. Viewed in this context, the word "landed", used as a measure of the levies which can be applied, is capable of covering and, to make sense of the legislative purpose and scheme, should be read as covering all sorts of arrival of sea fish and sea fish products in the United Kingdom. The striking anomaly which would otherwise result from the provision catering for the Channel Tunnel is further confirmation of this conclusion.

20. It is in the circumstances unnecessary to address the detailed submissions made by the parties on the admissibility of various exchanges which took place in Parliament during the passage of the 1981 Act as reported in Hansard. A primary issue here was, assuming the relevant provisions to be at least ambiguous, whether and how far it is legitimate to apply the rule in *Pepper v Hart* [1993] AC 593 to give rise to an expanded power to impose a levy, rather than to narrow executive power. It is not necessary or appropriate to go further into that issue in this case. The wider view of the word "landed" is, I consider, plainly correct. Suffice it to say, that, had it been appropriate to have regard to Hansard, the ministerial statements in response to specific questions in the course of the Bill's passage through Parliament would in my view have confirmed very clearly that it was intended, by section 14(2), to maintain the pre-existing levying power in relation to imports generally.

21. The Court of Appeal's conclusions on European Union law led it to add that a narrow interpretation of the word "landed" was in any event required to avoid

incompatibility with European Union law: Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1991] ECR I-4135. For reasons which will appear in the next section of this judgment, I do not agree with the Court of Appeal's conclusion on European Union law. But, even if I had done, I would not have considered them to require a narrow interpretation of "landed". The wider meaning would have been compatible with the making of regulations which complied with European Union law. The incompatibility would have affected the validity of the present regulations, not the interpretation of the 1981 Act.

A charge having equivalent effect to customs duty ("CEE")?

(a) The law

22. The second issue which arises in the light of my conclusion on the first issue is whether the levy constitutes a charge having equivalent effect to customs duty (a "CEE") in respect of imports of sea fish or sea fish products from other member states of the European Union, contrary to TFEU articles 28 and 30. If it is a CEE, then it is in relation to such imports void. If it is not, it may fall to be considered as an internal tax or due within article 110, in which case it will be valid except to the extent that it may be held to be discriminatory in relation to imports from other member states.

23. The articles to which I have referred provide as follows:

> "PART 3 UNION POLICIES AND INTERNAL ACTIONS
>
> TITLE II - FREE MOVEMENT OF GOODS
>
> Article 28
>
> The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.
>
> …….

CHAPTER 1

THE CUSTOMS UNION

Article 30

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

……

TITLE VII – COMMON RULES ON COMPETITION. TAXATION AND APPROXIMATION OF LAWS

Article 110

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."

24. The distinction between a CEE within articles 28 and 30 and a tax within article 110 is clear cut in principle. The two are alternatives, and a levy must fall into one category or the other. It cannot fall into both. But it is not always easy in practice to decide into which category a levy does fall. The distinction, though clear cut, can be very fine. So Advocate General Jacobs observed in Case C-90/94 *Haahr Petroleum Ltd v Åbenrå Havn* [1997] ECR I-4085, para 38 and again in Case C-213/96 *Proceedings brought by Outokumpu Oy* [1998] ECR I-1777, para 15. The underlying objective is the same, to avoid discrimination against goods from other member states, and overlapping considerations apply in relation to each.

25. However, it is clear that a charge may be within the scope of and in breach of article 110 without this meaning that it is or becomes a CEE prohibited under

articles 28 and 30: see eg Case 32/80 *Officier van Justitie v Kortmann* [1981] ECR 251, para 18 (which reads more intelligibly in the French), *Haahr*, paras 25-44 and Joined Cases C-78/90 to C-83/90 *Compagnie commerciale de l'Ouest v Receveur principal des douanes de La Pallice-Port* [1992] ECR I-1847, discussed below. There are thus different stages at which a question of prohibited discrimination may arise; one is where a charge constitutes a CEE, the other is where it does not constitute a CEE but is part of a general system of internal dues organised in a manner which discriminates against products originating in another member state.

