

THE
ALL ENGLAND
LAW REPORTS

1998

European
Cases



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Editor

CAROLINE VANDRIDGE-AMES LL.M

London
BUTTERWORTHS

UNITED KINGDOM	Butterworths, a Division of Reed Elsevier (UK) Ltd, Halsbury House, 35 Chancery Lane, London WC2A 1EL and 4 Hill Street, Edinburgh EH2 3JZ
AUSTRALIA	Butterworths, a Division of Reed International Books Australia Pty Ltd, Chatswood , New South Wales
CANADA	Butterworths Canada Ltd, Markham , Ontario
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Printed and bound in Great Britain by William Clowes Ltd, Beccles and London

ISBN for the complete set of volumes: 0 406 85159 X
for this volume: 0 406 98722 X



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CITATION

These reports are cited thus:

[1998] All ER (EC)

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The reference 26 *Halsbury's Laws* (4th edn) para 577 refers to paragraph 577 on page 296 of volume 26 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (1996 reissue) para 9 refers to paragraph 9 on page 24 of the 1996 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 26 *Halsbury's Statutes* (4th edn) 734 refers to page 734 of volume 26 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (1997 reissue) 269 refers to page 269 of the 1997 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The Digest

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The reference 37(2) *Digest* (Reissue) 424, 2594 refers to case number 2594 on page 424 of the reissue of green band volume 37(2) of *The Digest*.

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Halsbury's Statutory Instruments

The reference 17 *Halsbury's Statutory Instruments* 305 refers to page 305 of volume 17 of the grey volumes series of *Halsbury's Statutory Instruments*.

The reference 14 *Halsbury's Statutory Instruments* (1994 reissue) 201 refers to page 201 of the 1994 reissue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

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c

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EDWARD, PUISSOCHET (RAPPORTEUR), HIRSCH, JANN AND SEVÓN

ADVOCATE GENERAL JACOBS

29 APRIL, 26 JUNE, 2 DECEMBER 1997

d *European Community – Companies – Indirect taxes on raising capital – Danish rules imposing charge on registration of new companies and increases in capital – Variable element of charge calculated as proportion of nominal value of capital raised – Whether registration charge compatible with Community law – Whether Community provisions having direct effect – Council Directive (EEC) 69/335, arts 10, 12.*

e *European Community – State liability – Infringement of Community law attributable to state – Charges on raising or increasing capital levied unlawfully over long period of time without Danish authorities or persons charged being aware of unlawfulness – National law allowing dismissal of claims for recovery of charges in such circumstances – Whether compatible with Community law.*

f

The plaintiff companies were subject to charges levied by the Danish authorities on the registration of new public and private limited companies and on increases in their capital. The amounts charged consisted of a fixed basic charge and a supplementary charge calculated in proportion to the nominal value of the capital raised. When the Danish Court of Auditors found the charging system to be unlawful, the supplementary charge was abolished and the plaintiffs requested a refund of the charges they had paid between 1983 and 1992. The requests were rejected and the plaintiffs commenced proceedings against the relevant authorities, contending inter alia that the supplementary charge was contrary to arts 10¹ and 12² of Council Directive (EEC) 69/335 concerning indirect taxes on the raising of capital, which respectively prohibited the charging of any taxes in respect of registration or any other formality required in order to set up a business and laid down a list of exempt taxes and duties which included 'duties paid by way of fees or dues'. The Danish court stayed the proceedings and referred to the Court of Justice of the European Communities questions regarding the compatibility of the charges at issue with the directive, the application of national rules on state liability and limitation periods to actions for the recovery of charges imposed in contravention of Community law and whether arts 10 and 12 had direct effect.

g

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h

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1 Articles 10, so far as material, is set out at p 5 j, post

2 Article 12, so far as material, is set out at p 5 j, post

Held – (1) For the purposes of art 12 of Directive 69/335, ‘fees or dues’ charged on the registration of public and private limited companies and on increases in their capital could not increase indefinitely in proportion to the nominal value of the transaction in question but had to be calculated solely on the basis of the costs of the formalities involved. Those costs could also include the proportion of overheads which could be attributed to the effecting of registration and the costs of minor services performed without charge. Moreover, member states could impose flat rate charges of a fixed amount for an indefinite period provided that they checked at regular intervals that the charges did not exceed the average costs incurred (see p 33 d to j and p 37 c d, post); *Ponente Carni SpA v Amministrazione delle Finanze dello Stato* Joined cases C-71/91 and C-178/91 [1993] ECR I-1915 applied. a
b