26. The principal feature of a CEE is that it is levied solely or exclusively by reason of goods crossing the frontier, whereas domestic products are excluded from similar charge. Internal taxation within article 110 falls in contrast on both imported and domestic products: Case 78/76 *Firma Steinike und Weinlig v Germany* [1977] ECR 595, paras 28-29, Case 32/80 *Officier van Justitie v Kortmann* [1981] ECR 251, para 18 and *Outokumpu*, para 27. However, a charge may be regarded as levied solely or exclusively by reason of its crossing the frontier, although it is applied at a later stage, such as marketing or processing of the product: *Steinike*, para 29.

27. The Court amplified the distinction as follows in *Steinike*:

> "28….. the prohibition [of a CEE] is aimed at any tax demanded at the time of or by reason of importation and which, being imposed specifically on an imported product to the exclusion of a similar domestic product, results in the same restrictive consequences on the free movement of goods as a customs duty by altering the cost price of that product. The essential characteristic of a charge having an effect equivalent to a customs duty, which distinguishes it from internal taxation, is that the first is imposed exclusively on the imported product whilst the second is imposed on both imported and domestic products. A charge affecting both imported products and similar products could however constitute a charge having an effect equivalent to a customs duty if such a duty, which is limited to particular products, had the sole purpose of financing activities for the specific advantage of the taxed domestic products, so as to make good, wholly or in part, the fiscal charge imposed upon them".

28. The last sentence (not directly relevant on the present appeal and deriving originally from Case 77/72 *Capolongo v Maya* [1973] ECR 611) needs to be read with the fuller explanation or qualification given in the later Joined Cases C-78/90 to C-83/90 *Compagnie commerciale de l'Ouest v Receveur principal des douanes de La Pallice-Port* [1992] ECR I-1847:

> "26 Where a charge is imposed on domestic and imported products according to the same criteria, the Court has nevertheless stated that it may be necessary to take into account the purpose to which the revenue from the charge is put. Thus, if the revenue from such a charge is intended to finance activities for the special advantage of the taxed domestic product, it may follow that the charge imposed on the basis of the same criteria nevertheless constitutes discriminatory taxation in so far as the fiscal burden on the domestic products is neutralized by the advantages which the charge is used to finance whilst the charge on the imported product constitutes a net burden (judgment in Case 73/79 *Commission v Italy* [1980] ECR 1533, para 15).
>
> 27 It follows from the foregoing considerations that if the advantages stemming from the use of the proceeds of the charge in question fully offset the burden borne by the domestic product when it is placed on the market, that charge constitutes a charge having an effect equivalent to customs duties, contrary to article 12 *[now 30]* et seq of the Treaty. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the charge in question is subject to article 95 *[now 110]* of the Treaty. In the latter case, the charge would be incompatible with article 95 *[110]* of the Treaty and is therefore prohibited to the extent to which it discriminates against imported products, that is to say to the extent to which it partially offsets the burden borne by the taxed domestic product."

29. This explanation helps to point the differing spheres of operation of a CEE prohibited under articles 28 and 30 and an internal, but none the less discriminatory, tax falling within article 110. In the present case, the respondents did in their pre-trial skeleton argument seek to raise a case that the levy amounted to a CEE because its benefits went exclusively to domestic sea fish and products, or alternatively that it infringed article 110 because the latter derived proportionately greater benefit than imported sea fish and products. This case raised factual issues which the judge ruled could not be dealt with at the trial. However, by post-trial order dated 24 July 2009, I understand that he ultimately permitted them to be raised by amendment as a separate issue for subsequent trial.

30. A charge levied by reason of goods crossing a frontier will not be regarded as a CEE "if it forms part of a general system of internal dues applied systematically to categories of products according to objective criteria applied without regard to the origin of the products". This or a close approximation is the formulation used in a large number of authorities from Case C-90/79 *Commission v France* [1981] ECR 283 to Case C-314/82 *Commission v Belgium* [1984] ECR 1543, paras 11, 13 and 19, Case C-90/94 *Haahr Petroleum Ltd v Åbenrå Havn*,

above, para 20, Case C-213/96 *Outokumpu*, above, para 20, Case C-234/99 *Nygård v Svineafgiftsfonden* [2002] ECR I-3657, para 29 and Case C-387/01 *Weigel v Finanzlandesdirektion für Vorarlberg* [2004] ECR I-4951, para 64. Another way of analysing the position may be that, if a charge forms part of a general system of internal dues meeting these conditions, then it is not imposed solely by reason of the goods crossing the frontier.

31. If a charge forms part of such a general system of internal dues, any suggestion of discrimination will fall to be considered under article 110. The Court said in *Steinike*, para 30, that:

> "The objective of article 95 *[now 110]* is to abolish direct or indirect discrimination against imported products but not to place them in a privileged tax position in relation to domestic products. There is generally no discrimination such as is prohibited by article 95 *[110]* where internal taxation applies to domestic products and to previously imported products on their being processed into more elaborate products without any distinctions of rate, basis of assessment or detailed rules for the levying thereof being made between them by reason of their origin."

32. As an example, in *Haahr* a 40% import surcharge imposed on goods imported into Denmark by ship from other member states was held not to be a CEE. Rather it was (as a surcharge) an integral part of a general system of internal dues for the use of commercial ports and their facilities "imposed on goods, both domestic and imported, at the same time and in accordance with the same objective criteria, namely when they are taken on board or put ashore and according to the type of goods and their weight" (paras 21-24); and, as a result:

> "the fact that the import surcharge is payable ex hypothesi solely on imported goods and that the origin of the goods determines the amount of the duty to be levied cannot remove the tax in general or the surcharge in particular from the scope of article 95 [*now 110*] of the Treaty; accordingly, their compatibility with Community law must be assessed in the light of that provision and not articles 9 to 13 [*now 28 to 31*] of the Treaty"

The Court went on (in para 27) to refer to the issue of discrimination that can arise under article 110, saying:

> "It is ….. beyond question that application of a higher charge to imported products than to domestic products or application to imported products alone of a surcharge in addition to the duty payable on domestic and imported products is contrary to the prohibition of discrimination laid down in article 95 *[now 110]*."

33. The respondents rely upon statements from another case, important in the development of the case-law under what are now articles 28 and 30 and pre-dating those cited in paragraph 29 above: Case 132/78 *Denkavit Loire Sàrl v France* [1979] ECR 1923. The Court there explained the criteria identifying a CEE, and distinguished a CEE from an internal tax within article 110, using somewhat different wording. The respondents suggest that this wording establishes a need for identical treatment of imported and other goods in every relevant respect, before a levy will avoid being categorised as a CEE.

34. In particular, the Court in *Denkavit* referred to systematic application "in accordance with the same criteria to domestic products and imported products alike" (para 7) and continued (para 8):

> "It is however appropriate to emphasise that in order to relate to a general system of internal dues, the charge to which an imported product is subject must impose the same duty on national products and identical imported products at the same marketing stage and that the chargeable event giving rise to the duty must also be identical in the case of both products. It is therefore not sufficient that the objective of the charge imposed on imported products is to compensate for a charge imposed on similar domestic products - or which has been imposed on those products or a product from which they are derived - at a production or marketing stage prior to that at which the imported products are taxed. To exempt a charge levied at the frontier from the classification of a charge having equivalent effect when it is not imposed on similar national products or is imposed on them at different marketing stages or, again, on the basis of a different chargeable event giving rise to duty, because that charge aims to compensate for a domestic fiscal charge applying to the same products - apart from the fact that this would not take into account fiscal charges which had been imposed on imported products in the originating Member State - would make the prohibition on charges having an effect equivalent to customs duties empty and meaningless."

The requirements set out in the first sentence of para 8 in *Denkavit* have themselves been echoed in a number of cases, including Joined Cases C-149/91

and C-150/91 *Sanders Adour Snc v Directeur des Services Fiscaux des Pyrénées-Atlantiques* [1992] ECR I-3899 at para 17, *Outokumpu* at para 24, Joined Cases C-441/98 and C-442/98 *Kapniki Mikhailidis AE v Idryma Kinonikon Asphaliseon* [2000] ECR I-7145 and *Nygård* at para 20.