(2) The application of a general principle of national law under which the courts of a member state should dismiss claims for the recovery of charges levied over a long period in breach of Community law without either the authorities of that state or the persons liable to pay the charges having been aware that they were unlawful would, in the circumstances, have made it excessively difficult to obtain recovery of charges which were contrary to Community law. It would, moreover, have the effect of encouraging infringements of Community law which had been committed over a long period. It followed that charges levied in breach of the directive could not be justified on the ground that they had been imposed by a member state over a long period without either that state or the persons liable to them having been aware that they were unlawful (see p 34 h j and p 37 e, post); *SCS Peterbroeck Van Campenhout & Cie v Belgium* Case C-312/93 [1996] All ER (EC) 242 applied. c
d
e

(3) Community law did not prevent a member state which had not properly transposed a directive from resisting an action for the repayment of charges levied in breach thereof by relying on a limitation period under national law which ran from the date on which the charges in question became payable, provided that such period was not less favourable for actions based on Community law than for actions based on national law and did not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see p 36 e and p 37 f, post); *Comet BV v Produktschap voor Siergewassen* Case 45/76 [1976] ECR 2043 and *Johnson v Chief Adjudication Officer (No 2)* Case 410/92 [1995] All ER (EC) 258 applied; *Emmott v Minister for Social Welfare* Case C-208/90 [1991] ECR I-4269 distinguished. f
g

(4) The prohibition laid down in art 10 of the directive and the derogation from that prohibition in art 12(1)(e) were expressed in sufficiently precise and unconditional terms to be invoked by individuals in their national courts in order to contest a provision of national law which infringed the directive (see p 36 j and p 37 g, post); *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* Case C-236/92 [1994] ECR I-483 applied. h

Notes j

For an introduction to Community provisions on free movement of capital, see 52 *Halsbury's Laws* (4th edn) paras 17-01–17-02.

For private enforcement of Community law, see 51 *Halsbury's Laws* (4th edn) paras 2-34–2-35, 3-70.

Cases cited

- a** *Amministrazione delle Finanze dello Stato v Denavit Italiana Srl* Case 61/79 [1980] ECR 1205.
Amministrazione delle Finanze dello Stato v SpA San Giorgio Case 199/82 [1983] ECR 3595.
Argos Distributors Ltd v Customs and Excise Comrs Case C-288/94 [1996] ECR I-5311.
- b** *Bautiaa Sàrl v Directeur des Services Fiscaux, Société Française Maritime SA v Directeur des Services Fiscaux* Joined cases C-197/94 and C-252/94 [1996] ECR I-505.
BP Supergas Anonimos Etaira Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greece Case C-62/93 [1995] All ER (EC) 684, [1995] ECR I-1883, ECJ.
Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex p Factortame Ltd Joined cases C-46/93 and C-48/93 [1996] All ER (EC) 301, [1996] ECR I-1029, ECJ.
- c** *Comateb (Société) v Directeur Général des Douanes et Droits Indirects* Joined cases C-192–218/95 [1997] ECR I-165.
Comet BV v Produktschap voor Siergewassen Case 45/76 [1976] ECR 2043.
Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia Case C-236/92 [1994] ECR I-483.
- d** *Conradsen (P) A/S (Advokatrådet as representative of) v Ministeriet for Skatter og Afgifter* Case 161/78 [1979] ECR 2221.
Corbeau (Criminal proceedings against) Case C-320/91 [1993] ECR I-2533.
Denavit Internationaal BV v Kamer van Koophandel en Fabrieken voor Midden-Gelderland Case C-2/94 [1996] ECR I-2827.
- e** *Elida Gibbs Ltd v Customs and Excise Comrs* Case C-317/94 [1997] All ER (EC) 53, [1996] ECR I-5339, ECJ.
Emmott v Minister for Social Welfare Case C-208/90 [1991] ECR I-4269.
Felicitas Rickmers-Linie KG & Co v Finanzamt für Verkehrsteuern, Hamburg Case 270/81 [1982] ECR 2771.
- f** *FMC plc v Intervention Board for Agricultural Produce* Case C-212/94 [1996] ECR I-389.
Francovich v Italy Joined cases C-6/90 and C-9/90 [1991] ECR I-5357.
Haahr Petroleum Ltd v Åbenrå Havn Case C-90/94 (1997) ECJ Transcript, 17 July.
Johnson v Chief Adjudication Officer (No 2) Case 410/92 [1995] All ER (EC) 258, [1994] ECR I-5483.
- g** *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)* Case C-271/91 [1993] 4 All ER 586, [1994] QB 126, [1993] 3 WLR 1054, [1993] ECR I-4367, ECJ.
Marshall v Southampton and South West Hampshire Health Authority (Teaching) Case 152/84 [1986] 2 All ER 584, [1986] QB 401, [1986] 2 WLR 780, [1986] ECR 723, ECJ.
- h** *McDermott v Minister for Social Welfare* Case 286/85 [1987] ECR 1453.
Ministeriet for Skatter og Afgifter v Investeringsforeningen Dansk Sparinvest Case 36/86 [1988] ECR 409.
Palmisani v Istituto Nazionale della Previdenza Sociale (INPS) Case C-261/95 (1997) ECJ Transcript, 10 July 1997.
- j** *Peterbroeck Van Campenhout & Cie (SCS) v Belgium* Case C-312/93 [1996] All ER (EC) 242, [1995] ECR I-4599, ECJ.
Ponente Carni SpA v Amministrazione delle Finanze dello Stato Joined cases C-71/91 and C-178/91 [1993] ECR I-1915.
R v IRC, ex p Unilever plc [1996] STC 681, CA.