35. The same requirements have however been given a generous interpretation. In *Sanders* the Court said (para 18):

> "As to the requirement that the chargeable events be identical, no difference may be discerned in the present case in the fact that the charge is levied on an imported product at the time of importation and on the domestic product when it is sold or used, for in actual economic terms the marketing stage is the same since both operations are carried out with a view to utilisation of the product."

36. In *Outokumpu* the Court treated a duty on electricity as forming part of a general system of taxation (and so within article 110, rather than the equivalents of articles 28 and 30) although it was "levied not only on electrical energy as such but also on several primary energy sources such as coal products, peat, natural gas and pine oil" (para 21). The duty was levied on these primary sources, on electricity produced from other sources domestically and on imported electricity, and the Court, citing *Sanders*, para 18, said at para 25 that:

> "…. in circumstances such as those of this case, no difference may be discerned in the fact that imported electricity is taxed at the time of importation and electricity of domestic origin at the time of production, since in view of the characteristics of electricity the marketing stage is the same for both operations, namely the stage when the electricity enters the national distribution network ….".

37. In the same case, at para 30, Advocate General Francis Jacobs QC noted that in previous decisions the Court had accepted that a tax on the wort used in making beer domestically and a tax on imported beer adjusted to take account of the notional amount of wort used in its overseas production fell within article 110, rather than the equivalents of articles 28 and 30: Case 152/89 *Commission v Luxembourg* [1991] ECR I-3141 and Case 153/89 *Commission v Belgium* [1991] ECR I-3171.

38. In *Nygård* the Court held that a levy on pigs sent for slaughter on the domestic market and exported live to other member states satisfied similarly stated requirements. Citing *Sanders*, para 18, and *Outokumpu*, para 25, it said that:

> "29. …. the event giving rise to the levy here in issue in the main proceedings must be considered to be the withdrawal of the pigs from the national herd, regardless of whether that levy is charged on pigs intended for slaughter in Denmark or for live export. In both cases, therefore, the fiscal obligation arises when the animals leave the primary national production.
>
> 30 In those circumstances, no difference may be discerned in the fact that pigs exported live are taxed at the time of exportation, whereas pigs intended for slaughter on the national market are taxed at the time of supply for purposes of slaughter, as in real economic terms those two moments correspond to the same marketing stage, both operations being carried out with a view to releasing the pigs from national primary production ….."

39. The approach in these cases is consistent with that taken in the earlier case of Case 90/79 *Commission v France* [1981] ECR 283, where the Court addressed the situation of a French levy on sales and appropriations for own use, other than for export, of reprographic machines, in circumstances where 99% of such machines were imported. The Court said (para 14) that:

> "…. even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning of article 95 of the Treaty if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products."

It went on to treat the levy as internal taxation because its purpose was to redress the inequity resulting from the copying of published material, which would, if sold and bought in published form, have attracted a levy, and because it could be regarded as part of the same internal system of taxation as that levy:

> "16 The Court is of the opinion that the particular features of the levy in issue lead to its being accepted as forming part of such a general system of internal dues. That follows first from its inclusion in taxation arrangements which have their origin in the breach made in legal systems for the protection of copyright by the increase in the use of reprography and which are designed to subject, if only indirectly, the users of those processes to a charge which compensates for that which they would normally have to bear.

> 17 That conclusion follows in the second place from the fact that the levy in issue forms a single entity with the levy imposed on book publishers by the same internal legislation and from the fact, too, that it is borne by a range of very different machines which are moreover classified under various customs headings but which have in common the fact that they are all intended to be used for reprographic purposes in addition to more specific uses."

(b) Application of the law to this case

40. Applying the guidance given in these authorities to the present case, the first question is whether the regulations impose any levy on sea fish and sea fish products by reason of their crossing a frontier within the European Union. In *Weigel* the Court held that a tax imposed on the registration of second-hand vehicles, as well as vehicles sold and hired out for the first time for use on the road, was not, in the case of an imported second-hand car, imposed by reason of its import, but by reason of the need to register it. In the present case, however, the levy is expressly authorised to be imposed on importers in respect of sea fish and sea fish products landed (accepting, as I do, the wider sense) from other member states, after first landing outside the United Kingdom. The consideration that, under regulation 5, a firsthand sale is also required as the trigger for a chargeable event does not alter the fact that the levy is imposed by reason of the import: see *Steinike*, para 29, cited above.

41. That does not conclude the matter, or mean that the levy is imposed solely or exclusively by reason of the import, in particular if the levy "forms part of a general system of internal dues applied systematically to categories of products according to objective criteria applied without regard to the origin of the products", or, to the extent that this differs, meets the generously interpreted requirements that it "impose[s] the same duty on national products and identical imported products at the same marketing stage and that the chargeable event giving rise to the duty must also be identical in the case of both products": see paras 30 to 39 above.

42. On this, Richards LJ said:

> "55. In purely formal terms the 1995 Regulations appear to meet those requirements. They lay down a uniform system that draws no distinction between domestic and imported products as regards rates of levy, production or marketing stage or chargeable event. The authorities make clear, however, that one must look beyond form and examine contents and effects. It is here that, in my judgment, the

> scheme runs into difficulties in relation to sea fish products that have been processed on land. By virtue of regulation 4(1)(a), a levy is payable by a person who purchases a sea fish product on a firsthand sale. That takes one to the definition of firsthand sale in regulation 2. Imported products are covered by paragraph (b) of that definition, the application of which will in practice generally produce a liability to levy, since there will be both an importation and a first sale of the products to a relevant person. Domestic products are covered by paragraph (a) of the definition, but the application of that paragraph will in practice produce *no* liability to levy. That is because liability arises only in relation to sea fish products which have been "first landed" in the United Kingdom; but products resulting from processing on land are in no sense "landed", let alone "first landed", in the United Kingdom. The sea fish or sea fish product ingredients from which they are produced may have been first landed in the United Kingdom, but the resulting products are not.
>
> 56. In practice, therefore, the 1995 Regulations involve a material difference of treatment between domestic and imported products. …..”

43. This reasoning compares the levy payable on fish products imported into and bought by an importer, wholesaler or retailer carrying on business in the United Kingdom with the levy which it is assumed is not payable in respect of sea fish products which are both manufactured and sold in the United Kingdom. However, sea fish products which are imported into and sold in the United Kingdom will be subject, in accordance with section 4(4) of the Act and the regulations, to a levy which will reflect their sea fish content. If sea fish products are manufactured in the United Kingdom from sea fish or sea fish products first landed in the United Kingdom which have themselves been the subject of a firsthand sale (or either of the other two levy-triggering events identified in regulation 4(1)), the sea fish content of the subsequently manufactured sea fish products will have borne the levy, as a result of its imposition on the sea fish or sea fish products used in their manufacture. Regulation 4(6) confirms that the manufactured sea fish products cannot themselves attract the levy on any sale. But the reverse implication from regulation 4(6) is that, if sea fish products are manufactured in the United Kingdom from sea fish or sea fish products first landed in the United Kingdom which have not themselves been the subject of a firsthand sale (or either of the other two levy-triggering events identified in regulation 4(1)), then the subsequently manufactured sea fish products will bear the levy according to their sea fish content. The manufactured sea fish products must in this connection be equated with the sea fish or sea fish products from which they were manufactured.

44. The wording of the regulations is not perfect, but they must be read as intended to introduce a coherent scheme. It cannot have been intended that sea fish products manufactured in the United Kingdom from sea fish or sea fish products first landed in the United Kingdom which have not themselves been the subject of levy should escape the levy. This conclusion could, if it were necessary, also be reinforced by the consideration that, if the regulations would otherwise involve what would be a CEE favouring certain domestic producers as opposed to importers (as the Court of Appeal thought), then this too cannot have been intended, and the regulations should not be interpreted in this sense: Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1991] 1 ECR 4135.

45. Even on such an analysis, it appears that Richards LJ may have considered that the levy would constitute a CEE since it would involve the imposition of charges at differing production or marketing stages, which is impermissible although their effect is to compensate or balance each other. I say appears, because a later comment in para 60 of his judgment (to which I will revert) leaves room for doubt. On the other hand, he was not impressed by submissions that the scheme involved different chargeable events or higher rates on imported than domestic products (para 62).

46. As to the imposition of the levy at differing production or marketing stages, Richards LJ relied upon *Denkavit* and *Kapniki*. In *Denkavit* the impugned tax was payable on lard and other pig fat produced by rendering or solvent-extracted. The only relevant domestic charge was levied on slaughter. The Court said that a charge was a CEE, when it is imposed on imported goods, "even though no charge is imposed on similar domestic products" or "according to different criteria, in particular by reason of a different chargeable event". In *Kapniki* a special contribution (to go towards pensions and compensation payable to tobacco workers) was charged on unprocessed tobacco exported from Greece. A preliminary ruling was sought on the basis that no equivalent contribution was levied on either imports or domestic products distributed in the home market, and it was unclear that any other tax on tobacco existed in any form at the relevant times, apart from VAT and excise duties on the retail consumption of processed tobacco. Not surprisingly, the Court expressed serious doubts as to whether the special contribution matched any comparable charge levied on domestic products at the same rate and marketing stage and on the basis of an identical chargeable event, while emphasising that it was "for the national court alone to determine the exact effect of the national legislative provisions at issue" (para 25).

47. In contrast to the position in these cases, the present scheme identifies, according to objective criteria, the time when sea fish or sea fish products can be said to enter the United Kingdom market on a commercial basis, following upon their production or importation and firsthand sale (in whichever order these events

occur). In effect, it is as the judge said (para 125) "imposed when the sea fish is placed on the market and enters the supply chain". As the judge went on to note: "the rate of levy paid on processed and unprocessed fish is proportionately the same", since the rate of levy rises according to the proportion of inedible parts removed by processing, and (one can add) is adjusted to leave out of account "any other substance or article" added to or mixed with sea fish parts to make a sea fish product – these being the requirements of section 4(4).

48. If a general system of taxation within article 110 covers a tax on wort used in domestic production and a tax on beer reflecting the wort assessed as to have been used in the overseas production of imported beer (see para 37 above), that points strongly to the present scheme falling within article 110, rather than involving any CEE. If, as in *Outokumpu* (para 36 above), an internal system of taxation within article 110 may embrace not only electricity imported and electricity produced domestically, but also a levy "not only on electrical energy as such but also on several primary energy sources such as coal products, peat, natural gas and pine oil" (para 21), then such a system must be well capable of embracing the present scheme. So too, if, as in *Commission v France* (para 39 above), a levy on the sale or appropriation for use (other than for export) constitutes part of such an internal system, and *a fortiori* when the Court's analysis was that the levy "forms a single entity ["forme un ensemble"] with the levy imposed on book publishers".

49. Like both the judge (and in this respect it seems also the Court of Appeal: para 62), I am also unable to accept that the chargeable events under the present scheme operate upon materially different bases, where, as here, the difference is as to whether the levy attaches on import or sale, but "in actual economic terms the marketing stage is the same since both operations are carried out with a view to utilisation of the product": see *Sanders*, para 18 (para 35 above). Arguments that the judge wrongly took the actual levies on domestic and imported sea fish or sea fish products as equating with each other were barely if at all raised, and I reject them both on the ground of the judge's contrary finding and in any event. I also doubt if they have any relevance under articles 28 and 30, as opposed to article 110.

50. It follows that I have no doubt that the present carefully structured scheme falls to be regarded as "a general system of internal dues applied systematically to categories of products according to objective criteria applied without regard to the origin of the products" within the requirements of the case-law set out in paras 26, 30 and 33-34 above. It falls therefore within the scope of article 110, rather than constituting a CEE under articles 28 and 30. It also appears from para 60 of Richards LJ's judgment that the Court of Appeal might itself have reached this conclusion, but for its view that sea fish products manufactured in the United Kingdom where there had been no sale of (or therefore levy on) either the sea fish

or the sea fish products from which they were manufactured, escape all levy. I have already indicated my disagreement with that view (paras 43-44 above).

51. The respondents suggested that, unless the appeal was dismissed, there should, before its resolution, be a preliminary reference to the Court of Justice under TFEU article 267. The Court of Justice has however established the principles in a large number of authorities, including those which I have examined, in a manner which enables its resolution. As the Court has stressed, it is for national courts to apply such principles to particular facts - even in cases as apparently unpromising from the national government's viewpoint as *Kapniki* (para 46 above). The Court of Justice's role is one of interpretation, the national court's one of application. There is no need to refer any question of principle to the Court of Justice in order to resolve this appeal. This is despite the Court of Appeal's differing conclusion as to the outcome, which in any event appears, as I have said (paras 43-45 and 50 above), to have revolved substantially if not entirely around a point of construction of the domestic regulations.

Additional points

52. Before the Supreme Court, the respondents sought to raise two additional points. The first is that the prohibition of any CEE applies not merely to imports from other member states of the European Union, but to imports from other states "in particular where a common customs tariff applies in respect of those products and there is a Cooperation Agreement between the EU and the countries from which the products are imported". This is a new point. It is one which cannot arise in view of my conclusion that the levy does not impose a CEE within articles 28 and 30, and I need say no more than that. But I would add that it would have involved enquiries, eg as to the existence and dates of entry into force of any relevant common customs tariffs and Cooperation Agreements (see eg Case C-126/94 *Société Cadi Surgelés v Ministre des Finances* [1996] ECR I-5647). This would in my view have made it in any event inappropriate to entertain it for the first time on this appeal.

53. The second is that, if article 110 applies, then the levy imposed taxation in excess of that imposed on similar domestic products. The respondents' wish is, in other words, to argue a point along the lines contemplated in *Steinike*, para 30 (para 31 above) and in *Haahr* (para 32 above) to the effect that, although the levy was part of a general system of internal taxation, it involved "distinctions of rate, basis of assessment or detailed rules for the levying thereof being made" on imported sea fish or sea fish product "by reason of their origin." This is also a new point, not covered by the judgment below or, so far as one can judge, by the permission to amend given by the judge on 29 June 2009, and it is also not one which this Court should now entertain.

Conclusion

54. I would allow the appeal and make such orders as are appropriate to restore the judge's judgment dismissing the respondents' claim and allow the Authority's counterclaim for levy and otherwise.

LORD PHILLIPS

55. I agree with the judgment of Lord Mance on each of the issues that arise on this appeal. The first is one of statutory interpretation and I wish to add some comments on this, because there is one feature of this case which is unusual, and which should not pass unnoticed.

56. The issue of interpretation turns on the meaning to be attached to "landed in the United Kingdom" in section 4(3)(a) of the Fisheries Act 1981. Does this mean brought ashore for the first time in the United Kingdom ("the narrow meaning"), or does its meaning extend to embrace bringing onto the territory of the United Kingdom, whether directly from the sea or indirectly after having been brought ashore in another country ("the broad meaning")?

57. The unusual feature is that for nearly thirty years everyone concerned has proceeded on the basis that the phrase should be given the broad meaning. Thus the levy has been imposed and paid not only on fish and fish products brought ashore for the first time in the United Kingdom, but fish and fish products imported into the United Kingdom from other countries. The funds raised by the levy have been disbursed in payment for schemes intended to benefit the sea fish industry, which includes those whose business involves importing sea fish or sea fish products from other countries. By the time that these proceedings were commenced some 75% of the levy income was derived from imports. If the decision of the Court of Appeal is correct, the activities of the Authority must be drastically curtailed. Indeed, I would expect that the impact of potential claims for reimbursement of monies wrongfully levied would render the Authority insolvent.

58. In circumstances such as these there must be, at the very least, a powerful presumption that the meaning that has customarily been given to the phrase in issue is the correct one. Carnwath LJ expressed one reason for this in *Isle of Anglesey County Council v Welsh Ministers* [2009] EWCA Civ 94, [2010] QB 163:

> "Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without the risk of being upset by a novel approach."

59. This has the air of pragmatism rather than principle, but courts are understandably reluctant to disturb a settled construction and the practice that has been based on that construction- see *Bennion on Statutory Interpretation*, 5th ed (2008), section 288 at p 913 and the authorities there cited.

60. A more principled justification for the principle is that of contemporaneous exposition. Thus in *Clyde Navigation (Trustees of) v Laird & Sons* (1883) 8 App Cas 658 the issue was whether the Clyde Navigation Consolidation Act 1858 required dues to be paid on logs which were chained together and floated down the River Clyde. The evidence was that these dues had been levied and paid without protest for a quarter of a century. Lord Blackburn commented at p 670 that this raised a strong prima facie ground for thinking that there must exist some legal ground for exacting the dues. Lord Watson at p 673 did not, however, agree with this approach.

61. An important element in the construction of a provision in a statute is the context in which that provision was enacted. It is plain that those affected by the statute when it comes into force are better placed to appreciate that context than those subject to it thirty years later. The 1981 Act was introduced as a successor to legislation of similar character dating back to 1935. I would not readily have been persuaded that those who, when the 1981 Act came into force, charged and paid levies on imports of fish and fish products had misunderstood the effect of the Act.

62. The Court of Appeal reached this conclusion, however, on the basis of a narrow textual analysis that was, in my view, flawed and which produced a number of anomalies.

63. The textual analysis was flawed because it was dictated by the concept of landing a fish, which does indeed naturally suggest the bringing of the fish ashore for the first time. It did not, however, give proper weight to the fact that the landing referred to was not just of sea fish but of sea fish products. While these included "parts of sea fish" it was not suggested, nor sensibly could it have been, that sea fish products were confined to parts of sea fish. As soon as one applies the meaning of "landed in the United Kingdom" to "products" the natural conclusion is that these must include products produced from fish brought ashore in countries other than the United Kingdom, so that landed must bear the broader meaning.

64. The anomalies produced by giving "landed" the narrow meaning are two-fold. The first is that it produces a disparity between those who contribute to the levy and those who benefit from it. Those who carry on the business of importing sea fish or sea fish products are included in those for whose benefit the funds raised by the levy are used (see sections 2(1) and 14 (2)), but do not have to contribute to it.

65. The second anomaly, recognised by Richards LJ, relates to the amendment made to section 4(8) by the Channel Tunnel (Amendment of the Fisheries Act 1981) Order 1994 (SI 1994/1390). If "landed" means brought ashore for the first time it is a nonsense to extend its meaning to cover sea fish or fish products brought into the United Kingdom through the Channel Tunnel.

66. Hamblen J referred to the principle that the meaning and effect of an amended statute should generally be ascertained by an examination of the language of that statute as amended (*Inco Europe Ltd v First Choice Distribution* [1999] 1 WLR 270, 272-273). I do not think that that is the correct approach in this case. Had it been right to interpret "landed" as bearing the narrow meaning before this amendment was made, I do not consider that it would have been right to treat this amendment as altering the overall interpretation of the Act so as to give "landed" the broad meaning. The amendment was peripheral to the Act as a whole and it would not have been right to allow the tail (the amendment) to wag the dog (the Act). The significance of the amendment is that it reflects the accepted meaning given by everybody, including Parliament, to the meaning of "landed". It thus reinforces the principle that I have identified at paras 58 to 61 above. The same point applies to the insertion of section 2(2A) by the Fisheries Act 1981 (Amendment) Regulations 1989.

67. It is for these reasons that I agree with the conclusions of Lord Mance in relation to the first issue. I have nothing to add to his analysis in respect of the second issue. Accordingly I would allow this appeal.