- R v Secretary of State for Social Security, ex p Sutton* Case C-66/95 [1997] All ER (EC) 497, ECJ. a
- Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989.
- Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* Case C-338/91 [1993] ECR I-5475.
- Texaco A/S v Middelfart Havn, Olieselskabet Danmark amba v Trafikministeriet* Joined cases C-114–115/95 (1997) ECJ Transcript, 7 July 1997. b
- Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* Joined cases C-430–431/93 [1996] All ER (EC) 259, [1995] ECR I-4705, ECJ.
- Waldrich Siegen Werkzeugmaschinen GmbH v Finanzamt Hagen* Case C-38/88 [1990] ECR I-1447. c

Reference

By order of 8 June 1995, the Østre Landsret (the Eastern Regional Court) referred to the Court of Justice of the European Communities for a preliminary ruling under art 177 of the EC Treaty eight questions (set out at p 29 *b* to p 30 *d*, post) on the interpretation of Council Directive (EEC) 69/335 concerning indirect taxes on the raising of capital, as amended. Those questions were raised in actions brought by Fantask A/S and a number of other companies or groups of companies against the Industriministeriet (Erhvervsministeriet) (the Danish Ministry of Trade and Industry) relating to charges levied on registration of new public and private limited companies and on the capital of such companies being increased. Written observations were submitted on behalf of: Fantask A/S, by T Rørdam, of the Copenhagen Bar; Norsk Hydro Danmark A/S, Tryg Forsikring skadesforsikringsselskab A/S and Tryg Forsikring livsforsikringsselskab A/S, by K Michelsen, C Høeg Madsen and H Aasmul-Olsen, of the Copenhagen Bar; Aalborg Portland A/S, by K Dyekjær-Hansen, of the Copenhagen Bar; Forsikrings-Aktieselskabet Alka, Robert Bosch A/S, Uponor A/S, Uponor Holding A/S and Pen-Sam ApS and others, by V Thorup, H Stenbjerre, J Boe and L Normann Jørgensen, from the firm Kromann and Münter, of the Copenhagen Bar; the Danish government, by P Biering, Head of Division in the Ministry of Foreign Affairs, acting as agent, assisted by K Hagel-Sørensen, of the Copenhagen Bar; the French government, by C de Salins, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and F Pascal, Administrative Attaché in the same directorate, acting as agents; the Swedish government, by E Brattgård, Adviser in the Trade Department of the Ministry of Foreign Affairs, acting as agent; the UK government, by J E Collins, Assistant Treasury Solicitor, acting as agent, assisted by E Sharpston, Barrister; and the European Commission, by A C Jessen and E Traversa, of its Legal Service, acting as agents, assisted by S Helsteen and J Rostock-Jensen, from the firm Reumert & Partnere, of the Copenhagen Bar. Oral observations were submitted by: Fantask, represented by P Jøker Thorsen, of the Copenhagen Bar; Norsk Hydro Danmark, Tryg Forsikring skadesforsikringsselskab and Tryg Forsikring livsforsikringsselskab, represented by H Aasmul-Olsen; Aalborg Portland, represented by L Hennenberg, of the Copenhagen Bar; Forsikrings-Aktieselskabet Alka, Robert Bosch, Uponor, Uponor Holding and Pen-Sam and others, represented by H Peytz, of the Copenhagen Bar; the Industriministeriet (Erhvervsministeriet), represented by K Hagel-Sørensen; the Danish government, represented by P Biering; the French government, represented by G Mignot, Foreign Affairs Secretary in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting